

# **The Protection of Foreign Investments in Armed Conflicts**

Ira Ryk – Lakhman

University College London (UCL)

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I, Ira Ryk – Lakhman, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

## **Abstract**

This thesis examines the international legal framework that governs the protection of foreign investments in times of armed conflict. It addresses the laws of armed conflict and the international law of foreign investment and their regulation of investments in particular situations.

The thesis provides an overall argument that the potential for conflict between investment law and international humanitarian law is a significant issue of growing relevance, as the two regimes, through their different norms, may regulate the same conduct with different objectives in mind, but that international law mostly (but not entirely) has the tools to resolve any such conflict through the rules of interpretation or through rules of priority.

The thesis first establishes that the outbreak of hostilities does not, *ipso facto*, abrogate the operation of investment treaties. Then, the analysis proceeds to assess the application of investment treaties and their standards of protection in situations of armed conflict. In this respect, the thesis analyzes the legal frameworks that govern the dispossession and destruction of foreign investments, the treatment of investments under the contemporary laws of targeting, and the obligation to protect foreign investments from the effects of armed conflict (precautionary obligation). Having dealt with the substantive standards of protection, the thesis examines whether the occurrence of armed conflicts can be used to exempt, excuse, justify, or carve-out investment obligations during armed conflict. Finally, the analysis deals with the consequences of the State's failure to guarantee the protection of foreign investments as required by international law and the obligation to award 'adequate' compensation for losses owing to armed conflict.

## **Impact Assessment**

The thesis aims to provide a clear legal framework for the treatment of foreign investments in times of armed conflict, through an analysis of both the laws that govern armed conflict and the international law of foreign investment.

### Impact inside academia

This thesis takes on an issue of growing relevance in international law – the protection of investments in armed conflict. An important impact of the thesis will be in addressing a gap in the academic literature, since the treatment of the issue thus far has mostly focused on investment law norms, with insufficient focus on the law of armed conflict (international humanitarian law) and the effect that humanitarian law has on the interpretation and application of investment standards of treatment.

The thesis provides an overall argument that the potential for conflict between investment law and humanitarian law is a significant issue, as the two regimes may (and in some cases, do in fact) regulate the same conduct with different objectives in mind, but that international law mostly (but not entirely) has the tools to resolve this (potential) conflict through interpretive means or through rules of priority.

To ascertain the legal framework that governs the treatment of investments during hostilities, the thesis takes on, and resolves, several ubiquitous, yet contentious, standards in investment law and arbitration, such as ‘full protection and security’ clauses, provisions dealing with compensation for war losses, and security exceptions. Such analyses add to the existing literature and attempt to reconcile, where possible, different conflicting approaches.

Likewise, in the process of determining the law that governs investments during hostilities, the thesis seeks to resolve several debates in the law of armed conflict, namely debates over the lawfulness of economic targets and destruction of private property. In this regard, the study seeks to add to the literature in international humanitarian law, beyond the treatment of investments. Impact outside academia

By clarifying the meaning and content of several contested investment standards of treatment and by considering the interaction between warfare practices and investment liberalization policies, the thesis seeks to engage with military lawyers and investment lawyers, and it hopes to be of help to policymakers and public servants involved with the drafting of investment instruments and military manuals.

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כָּל יָמֵי גִדּוּלִי בֵּין הַחֲכָמִים, וְלֹא מָצָאתִי לְגוֹף טוֹב אֲלָא שְׁתִּיקָה. וְלֹא הַמְדָּרְשׁ הוּא הָעֵקֶר, אֲלָא הַמַּעֲשֶׂה. וְכָל הַמְרֻבָּה דְּבָרִים, מִבֵּיא חֶטָּא (אבות א, יז)

## Table of Contents

Table of Authorities .....	10
Table of Cases (International Courts and Tribunals).....	10
Table of Cases (National Courts) .....	23
Table of Treaties .....	25
Statutory Instruments, Institutional Rules, and Military Manuals .....	41
Chapter 1 .....	43
1. Terminology and Scope .....	44
2. Methodology.....	47
3. The International Law Regulating the Protection of Foreign Investments.....	49
4. The International Law Regulating the Conduct of Hostilities.....	54
5. Investment Law and Humanitarian Law.....	59
6. Litigating War in Investment Arbitration: How Much IHL is Too Much IHL? 69	
7. Structure .....	80
8. The Main Objectives of The Research and its Target Audience .....	95
Chapter 2.....	98
1. Introduction.....	98
2. The Relevant Authorities and Their Assessment.....	100
3. A Progressive Development of Treaty Law: From Abrogation to Continuity 106	
4. The 2011 ILC Articles on the Effect of Armed Conflicts on Treaties .....	116
5. Conclusion: Investment Treaties Are Not Ipso Facto Abrogated by Hostilities .....	126
Chapter 3.....	130
1. Introduction.....	130
2. The Conduct of Hostilities and the Law Enforcement Paradigms .....	133
3. Expropriation of Foreign Investments under the Law Enforcement Paradigm .....	137
4. Appropriation and Destruction of Property under the Paradigm of Hostilities: The Hague Law .....	145
5. The Hague Law and the Customary Standard of Treatment of Foreign Property in War.....	152

6. Modern Investments Treaty Provisions Incorporate Customary IHL Rules on Appropriation and Destruction of Private Property .....	157
7. Conclusion.....	170
Chapter 4.....	173
1. Introduction.....	173
2. The Interaction between The Hague Law and the Geneva Law on Targeting.....	174
3. Target Classification under API Article 52(2) .....	179
4. Targeting Investments under the Concept of Dual-Use Objects .....	183
5. Targeting Investments under the Doctrine of Revenue-Generating Targets 188	
6. Conclusion.....	202
Chapter 5.....	209
1. Introduction.....	209
2. The Standard of 'Reasonable Care' under Customary Law on the Treatment of Aliens .....	214
3. The Treaty Language 'Full Protection and Security' is A Reference to Customary Law.....	218
4. The Obligations to Take Precautionary Measures under IHL .....	224
5. The Relationship between FPS and the IHL Obligation to Take Precautions .....	230
6. Conclusion.....	238
Chapter 6.....	241
1. Introduction.....	241
2. 'Security interests' that Exempt from Treaty Standards of Protection in Armed Conflict .....	243
3. Hostilities-based Excuses and Justifications for Violations of Investment Standards in Armed Conflict.....	261
4. Denial of Benefits on Security-Related Grounds.....	273
5. Conclusion.....	276
Chapter 7.....	279
1. Introduction.....	279
2. The Obligation to Pay Compensation for War Losses under IHL.....	282



3. Nondiscriminatory Compensation for Losses to Investments Owing to Armed Conflict .....	298
4. 'Adequate' Compensation for Requisition and Destruction of Property...316	
5. War Reparations in Investment Arbitration: FMV and IHL-Considerations 326	
6. Conclusion.....	334
Chapter 8.....	336
1. The Protection of Foreign Investments in Armed Conflict .....	336
2. IHL and Investment Law: The Big Picture .....	337
3. The Protection of Investments in Armed Conflict: From Unification to Fragmentation in 50 Years or Less .....	346
Bibliography .....	353
Books .....	353
Book Chapters .....	362
Journal Articles .....	368
Conference Proceedings, Encyclopedia Entries, and Other Publications.....	385
Online Sources, Blogs, and News Reports .....	390
UN Documents, Reports, and Resolutions .....	398

## Table of Authorities

### Table of Cases (International Courts and Tribunals)

*AAPL v Sri Lanka*, ICSID Case No ARB/87/3, Award, 27 June 1990

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of England (signed 2 April 1559)

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## **Chapter 1**

### **The Protection of Foreign investments in Armed Conflict**

I was first introduced to the concept of foreign investments in the summer of 2006 during the Second Lebanon War, when my unit was instructed to avoid areas in Lebanon that were otherwise cleared for operation. This order followed a request of certain European countries that the Israeli army spares, inasmuch as possible, areas where they and their nationals had economic assets. Although mine was not to reason why, I was of the view that foreign economic assets and financial interests should remain outside the scope of my considerations as an operations officer.

I came across the idea of foreign investments for the second time in the spring of 2014 amid the annexation of Crimea and the outbreak of hostilities in eastern Ukraine. A client of the firm for which I work, who had assets in Crimea, grew concerned that the turmoil would affect his operation and asked to ascertain his legal rights.<sup>1</sup> Although his question remained a hypothetical exercise since his concerns were resolved in a different way, I took note of the fact that this question gained practically no attention in jurisprudence. With this dissertation I answer a question that has occupied my mind for years as an officer, a lawyer, and a researcher: What treatment does international law prescribe for foreign investments in times of armed conflict?

Accordingly, this first introductory chapter proceeds as follows. First, section 2 explains the focus and scope of this research on the protection of foreign investments in armed conflicts. Next, the doctrinal methodology of this study is briefly outlined. Sections 3 and 4 introduce, respectively, the two main fields of law that regulate the treatment of investments in armed conflicts – international investment law and international humanitarian law (IHL). Then, section 5 elucidates the treatment of IHL *and* investment law norms in this study.

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<sup>11</sup> For professional and personal reasons, this dissertation mostly avoids the analysis of investments in Crimea.

Next, mindful of the significant role that litigation plays in the enforcement of investment standards of protection, including in times of hostilities, section 6 deals with the ability of the host State to invoke IHL in investment arbitration concerning claims that arise out of, or in relation to, conflicts. Section 7 proceeds to explain the structure and flow of the thesis and the perspective through which each of the issues in the thesis is addressed. Finally, the aims of this study and its target audience are addressed in section 8.

### **1. Terminology and Scope**

The title of the research, *the protection of foreign investments in armed conflict*, was carefully drafted to delimit the scope of this study through three main elements.

First, unless specifically provided otherwise, the phrase ‘protection of investments’ is not limited to the colloquial idea of physical protection and security. It rather encompasses the overall legal treatment of the investment, including its physical integrity. The term ‘protection’ is preferred over ‘treatment’ or ‘regulation’ as it better fits the reality of hostilities and the types of threats that this reality represents for investments. Second, the use of the term ‘investment’ (and ‘investor’) in this research is of note. Broadly speaking, the term ‘investment’ determines the economic interests to which States extend substantive protections in investment treaties, while the term ‘investor’ specifies the range of legal and natural persons who stand to benefit from any such treaty. In principle, this research is not concerned with the protection of foreign investors, as legal or natural persons, from the effects of hostilities. Rather, this research is concerned with investments in the form of tangible objects and premises, such as – hotels, oil platforms, mines, factories, refineries, and hydro plants, and the protection of such objects in hostilities. The debates over the definition of ‘investment’ and the

question whether a particular asset meets a treaty's definition of 'investment' are mostly left outside the scope of the discussion.<sup>2</sup>

Third, the research is concerned with situations of 'armed conflict'. An armed conflict exists whenever there is a resort to armed force between States (international armed conflict (IAC))<sup>3</sup> or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State (a non-international armed conflict (NIAC)).<sup>4</sup> Legally speaking, no other type of armed conflict exists; every armed conflict is either an IAC or a NIAC. The point of departure for this study is that an armed conflict *exists*. The questions whether and when violence rises to the level of an armed conflict and the conflict's classification are not addressed in this analysis. This also means that this research is principally not concerned with hostilities that do not rise to the level of an armed conflict; different international law governs such situations. In this study, the terms 'armed conflict' and 'hostilities' are used interchangeably to refer to IACs and NIACs. The expressions 'conflict-ridden States' and 'war-torn countries', in turn, are used to refer to host States that are involved in an armed conflict.

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<sup>2</sup> See: A Grabowski, 'The Definition of Investment under the ICSID Convention: A Defense of Salini' (2014) 15(1) *Chicago Journal of International Law* 287-309; D Williams and S Foote, 'Recent developments in the approach to identifying an 'investment' pursuant to Article 25(1) of the ICSID Convention' in C Brown and K Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 42-64; Z Douglas, *The International Law of Investment Claims* (CUP 2009) 161-202.

<sup>3</sup> Article 2 common (CA GC) to Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (GCI), Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 75 UNTS 85 (GCII), Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135 (GCIII), and Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (GCIV). Additional Protocol I extends the definition of international armed conflicts to include armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination (Article 1(4), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3 (API)).

<sup>4</sup> CA 3, GC; Article 1, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609 (APII).

Notably, this discussion assumes that there is nothing undesired or illegitimate *per se* with investing in a conflict-ridden State.<sup>5</sup> On the contrary, this research postulates that capital inflows are required for economic reconstruction and development and that often foreign investment is a prerequisite for transitions from conflict to peace.<sup>6</sup> Mindful of other views,<sup>7</sup> the thesis is predicated on the assumption that even if the exact policies that States adopt to promote, facilitate, and protect investments are debated, the promotion, facilitation, and protection of investments, as such, are desired on the national and international planes.

Finally, the implication of the proposition that this research is concerned with the protection of investments in armed conflicts is, as further explained in section 5 below and elaborated in the next chapters, that this study is *not* concerned with the treatment of investments against the general backdrop of hostilities, but rather with the treatment of investments *in relation to* the armed conflict. This is to say that it should be borne in mind that not every measure that a conflict-ridden host State takes vis-à-vis foreign investments in its territory relates to the armed conflict in which it is engaged.

For instance, to promote environmental aims or public health, Israel may adopt regulatory measures that adversely affect foreign investments in, say, the energy sector. Such measures need have nothing to do with the conflict in Gaza or the hostilities in the northern border. The lawfulness of such measures is not dealt with in this research.<sup>8</sup> By contrast, the issue of the protection of investments *in relation to* armed conflicts will arise, for

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<sup>5</sup> Indeed, questions concerning the investor's conduct may arise (EC Gillard, 'Business Goes to War' (2006) 88(863) IRR 525-72), and elements of the investment might be used to violate international law (eg knowingly investing a chemical plant in Syria). This research does not address the lawfulness and legality of the investor's conduct.

<sup>6</sup> E De Brabandere, 'Jus Post Bellum and Foreign Direct Investment: Mapping the Debate' (2015) 16 JWI 590-603.

<sup>7</sup> See generally: G Van Harten, *Investment arbitration and public law* (OUP 2007) ch 7.

<sup>8</sup> In this example, the existence of the armed conflict and implications thereof are separate from assessment of whether Israel's measures constitute, say, a violation of the fair and equitable treatment provision under a given treaty or amount to indirect expropriation.

instance, where a foreign investment in Israel suffers losses in the framework of a military operation whether authored by Israel or not, or when Israel adopts regulatory measures that adversely affect a foreign investment in its territory so as to protect the civilian population from the effects of hostilities or in pursuit of military aims in the context of hostilities.

## **2. Methodology**

This is a gap-based, doctrinal research that seeks to ascertain the meaning and content of international law by way of using the methodology of sources and interpretation. To bring further clarity to the examined norms, the research conducts a historical analysis of the development of relevant international standards going back as early as the 18<sup>th</sup> century. At the same time, mindful of the significant developments in the law and policy of treaties and war over the years, the thesis also uses modern case-studies of foreign investments in conflict-ridden States that have not been addressed in doctrine and arbitral jurisprudence.

The sources of international law are generally considered to be listed in Article 38 of the Statute of the International Court of Justice (ICJ).<sup>9</sup> These are treaties, customary law, and general principle of law; judicial decisions and the writings of the most highly qualified publicists are subsidiary means that assist in determining the rule of law.<sup>10</sup> In this research, the meaning of treaty rules is determined by way of applying rules on treaty interpretation which are codified in the Vienna Convention on the Law of Treaties

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<sup>9</sup> Article 38, Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS xvi (ICJ Statute).

<sup>10</sup> Of course, decisions of international tribunals have implications for the relations between States beyond the parties to the dispute. In fact, some areas of the law cannot be fully understood without recourse to judicial jurisprudence, in particular that of the ICJ. See: C Tams and A Tzanakopoulos, 'Barcelona Traction at 40: the ICJ as an agent of legal development' (2010) 23(4) *Leiden Journal of International Law* 781-800 and C Tams, 'Meta-Custom and the Court: A Study in Judicial Law-Making' (2015) 14 *Law and Practice of International Courts and Tribunals* 51-79. On the contribution of domestic courts to the development of international law, see: A Tzanakopoulos and C Tams, 'Introduction: domestic courts as agents of development of international law' (2013) 26(3) *Leiden Journal of International Law* 531-540.

(VCLT).<sup>11</sup> In turn, the content of customary norms is ascertained by way of examining State practice and *opinio juris*. On this point, the research takes note and makes use of the Statement of Principles Applicable to the Formation of General Customary International Law, which was adopted in 2000 by the International Law Association (ILA),<sup>12</sup> and the Conclusions on the Identification of Customary International Law as adopted in 2018 by the International Law Commission (ILC).<sup>13</sup> The reasoning and conclusions that follow from the analysis of treaties and customs are then checked and verified against the decisions of international courts and tribunals, domestic instances, and contemporaneous authorities.

Within the boundaries of the traditional rules of sources and interpretation, the research is also assisted by historical analysis. The premise here is that it is only when placed in its context that law is imbued with a meaning and a function, and only by looking at the temporal context can it be determined what the relevant actors understood the law to mean at various times in the past.<sup>14</sup> Historical context also offers a better understanding of the political, socio-cultural, and economic conditions

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<sup>11</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 33 (VCLT). For authorities that recognized and applied the VCLT as a reflection of customary law, see: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* [1971] ICJ Rep 3 para 94; *Fisheries Jurisdiction Case (Federal Republic of Germany v Iceland)* [1973] ICJ Rep 49 paras 24-36; *Kasikili/Sedudu Island, Botswana v Namibia*, Judgment, Merits, [1999] ICJ Rep 1045, para 18. There has yet been no case where the ICJ has held that the VCLT does not reflect customary law (M Mendelson, 'The International Court of Justice and the sources of international law' in V Lowe and M Fitzmaurice (eds) *Fifty Years of the International Court of Justice. Essays in Honour of Sir Robert Jennings* (CUP Cambridge 1996) 63, 66).

<sup>12</sup> Committee on the Formation of Customary (General) International Law, 'Final Report of The Committee Statement of Principles Applicable to The Formation of General Customary International Law' in International Law Association Report of the Sixty-Ninth Conference (London 2000) (International Law Association, London 2000).

<sup>13</sup> ILC, Draft Conclusions on Identification of Customary International Law with Commentaries, 70th session (2018) UN Doc A/73/10.

<sup>14</sup> M Payek, 'The History of International Law – or International Law in History?' (*EJIL Talk!* 8 January 2015) <<https://www.ejiltalk.org/the-history-of-international-law-or-international-law-in-history-a-reply-to-alexandra-kemmerer-and-jochen-von-bernstorff/>> accessed 10 September 2018 and K Miles, 'History and international law: Method and mechanism – empire and 'usual' rupture' in S Schill et al (eds) *International Investment Law and History* (Elgar 2018) 136, 139-43.



under which particular ideas, such as the protection of 'aliens' and their property during 'war', became conceivable as legal concepts that yield certain rights and obligations. Importantly, a careful assessment of the development of international law allows us to identify continuities and discontinuities in the perception and application of the law and thus, to identify the emergence of binding norms on the treatment of investments in armed conflict.<sup>15</sup>

Additionally, this research uses several case studies to demonstrate how armed conflicts affect the promotion, facilitation, and protection of foreign investments in practice. The premise here is that the protection of investments in armed conflicts has been addressed in a relatively small number of known arbitral decisions, where the issue was dealt with in a rather limited manner that mostly neglected the laws that regulate the conduct of hostilities (IHL) and the implications of the applicability of IHL norms to matters involving investments, often notwithstanding the recognition that an armed conflict existed at the relevant time.

Accordingly, to identify and demonstrate the range of challenges that the protection of investments in armed conflict raises in practice for investors and States there is a need to look beyond the known case law. On this point, the thesis uses examples of investment projects in Iraq, Afghanistan, and Israel, which were adversely affected by hostilities, but have not resulted in claims to date. These examples also offer a convenient set of facts against which the relevant international norms (once identified and explained) can be applied.

### **3. The International Law Regulating the Protection of Foreign Investments**

Since the law that regulates the treatment of foreign investments is central to this discussion, it is useful to explain how this law is perceived and which of its aspects are explored in this research.

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<sup>15</sup> H Bray, 'Understanding change: Evolution from international claims commissions to investment treaty arbitration' in (ibid) 105 -111.

In principle, the term ‘international investment law’, may refer either to the international law governing investments or to all the law applicable to international investments.<sup>16</sup> In this study, ‘international investment law’ or ‘foreign investment law’ (and like formulations) describe a field of public international law that is concerned with the protection of the investments of one State’s nationals in the territory of another State.

As with any other field of public international law, investment law comprises treaties, custom, and general principles. During the 18<sup>th</sup> and 19<sup>th</sup> centuries, most foreign investments were made in the context of colonial expansion. Since European countries effectively controlled the actions of the government and its legal system in colonized territories, these imperial powers had no need for detailed treaty instruments to regulate the treatment of their merchants and their property abroad.<sup>17</sup> To prevent adverse interferences with the investments and the commercial activities of their nationals, such powers used a ‘blend of diplomacy and force’.<sup>18</sup> Beginning in the 18<sup>th</sup> century, with the establishment of the US and its entrance into the international arena, western powers began to conclude commercial treaties among themselves on a basis of equality between ‘civilized nations’.

Although today these treaties of friendship, commerce, and navigation (FCN treaties) are often referred to as ‘a forerunner of modern bilateral investment treaties’,<sup>19</sup> in proper temporal context this is not necessarily an accurate statement. While FCN treaties contained provisions affecting the ability of the national of one country to own property and engage in commerce in the territory of the other country, they were

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<sup>16</sup> R Dolzer and C Schreuer, *Principles of International Investment Law* (2<sup>nd</sup> edn, OUP 2012) 12; J Salacuse, *The Three Laws of International Investment National, Contractual, and International Frameworks for Foreign Capital* (OUP 2013) Preface.

<sup>17</sup> K Miles, *The Origins of International Investment Law* (CUP 2013) 24-5; J Salacuse, *The Law of Investment Treaties* (2<sup>nd</sup> edn, OUP 2015) 89-93.

<sup>18</sup> Salacuse – *The Law of Investment Treaties* (ibid) 92; G Schwarzenberger, *Foreign Investments and International Law* (Praeger 1969) 22-24.

<sup>19</sup> Miles (n 17) 24. In this research, unless where a special appellation exists (eg: The Jay Treaty), FCN treaties are cited using their short title (eg: US – Iran FCN treaty) rather than the official title (eg: ‘Treaty of amity, economic relations, and consular rights between the United States of America and Iran).

designated to regulate a range of issues relating to the treatment of nationals of the State parties.<sup>20</sup> These instruments were, as Walker described them, 'a basic accord fixing ground-rules governing day-to-day intercourse between two countries' and the 'medium *par excellence* through which nations have sought in a general settlement to secure reciprocal respect for their normal interests abroad'.<sup>21</sup> At the same time, it is because of their broad scope that the negotiation, interpretation, and application of FCN treaties teaches us a great deal about the development of international law, and the law on the protection of foreign property in particular.

In the 19<sup>th</sup> century, FCN treaties were extended beyond the regulation of the reciprocal interaction of equal western powers to non-European countries. With this, FCN treaties turned into 'the first steppingstone' to establishing a more intrusive presence within non-European nations'.<sup>22</sup> As a result, Latin American countries often found themselves held to standards which ignored their weaker socioeconomic position. However, changes in the world order in the post-colonial era somewhat relaxed the coercive nature of FCN treaty obligations, turning them from absolute standards that disregard the abilities of the State, to relative standards that account for the prevailing conditions in the host State.<sup>23</sup>

Since the end of World War II (WWII), States worldwide have been engaged in building an international regime for the regulation of investment by way of negotiating and concluding bilateral investment treaties (BIT). As

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<sup>20</sup> FCN treaties also dealt with freedom of movement and worship, rights to trade and engage in commercial enterprise, national treatment and most-favored-nation (MFN) status, and navigation rights through territorial waters. See: J Coyle, 'The Treaty of Friendship, Commerce and Navigation in the Modern Era' (2013) 51 *Columbia Journal of Transnational Law* 302, 307-12.

<sup>21</sup> H Walker, Jr., 'Modern Treaties of Friendship, Commerce, and Navigation' (1958) 42 *Minnesota Law Review* 805, 805 and Coyle (ibid) 306-7.

<sup>22</sup> J Westlake, *Chapters on the Principles of International Law* (CUP 1894) 144; A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 74-76; Miles (n 17) 25; Salacuse – *The Law of Investment Treaties* (n 17) 93-95.

<sup>23</sup> Anghie (ibid) 75-80; Salacuse (ibid) 93-103; Coyle (n 20) 311-316.

part of this effort, FCN treaties gradually made way for investment treaties.<sup>24</sup> While the US proceeded to conclude FCN treaties until the late 1960s<sup>25</sup> and its first BIT was concluded only in 1982,<sup>26</sup> European countries turned to other avenues earlier, with the very first BIT concluded between Germany and Pakistan on 25 November 1959.<sup>27</sup>

In contrast to FCN treaties, which dealt with an array of issues, investment treaties are essentially instruments that deal with the protection (and promotion) of investments.<sup>28</sup> In these treaties, States undertake commitments to guarantee a certain legal treatment to the investors of the other contracting party and consent to mechanisms for the enforcement of those commitments. As of April 2019, the total number of known investment treaties according to the United Nations Conference on Trade and Development (UNCTAD), is 3,319, comprising 2,938 BITs, of which 2,346 are in force, and 387 other treaties with investment provisions, of which 313 are in force. Most countries in the world are parties to at least one such instrument.<sup>29</sup>

The historical development of these instruments from FCN treaties and the process of their negotiations based on existing models and

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<sup>24</sup> On the factors leading to the demise of FCN treaties, see: Coyle (n 20) 309-11.

<sup>25</sup> The US – Thailand FCN treaty entered into force on 8 June 1968. It was the last of its kind.

<sup>26</sup> The US – Panama BIT was signed on 27 November 1982.

<sup>27</sup> This treaty, as further explained below, was based on the US FCN Draft Treaty, which served as the basis for the negotiations of a treaty between the US and Germany (never concluded).

<sup>28</sup> Granted, whether investment treaties do in fact promote investment inflows is debated. See: J Webb Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment - Some Hints from Alternative Evidence' (2001) 51 Virginia Journal of International Law 397-441; J Salacuse and N Sullivan, 'Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46(1) Harvard International Law Journal 67-130; N Bhasin and R Manocha 'Do Bilateral Investment Treaties Promote FDI Inflows? Evidence from India' (2016) 41(4) The Journal of Decision Makers 275–287.

<sup>29</sup> All investment instrument in this study, unless specified otherwise, are available at UNCTAD'S International Investment Agreement Navigator <<https://investmentpolicyhub.unctad.org/IIA>>. All BITs in this study are cited under their short title (eg: 'Argentina – Japan BIT') rather than the official title of the treaty (eg: 'Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment').

instruments resulted in many commonalities in structure, language, definitions, scope, and purpose between these 3,000 separate treaties.<sup>30</sup> Nonetheless, since each investment treaty is legally distinct, separate, and binding only on its parties, unless it can be established, using the methodology of sources and interpretation, that certain similarities in formulation are designated to reflect the same customary treatment, due respect is given in this research to variations in formulation and to the separate status of each investment treaty.

Customary law plays a key role in the analysis of the protection of investments in armed conflict. Starting at least as early as the 19<sup>th</sup> century, various rules emerged in the law of nations concerning the treatment of aliens and their property, including the right to be free from a denial of justice and the right of aliens to protection against bodily harm. In investment law jurisprudence, the sum of these rules is often referred to as ‘the international minimum standard’.<sup>31</sup> Mindful that many aspects concerning the ‘minimum standard’ remain contested, this study clarifies some elements concerning of content and scope of the customary standard of treatment of aliens and their property in wartime.

Finally, a notable feature of the regime of investment law concerns the nature of investor’s rights. On the one hand, investment treaties and customary law impose certain obligations on host States to provide protections to foreign investors and investments, and investment treaties often contain consent to investor-state arbitration over investment disputes. At the same time, it remains unclear whether these treaties codify inalienable rights of investors or rights that are shared by the investor with his home State and enjoyed by the investor only under sufferance, or whether investment treaties merely grant investors recourse to *ad hoc*

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<sup>30</sup> See generally: A Newcombe and L Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International 2009) ch 1.

<sup>31</sup> See generally: H Dickerson, ‘Minimum Standards’ in R Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (OUP 2010) <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e845>> (10 June 2018).

procedural mechanisms that provide for ‘the public international law equivalent of subrogation’.<sup>32</sup> With this overview of the regime of investment law the study proceeds to analyze the meaning and content of investment standards of protection.

#### **4. The International Law Regulating the Conduct of Hostilities**

The main implication of the proposition that an armed conflict exists, which predicates this research, is that IHL applies.

IHL applies from the initiation of armed conflicts and extends even beyond the cessation of hostilities until a general conclusion of peace is reached or a peaceful settlement is achieved. It is a set of rules that seek to limit the effects of armed conflict by way of protecting those who are not, or are no longer, participating in hostilities and restricting the permitted means and methods of warfare. IHL achieves these objectives through several treaty and customary rules and standards.

Broadly speaking, IHL comprises the ‘Hague Law’ and the ‘Geneva Law’. The Law of The Hague is a colloquial term that derives its name from the Hague Conventions and Regulation of 1899 and 1907 (HC and HR).<sup>33</sup> The Hague Law refers to the body of laws that deal with the conduct of hostilities and which establish restrictions on the means and methods of warfare. The ‘Geneva Law’, in turn, refers to the body of law that mainly deals with the protection of the victims of armed conflicts. It usually references the four Geneva Conventions of 1949 (GC) and the two Additional Protocols to the Geneva Conventions of 1977 (API and APII).

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<sup>32</sup> Under the latter constellation, the host State essentially recognizes that the investor can enforce its home State's rights while the home State, in turn, allows the investor to keep any remedy otherwise owed to it from the host State. A Roberts, ‘Triangular treaties: the nature and limits of investment treaty rights’ (2015) 56(1) *Harvard International Law Journal* 353-355-60; R Volterra, ‘International Law Commission Articles on State Responsibility and Investor-State Arbitration: Do Investor Have Rights?’ (2010) 25(1) *ICSID Review-FILJ* 218-23; Douglas (n 2) 167-70. Chapter 6 returns to the issue of investors’ rights.

<sup>33</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907 (HC-IV; HR).

This research deals both with The Hague and the Geneva Laws depending on context. As regards the status of these laws it is important that not all the provisions of The Hague Law and Geneva Law are customary, and it is not always easy to identify which norm is.<sup>34</sup> Nonetheless, this research mostly deals with IHL treaty norms that codify pre-existing custom or which have attained customary status after their adoption and are therefore applicable to international and non-international conflicts and bind all belligerent parties. Where the content of the treaty or customary IHL norm at issue is debated, this debate is addressed in detail.

‘But’, as Pictet remarked, treaty and customary IHL norms are ‘not the whole story. Behind these rules are a number of principles which inspire the entire substance of the documents’.<sup>35</sup> Since these principles are repeatedly referenced throughout the thesis, it is useful to briefly outline them at this point: Distinction, military necessity, humanity, and proportionality.<sup>36</sup> Distinction is a fundamental and ‘intransgressible’ principle of customary international law.<sup>37</sup> It mandates that the parties to the conflict must at all times distinguish between civilians and civilian objects, who may not be the subject of direct and deliberate attacks, and combatants and military objectives, against whom attacks may be directed subject to certain qualifications.<sup>38</sup>

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<sup>34</sup> See for instance: Section 1.8.1 of USA Department of Defense, Office of General Counsel, Law of War Manual, June 2015 (revised 2016) <<https://www.hsdl.org/?abstract&did=797480>> (DoD LOAC Manual).

<sup>35</sup> J Pictet *Development and Principles of International Humanitarian Law* (Martinus Nijhoff 1985) 59-60.

<sup>36</sup> Additionally, the prohibition to attack those *hors de combat* and the prohibition to inflict unnecessary suffering are both considered as fundamental IHL principles. Since they are less pertinent for this discussion of investments’ protection in armed conflict they are not addressed herein.

<sup>37</sup> *Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 26, 257.

<sup>38</sup> Articles 48 and 52, API; Rule 1 in J-M Henckaerts and L Doswald-Beck (eds) *International Committee of the Red Cross, Customary International Humanitarian Law* (Cambridge ICRC 2005). The most updated version of the rules and the one used in this thesis is available at <<https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>> (accessed 20 January 2018) (ICRC – Customary IHL Study).

Next, military necessity appears as both a specific element and a general foundational principle that pervades the entire body of IHL by undergirding individual rules.<sup>39</sup> At its most basic, military necessity is what permits combatants to lawfully cause damage and destruction and even to injure or kill. But necessity is also what prohibits combatants from using violence if and when it is not required by military necessity.<sup>40</sup> It is also important that while military necessity allows a deviation (exemption) from a humanitarian rule (eg: to destroy property when required by military necessity), it is not an excuse nor a justification for violations of IHL. Necessity cannot permit what is otherwise prohibited under IHL.

Humanity is a broad open-ended term<sup>41</sup> that is commonly associated with the 'Martens Clause'.<sup>42</sup> The Martens Clause instructs that even in situations that are *not* expressly covered by IHL instruments, both combatants and civilians enjoy a minimum level of protection, namely that all armed conflicts should be regulated by the principles of international law 'as they result from the usages established between [States] from the laws of humanity and the requirements of the public conscience'.<sup>43</sup> This reflects

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<sup>39</sup> M Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' in M Schmitt (ed) *Essays on Law and War at the Fault Lines* (Springer 2011) 89, 90.

<sup>40</sup> *Hostage Case, United States v List (Wilhelm) and others*, Trial Judgment, Case No 7, (1948) 11 TWC 757 reported in: H Lauterpacht (ed), *Annual Digest and Reports of Public International Law Cases: Being a Selection from the Decisions of International Courts and Tribunals and Military Courts given during the year 1948* (1953), 632, 646; I Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under AP I* (Martinus Nijhoff 2009) 35.

<sup>41</sup> J Pictet, *Commentary on the Fundamental Principles of the Red Cross* (Henry Dunant Institute, Geneva, 1979) 12-23. See further: T Meron, 'The Humanization of International Humanitarian Law' (2000) 94(2) AJIL 239-278; R Coupland, 'Humanity: What is it and how does it influence International Law?' (2001) 844 IRRC 969-90.

<sup>42</sup> The Martens Clause was introduced in the Preamble to the 1899 HC II and has gained customary status by the time of its incorporation into API. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (adopted 11 December 1868, entered into force 29 November 11 December 1868) 138 Consol TS 297, Preamble. See: M Bothe, et al (eds), *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (2<sup>nd</sup> edn Martinus Nijhoff 2013) 43, 224.

<sup>43</sup> *ibid*; *Corfu Channel case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 22; V Pustogarov, 'Fyodor Fyodorovich Martens (1845-1909) — A Humanist of Modern Times' (1996) 312 IRRC, 300-314; R Ticehurst, 'The Martens Clause and the Laws of Armed Conflict' (1997)



the overarching goal of IHL: To establish minimum, non-derogable standards of restraint that apply in all situations of armed conflict.

What follows next is the principle of proportionality, which serves as the ‘inescapable link’ between the principles of military necessity and humanity, when they pull in opposite directions.<sup>44</sup> IHL proportionality essentially mandates that even attacks that comply with the principles of distinction and military necessity are prohibited if they ‘may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’.<sup>45</sup>

While the object and purpose of IHL, as reflected in IHL norms and principles, is to protect the civilian population from the effects of hostilities, questions remain whether individuals have rights under IHL and even if so, whether they can assert these rights against the State. Treaty IHL norms are silent in this regard. This silence stems from the traditional stance that only States are subjects of international law with full rights and obligations while individuals are, at most, beneficiaries, who must claim their rights through their State of nationality.<sup>46</sup> While it is now mostly accepted that individuals hold some substantive rights under IHL,<sup>47</sup> problems still remain, since IHL instruments are silent on the exercise of rights, leaving it to customary international law or domestic law to empower international tribunals or national courts to give effect to that right.<sup>48</sup> Effectively, this reality prevents individuals from pressing claims against the wrongdoing belligerent.

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317 IRRC 125-34; A Cassese, ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky?’ (2000) 11(1) EJIL 187-216.

<sup>44</sup> M Sassòli et al (eds) *How does the law protect in war?* Vol 1 (3<sup>rd</sup> edn ICRC 2014) ch 9, section 6.

<sup>45</sup> Article 51(5)(b), API; ICRC – Customary IHL Study (n 3738) Rule 14.

<sup>46</sup> See: A Alexander, ‘A Short History of International Humanitarian Law’ (2015) 26(1) EJIL 109-138.

<sup>47</sup> This point is addressed in detail in chapter 7.

<sup>48</sup> Article 3, HC-IV and Article 91, API. This issue is addressed in chapter 7.

As regards its development, IHL is no different from most other spheres of international law, including investment law, in its traditional development in the form of absolute norms which prescribe certain uniform minimum standards and obligations.<sup>49</sup> Hence, just as with investment law, the application of war law was generally equal in that the laws applied equally to all belligerent parties in an international armed conflict, irrespective of the question of how the war began or the relative justice of the causes involved, but this application was not necessarily equitable insofar as it affected differently situated parties unevenly.<sup>50</sup>

Today, many IHL norms are articulated in absolute terms that do not account for the State's level of development but prescribe certain minimum standards to be equally applied across belligerents.<sup>51</sup> This is mostly the case with norms that anchor core humanitarian notions. For instance, the principle of distinction, which translates into the uniform prohibition on indiscriminate attacks and bans the targeting of civilians, excludes differential treatment.<sup>52</sup>

At the same time, like the contemporary international legal system,<sup>53</sup> modern IHL also comprises norms that account for the State's level of

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<sup>49</sup> E De Vattel, *The Law of Nations or Principles of Natural Law Applied to the Conduct and Affairs of Nations and Sovereigns* Book II (translated from French by J Chitty T & J Johnson 1844) ch 1, section 2; P Cullet, 'Differential Treatment in International Law: Towards a New Paradigm of Inter-state Relations' (1999) 10(3) EJIL 549, 551-2.

<sup>50</sup> G Blum, 'On a Differential Law of War' (2011) 52(1) Harvard International Law Journal, 163, 177.

<sup>51</sup> Eg: the intentional killing of civilians is always a war crime (API, Article 51), the use of chemical or biological weapons is absolutely prohibited (Article 1(b), Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 3 September 1992, 1974 UNTS 45; see also Article 1, Convention on the Prohibition of the Development, Production, and Stockpiling of Bacterial (Biological) and Toxin Weapons and on their Destruction 10 April 1972, 1015 UNTS 163), the torture of prisoners of war or civilians is never lawful (Article 3, GCIII) and the carrying out of attacks while posing as a civilian is illegal perfidy (Article 37(1)(c), API).

<sup>52</sup> A Roberts, 'The Equal Application of the Law of War: A Principle Under Pressure' 90 IRRC 931, 932 (2008) ('Under this principle, [IHL] apply[s] equally to all those who are entitled to participate directly in hostilities [...] it is not relevant whether a belligerent force represents an autocracy or a democracy, nor is it relevant whether it represents the government of a single country or the will of the international community').

<sup>53</sup> Examples of differential environmental norms are contained in the Kyoto Protocol (Article 10(c), Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 162). The World Trade Organization Agreements (WTO) prescribe some 150

development.<sup>54</sup> Such norms hold States to contextual standards with which they can practicably comply relative to their means, abilities, and particular circumstances. Schmitt explains this state of play in terms of 'normative relativism'<sup>55</sup> that holds belligerents to the standards to which they are 'capable of rising'.<sup>56</sup> Importantly, such relative norms are not to be confused with differential treatment norms as under, say, the instruments of the World Trade Organization (WTO). While relative IHL norms take the State's level of development into account in the assessment of compliance, as one of the considerations, IHL norms do not prescribe preferential treatment to developing countries.<sup>57</sup>

## 5. Investment Law and Humanitarian Law

The relationships between different international norms, in particular the relationships of IHL, or that of investment law, with other fields of international law, 'are often examined from a high-altitude perspective of a relationship between two or more legal regimes', as Milanović has observed.<sup>58</sup> It is therefore important to explain that this thesis is not

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special provisions which grant developing countries special rights, and which give developed countries the possibility to treat developing countries more favorably than other Members (WTO – Trade and Development Committee, 'Special and differential treatment provisions'

<[https://www.wto.org/english/tratop\\_e/devel\\_e/dev\\_special\\_differential\\_provisions\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm)>)

<sup>54</sup> D Magrawt, 'Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms' (1990) 1 Colorado Journal of International Environmental Law and Policy 69, 76; Lt Cdr S Belt, 'Missiles Over Kosovo: Emergence, Lex Lata, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas' (2000) 47 Naval Law Review 170; N Gallus, 'The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection' (2005) 6 JWIT 711–729.

<sup>55</sup> M Schmitt, 'Bellum Americanum: The US View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict' (1998) 19 Michigan Journal of International Law 1051, 1088.

<sup>56</sup> *ibid* ('The sole exceptions are absolute prohibitions, such as the direct targeting of civilians or the use of poison').

<sup>57</sup> M Schmitt, 'The Principle of Discrimination in 21st Century Warfare' (1999) 2 Yale Human Rights & Development Law Journal 43, 176 (explaining that it is 'simply beyond credulity to suggest that the acceptability of striking a particular type of target or causing a certain amount of collateral damage or incidental injury might one day depend on the characteristics of the attacking State').

<sup>58</sup> M Milanović, 'Norm Conflicts, International Humanitarian Law and Human Rights Law' in O Ben-Naftali (ed) *International Humanitarian Law and International Human Rights Law* (OUP 2011) 95, 100. See, among many, 'high-altitude' discussions of investment law with other regimes in: M Footer, 'International investment law and trade: the relationship that

concerned with, nor does it presume to offer, a thorough examination of the interaction between two legal regimes, IHL and investment law, as such.<sup>59</sup> Rather, the study deals with the relationship between investment law and IHL 'at the level of specific problems regulated by specific norms'.<sup>60</sup>

Principally, and as suggested with respect to the interaction between other international norms, the relationship between investment law and IHL norms may be one of compatibility, where the norms are complementary and go in the same direction,<sup>61</sup> or one of conflict, where the application of both IHL and investment law norms leads to two different results and a 'norm conflict' arises.<sup>62</sup>

On this point, it should be clarified that this research adopts a broad definition of 'conflict' that also covers incompatibilities between permissive norms and obligations.<sup>63</sup> However, other definitions exist in scholarship and jurisprudence. The difference between the approaches to the definition of conflict mostly concerns the question of whether a norm conflict should cover only incompatibilities between obligations and prohibitions or whether it should also extend to 'incompatible obligations, prohibitions and permissions'.<sup>64</sup>

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never went away' in F Baetens (ed) *Investment Law within International Law: Integrative Perspectives* (CUP 2013) 259-297 and M Hirsh, 'Investment Tribunals and Human Rights: Divergent Paths' in P-M Dupuy et al (eds) *Human Rights in International Investment Law and Arbitration* (OUP 2009) 97-114.

<sup>59</sup> Albeit, as chapter 8 explains, an inductive reasoning allows us to make broader inferences about the different levels of interactions between IHL and investment law

<sup>60</sup> M Milanović, 'The Lost Origins of *Lex Specialis*' in J-D Ohlin (ed) *Theoretical Boundaries of Armed Conflict and Human Rights* (CUP 2016) 80.

<sup>61</sup> *ibid.*

<sup>62</sup> Milanović – Norm Conflicts (n 58) 100; M Milanović, 'Norm conflict in international law: Whither human rights?' (2009) 21(1) *Duke Journal of Comparative International Law* 63, 72-5; J Pauwelyn, *Conflict of norms in public international law* (Hart 2003) 176.

<sup>63</sup> Pauwelyn (*ibid.*) 176.

<sup>64</sup> E Vranes, 'The Definition of 'Norm Conflict' in International Law and Legal Theory' (2006) 17(2) *EJIL* 395, 396 (Vranes explains that, 'an example of the last constellation would be a situation in which one norm requires a person to pay an indemnity of \$200, while another norm stipulates the sum of \$100. Compliance with the second obligation may violate the first (stricter) obligation, but not vice versa').

For some commentators and adjudicative instances,<sup>65</sup> a norm conflict exists only when two (or more) *obligations* ‘cannot be complied with simultaneously’.<sup>66</sup> According to this (narrow) view, ‘there is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another’.<sup>67</sup> Nor is there a conflict if it is possible to comply with the obligations of one instrument by ‘refraining from exercising a privilege or discretion accorded by another’.<sup>68</sup> Marceau, one of the main proponents of the narrow definition of ‘conflict’, proposes that three cumulative conditions define a ‘conflict’. First, two States must be bound by two different obligations. Second, these obligations must cover the same substantive subject-matter. Third, the provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations.<sup>69</sup>

One of the main difficulties with this narrow view, which the supporters of this approach themselves recognize, is that incompatibilities between permissions and obligations, incompatibilities between permissions and prohibitions, and unilateral incompatibilities between obligations, which are not mutually exclusive, may ‘from a practical point of view be as serious as a conflict’, since they ‘may render inapplicable provisions designed to give one of the divergent instruments a measure of flexibility of operation which was thought necessary to its practicability’, and yet the narrow approach effectively disregards this reality.<sup>70</sup>

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<sup>65</sup> Eg: WTO, Appellate Body Report, *Guatemala—Anti-Dumping Investigation regarding Portland Cement from Mexico* (25 November 1998) WT/DS60/AB/R, para 65 (‘A special or additional provision should only be found to prevail over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a conflict between them’). See also: WTO, Report of the Panel, *Indonesia—Certain Measures Affecting the Automobile Industry* (23 July 1998) WT/DS54, 55, 59 and 64/R, paras 14.29–14.36, 14.97–14.99.

<sup>66</sup> W Jenks, ‘The Conflict of Law-Making Treaties’ (1953) 30 *British Ybk Int* 401, 425. See further authorities in G Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions the Relationship between the WTO Agreement and MEAs and other Treaties’ (2001) *Journal of World Trade* 1081–1131 and in Vranes (n 64) 401–402).

<sup>67</sup> *ibid*.

<sup>68</sup> Jenks (*ibid*).

<sup>69</sup> Marceau (n 66) 1084.

<sup>70</sup> *ibid*, 404; Jenks (n 66) 426–27; E Vranes *Trade and the Environment: Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford 2009) 19–22.

A different view maintains that a conflict arises where one norm prohibits, or restricts, what a different norm *permits*.<sup>71</sup> For Kelsen, for instance, a ‘conflict between two norms occurs if in obeying or applying one norm, the other one is necessarily or possibly violated’.<sup>72</sup> Vranes builds on Kelsen’s proposition and argues that, ‘there is a conflict between norms, one of which may be permissive, if in obeying or applying one norm, the other norm is necessarily or potentially violated’.<sup>73</sup> This study follows the latter broad definition. This approach ‘gives weight to “possibilities, privileges or rights” that are recognized in treaties’.<sup>74</sup>

The distinction between these narrow and wide definitions of ‘conflict’ is of practical significance. The first Panel Report *Indonesia – Automobiles*,<sup>75</sup> which concerned a claim that was brought against Indonesia *inter alia* under the national treatment provision of Article III of the General Agreement on Tariffs and Trade (GATT), is illustrative. In defence, Indonesia invoked its special developing country rights under the WTO Agreement on Subsidies and Countervailing Measures. Essentially, Indonesia invoked a *permission* to provisionally maintain certain subsidies.

The Panel espoused a strict definition of ‘conflict’, under which a norm conflict only exists in a situation of mutually exclusive obligations, thereby rejecting the proposition that a normative conflict may arise in

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<sup>71</sup> L Bartels, ‘The Relationship between the WTO Agreement on Agriculture and the Agreement on Subsidies and Countervailing Measures’ (2016) 50 *Journal of World Trade* 7-20. See also a broad definition to conflicts in WTO, Panel Report on *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, (EC—*Bananas III*) (22 May 1997), WT/ DS27/R(US) para 7.159. See a detailed analysis of jurisprudence espousing a broad definition to ‘conflict’ in Vranes (n 64) 406-407.

<sup>72</sup> H Kelsen, ‘Derogation’, in H Klecatsky et al (eds) *Die Wiener Rechts-theoretische Schule* (1968) 1429 – 1438; H Kelsen, *Allgemeine Theorie der Normen* (MANZ Verlag Vienna 1979) 99. See also Vranes (n 64) 414-15. a

<sup>73</sup> Vranes (n 64) 414-418. He illustrates: ‘Assume that under norm A, restrictions of imports from country X are prohibited, while under norm B import bans on goods from country X are permitted if there is no sufficient environmental protection in country X. A State that complies with norm A does not violate norm B. However, where a State asserts the explicit permission under norm B, then its compliance with norm B is in violation of norm A’.

<sup>74</sup> Marceau (n 66) 1085 (discussing the advantages of a broader definition to a conflict, as reflected namely in the writing of Bartels).

<sup>75</sup> *Indonesia—Certain Measures Affecting the Automobile Industry*, paras 14.29–14.36, 14.97–14.99.

instances involving express permissions and duties. This narrow definition influenced the outcome of this dispute, leading the Panel to refrain from addressing Indonesia's developing country rights under the relevant instrument, which could potentially have prevailed if a broader conflict of norms approach were adopted.<sup>76</sup>

The distinction between the approaches to conflict is also significant with respect to IHL norms and their interaction with other international norms, including investment standards. Since IHL is designed to regulate the conduct of hostilities, aside from and subject to, limitations and restrictions on the use of lethal or potentially lethal measures and other means, IHL *permits* (but does not oblige or mandate) States to take certain lethal or potentially lethal measures against persons and property. Thus, the question of whether a conflict arises at all in instances of incompatibilities between permissions and other obligations or prohibitions is potentially decisive for the treatment of incompatibilities involving IHL norms.

On this point,<sup>77</sup> d'Aspremont and Tranchez argue, with respect to the issues of the right to life that, 'IHL and HRL are not conflicting sets of norms since only HRL imposes obligations; IHL does not prescribe killing, it 'just' permits the fact of killing in time of wars'.<sup>78</sup> Therefore, they propose that in such cases, the norms are to be construed as 'competitive' rather than 'conflicting'.<sup>79</sup> By contrast, Milanović who, like this study, adopts a broad definition of conflict, suggests that 'a norm conflict would exist whenever the

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<sup>76</sup> *ibid*, see footnote 649 and the authorities cited therein. Since this incompatibility was not classified as a 'conflict', the Panel did not apply the rules on conflict resolution (below) and therefore did not examine whether the permissive norm invoked by Indonesia was the *lex specialis* which should have prevailed.

<sup>77</sup> See a through discussion of the potential compatibilities and divergence between IHL and human rights norms in: N Lubell, 'Parallel Application of International Humanitarian Law and International Human Rights Law: An Examination of the Debate' (2007) 40(2) *Israel Law Review* 648-660.

<sup>78</sup> J d'Aspremont and E Tranchez, 'The Quest for a Non-conflictual Coexistence of International Human Rights Law and Humanitarian Law: Which Role for the *lex specialis* Principle?' in R Kolb and G Gaggiol (eds) *Research Handbook on Human Rights and Humanitarian Law* (Elgar 2014) 232.

<sup>79</sup> *ibid*.

application of the two norms leads to two opposite results, for example if IHL provided that a particular use of force was lawful, while IHRL made it unlawful'.<sup>80</sup> That said, in contrast to the referenced Panel Report in *Indonesia – Automobiles*, both d'Aspremont and Milanović, who hold different definitions of conflict, essentially propose to resolve the friction between these norms (be they 'competing' or be they 'conflicting') with analogous tools, relying on interpretive means and on priority rules, namely the *lex specialis* rule (discussed below).<sup>81</sup>

Having established the broad approach to 'conflict' that this study adopts, additional distinctions between 'apparent and genuine' norm conflicts and conflict 'avoidance' and conflict 'resolution', should be addressed. An 'apparent' conflict exists where the content of two international norms is professedly contradictory, but interpretive means (under the VCLT) allow to 'avoid' the conflict by way of interpreting it away in a compatible manner.

The avoidance of an apparent conflict is possible, as Milanović explains, 'when the language, object and purpose, and other structural elements of the two potentially or apparently conflicting norms can be reasonably reconciled without much effort'.<sup>82</sup> Doctrine and jurisprudence often cite, as a notable example of such a technique, the *Nuclear Weapons Advisory Opinion*,<sup>83</sup> where the ICJ held that, in times of armed conflict, what is an 'arbitrary deprivation of life' under Article 6 of the International Covenant on Civil and Political Rights (ICCPR) 'can only be decided by

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<sup>80</sup> Milanović – Norm conflict (n 58) 102-108.

<sup>81</sup> *ibid*, 234-41 (suggesting the application of interpretive tools under the notion of systematic integration and priority rules). See further on the apparent and real difference between the perceptions to the interaction between IHL and human rights law in W Schabas, 'Lex specialis? Belt and suspenders? The parallel operation of human rights law and the law of armed conflict, and the conundrum of jus ad bellum' (2007) 40(2) Israel Law Review 592-613.

<sup>82</sup> Milanović – Norm conflict (n 58) 106.

<sup>83</sup> *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 6, para 25.



reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself'.<sup>84</sup>

But not all conflicts may be interpreted away. In such cases a 'genuine' conflict exists. Of course, the proposition that a genuine conflict exists does not conclude the legal analysis of norm interaction, it is but one of the phases in the examination. The next step requires consideration of whether there are legal means to 'resolve' any such genuine conflict. In contradistinction to conflict avoidance, norm conflict 'resolution' requires one conflicting norm (including permission) to prevail, or have priority, over the other norm. This also means that for a genuine conflict to be resolved, 'it is necessary for the wrongfulness on the part of the state for failing to abide by the displaced norm to be precluded as a matter of state responsibility'.<sup>85</sup>

It follows that, generally, where an incompatibility between two international norms potentially arises, the examination proceeds in two main steps. First, an assessment of whether it is possible to avoid the conflict by interpretive means that make the two, potentially conflicting norms, compatible. Second, where the avoidance of a conflict is not possible through interpretive means, the resolution of the genuine conflict will be dealt with, namely by way of assigning priority to one norm (potentially including a permission) over the other.<sup>86</sup> In this latter respect, and without any pretense to exhaust the issue of conflict resolution rules, for its breadth, the study suggests recourse to the *lex specialis* rule.<sup>87</sup>

Mindful of the debates over its origins, function, and application in particular cases, for the purpose of this study suffice it to explain, in the words of the ILC, that *lex specialis* 'is a generally accepted technique of...

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<sup>84</sup> *ibid*, para 25. For a critical analysis of the technique used by the Court, see further in Milanović – Origins of *lex specialis* (n 60) 103-114 and Schabas (n 81) 592-613.

<sup>85</sup> Pauwelyn (n 62) 327 and Milanović – Norm conflict (n 58) 102.

<sup>86</sup> Pauwelyn (n 62) 272; Milanović – Whither human rights? (n 62) 73-4; Milanović – Norm conflict (n 58) 103-106.

<sup>87</sup> For other means see generally Pauwelyn (*ibid*) 327-385 and Milanović – Norm conflict (*ibid*) 102-106.

conflict resolution in international law. It suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific', the 'special norm'.<sup>88</sup> Principally, a norm may be *lex specialis* 'because it addresses the particular subject matter that a general law also addresses more directly or precisely<sup>89</sup> or because it deals with the same subject-matter 'but in a way that goes further, either in detail or in terms of the objectives pursued under both treaties'.<sup>90</sup>

Without derogation from the aforementioned, it should also be noted that there are situations in which 'all legitimate interpretive tools will fail us' and so will the *lex specialis* rule.<sup>91</sup> These are cases, as Milanović observes, 'where a norm conflict will be both unavoidable and irresolvable due to a fundamental incompatibility in the text, object and purpose, and values, and where the only possible solution to the conflict will be a political one'.<sup>92</sup> In such cases, as further explored below, the State has to make a strategic choice as to the international policies to which it prefers to give precedence.<sup>93</sup>

The issue of the interaction between IHL and investment law norms arises in this research in different contexts and is thus addressed from several perspectives. In the aggregate, this allows the study to flesh out different kinds of interactions between IHL and investment law. As further explained below, some IHL norms and investment law standards of treatment share a common historical backdrop. This historical development,

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<sup>88</sup> See further in: ILC, Study on the Function and Scope of the Lex Specialis rule and the Question of 'Self-Contained Regimes'. ILC (LVI)SG/ FIL/CRD.1 (2004) and the authorities therein, Milanović – Norm conflict (ibid) 113-17 and the authorities cited there.; N Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?' (2007) 40(2) Israel Law Review 355-395.

<sup>89</sup> Pauwelyn (n 62) 389. (eg: 'an obligation to do something in the events A to Z is less specific than an obligation not to do this something in the events A and B. Or a WTO obligation not to restrict trade, irrespective of the product involved, must be seen as less specific than an obligation (or permission) to restrict trade in the specific products A and B').

<sup>90</sup> Pauwelyn (ibid) 390.

<sup>91</sup> Milanović – Norm conflict (n 58) 102-103.

<sup>92</sup> ibid, 108-113.

<sup>93</sup> Milanović suggests that such situations are better resolved by the legislator, not the courts (ibid, 123-125).

in turn, has resulted in several compatibilities between the language, object and purpose, and other structural elements of these potentially divergent norms, thereby allowing both norms to 'be reasonably reconciled without much effort'.<sup>94</sup> In such cases, the thesis suggests using several interpretive techniques.

For instance, with respect to some investment standards of treatment, it is suggested that the investment provision uses terms of art with a recognized meaning under IHL, and thus, under the VLCT (Articles 31(1), (4)), the ordinary (or special) meaning of the treaty standard makes a reference to customary IHL; and thus, the content of the IHL rule informs the meaning of the investment standard (chapter 3). In another instance, it is proposed that a potential incompatibility between IHL and investment law norms may be avoided through evolutionary interpretation of investment treaty terms, such as 'war' or 'armed conflict', in a manner that conforms with the way in which IHL defines and treats the notions of 'war' (chapter 6).

In other instances, the study suggests that, under VCLT Article 31(3)(c), IHL rules may be taken into account as part of the context (rather than the ordinary meaning) in the interpretation of investment standards of treatment (chapters 5 and 7). Further, this study proposes that, as a supplementary means of interpretation (VCLT Article 32), the mentioned historical backdrop regarding the symbiotic development of IHL and investment norms, assists to bring further compatibility in the interpretation of international norms by way of confirming and clarifying the meaning of a given standard (chapter 3-7).

The study also deals with an instance when a potential incompatibility cannot be avoided or interpreted away, and a genuine conflict arises. In this case, the research looks to the application of the *lex specialis* rule so as to resolve the conflict (chapter 5). Finally, an instance of an 'unavoidable' and 'unresolvable' conflict is addressed.<sup>95</sup> Here, priority

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<sup>94</sup> *ibid*, 106.

<sup>95</sup> *ibid*, 102, 121-22.

rules are of little assistance. In such cases, it is suggested that the contradiction of investment law and IHL policies and practices is resolved through a political solution. That is to say that in such cases, rather than leaving it to the adjudicators to reconcile potential incompatibilities between particular norms, it is for the State to prioritize its conflicting policies by way of making a value judgment with respect to certain issues. (chapter 4). Overall, depending on context, the thesis illustrates how existing tools in international law may be used to clarify the interaction between investment law and IHL.

While international law offers tools (namely interpretive instruments and priority rules on the resolution of conflict) to address the interaction between investment law and IHL norms at the 'level of specific problems', it remains unclear how an international forum will resolve such problems. The identity and function of the forum and its perception of international norms may affect the use of these regime-interaction tools and the results of their application.<sup>96</sup>

Faced with a 'specific problem' concerning the protection of investments in armed conflict, an investment tribunal is likely to treat the investment instrument as the point of departure in the resolution of the claim and assess, at best, the effect of IHL on the interpretation and application of the investment standard at issue. Other international tribunals or national courts may approach a similar problem primarily from the perspective of IHL, which they may construe differently. Mindful that IHL lacks a

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<sup>96</sup> This proposition is supported by the different treatment of IHL in national courts and human rights tribunals. See: E Buis, 'The Implementation of International Humanitarian Law by Human Rights Courts: The Example of the Inter-American Human Rights System' in R Arnold and N Quéniwet (eds) *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Brill Nijhoff 2008) 269-93; S Tabak, 'Ambivalent Enforcement: International Humanitarian Law at Human Rights Tribunals' (2016) 37(4) *Michigan Journal of International Law* 661, 684-715; D Jinks et al, 'Introducing International Humanitarian Law to Judicial and Quasi-Judicial Bodies' in D Jinks et al (eds) *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies* (Asser, Springer 2014) 1-26. Also compare the decision on the expropriation of Yukos's property in a human rights tribunal (*Case of Yukos V Russia* Application No 14902/04, Judgment, 31 July 2014) with the decision of the investment tribunal on similar issues (*Yukos v Russia*, UNCITRAL, PCA Case No AA 227, Final Award, 18 July 2014).

specialized forum for enforcement and that investment claims involving war-torn States have already arisen, this research approaches the protection of investments in armed conflicts from the perspective of investment arbitration.<sup>97</sup>

## **6. Litigating War in Investment Arbitration: How Much IHL is Too Much IHL?**

To provide the relevant actors and decision makers with workable tools to address the problem of the regulation of investments in armed conflicts this discussion must be aware of the significant role that litigation plays in the enforcement of investment standards of protection. Accordingly, while this research deals with the substantive, rather than the procedural, international law that regulates the protection of investments in armed conflict, it is mindful that the value of a legal argument, as sound as it may be, is diminished if it cannot be introduced before a relevant forum. It is therefore useful to address, at this preliminary stage, the question whether IHL norms can be invoked in investment arbitration and if so, how and by whom.

As explained below, the analysis of this thesis could form the basis for IHL-based arguments that may be raised by host States *defensively*.<sup>98</sup> For the sake of completeness, it should be noted that, as with human rights-based arguments, investors, third parties, and the tribunal could (but rarely do) also introduce IHL-based arguments in investment arbitration.<sup>99</sup> In line

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<sup>97</sup> For the sake of accuracy, and as further explained below, to a degree chapter 4 is an outlier to this perspective. As further explored below, chapter 4 deals with the contemporary laws of targeting and the rare instances when an investment may be said to be classified as target susceptible to direct attack. This discussion, while also relevant for the interpretation and application of investment standards of protection in hostilities (including by investment tribunals), approaches the issue of the protection of investments in armed conflicts from a broader policy perspective.

<sup>98</sup> IHL-based counterclaims against investors are not addressed in this study. For a discussion of the substantive and procedural limits to counterclaims based on non-investment norms, see: E De Brabandere 'Human Rights Counterclaims in Investment Treaty Arbitration' (2017) 50(2) *Revue Belge de Droit International* 591-611.

<sup>99</sup> For a breakdown of cases by the identity of the party invoking human rights arguments see: S Steininger 'What's Human Rights Got to Do with It? An Empirical Analysis of Human Rights References in Investment Arbitration References in Investment Arbitration' (2018) 31(1) *Leiden Journal of International Law* 33, 41-43.

with the fact that investors rarely invoke other international norms, such as human rights,<sup>100</sup> IHL arguments are not generally invoked by investors. Based on the (limited) willingness that some tribunals have demonstrated to entertain human rights considerations when such were made in *amicus curiae* briefs,<sup>101</sup> it may be said that, even where such arguments are not raised by the litigants for whatever strategic, procedural, or substantive reasons, IHL-considerations can be introduced by third-parties.<sup>102</sup> But there is no known case of such submissions. Finally, by analogy to the treatment of human rights instruments in investment arbitration, it may be suggested that the tribunal itself can raise IHL. However, based on the *non ultra petita* rule<sup>103</sup> such IHL-based arguments can, at most, be invoked to support a decision with respect to the investment claim, they cannot be used to introduce new arguments.<sup>104</sup>

The next question is whether, given their limited jurisdictions and the rules on applicable law, investment tribunals can, *as a matter of principle*, consider IHL-based arguments when such are raised by the State. The starting point is that investment tribunals are endowed by the parties with the power to settle the specific category of disputes that the parties have

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<sup>100</sup> This may be in part because as judicial entities, investor benefit from few protections under human rights instruments or because investors are of the view that investment treaties provide equivalent, and even higher protections. See further: C Reiner and C Schreuer, 'Human Rights and International Investment Law' <[http://www.univie.ac.at/intlaw/h\\_rights\\_int\\_invest\\_arbitr.pdf](http://www.univie.ac.at/intlaw/h_rights_int_invest_arbitr.pdf)> (accessed 30 July 2018). Notably, when such human rights-based claims were made by investors, these were mostly rejected, as explained below.

<sup>101</sup> *Aguas del Tunari v Bolivia*, ICSID Case No ARB/02/3, NGO Petition to Participate, 29 August 2002, paras 26-8 and *Aguas del Tunari v Bolivia*, ICSID Case No ARB/02/3, Letter from President of Tribunal Responding to Petition, 29 January 2003). See further on this analysis in Reiner and C Schreuer (ibid).

<sup>102</sup> Eg: *Tecmed v Mexico*, ICSID Case No ARB (AF/00/2), Award, 29 May 2003. The case concerned measures that were taken by Mexico in order to abide by its human right obligations (access to water), neither the investor nor the State raised human right. See further in: E De Brabandere, 'Human Rights Considerations in International Investment Arbitration' in M Fitzmaurice P Merkouris (eds) *The Interpretation and Application of the European Convention of Human Rights* (Martinus Nijhoff 2013) 209-14.

<sup>103</sup> For a discussion of the *ultra petita* rule in investment arbitration, eg: *SAUR v Argentina*, ICSID Case No ARB/04/4, Decision on Annulment, 19 December 2016.

<sup>104</sup> Eg: In *Tecmed v Mexico*, the Tribunal cited the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights in the context of expropriation (*Tecmed v Mexico*, paras 116-22).

accepted for submission.<sup>105</sup> While some treaties limit the tribunal's jurisdiction to disputes 'concerning expropriation',<sup>106</sup> other treaties provide for broader jurisdiction that encompasses disputes 'concerning matters governed by this agreement', 'an alleged breach of any right conferred by this agreement',<sup>107</sup> disputes over 'interpretation and application' of the treaty, etc.<sup>108</sup>

Under another strand of drafting, tribunals have jurisdiction over disputes relating to the treaty's substantive standards *and* disputes that concern investment agreements and investment authorizations.<sup>109</sup> Finally, investment treaties are replete with broad jurisdiction clauses that limit the subject-matter jurisdiction not by a reference to certain instruments but rather by circumscribing a type of disputes that the tribunal can hear.<sup>110</sup> Such language refers to any 'investor-State dispute',<sup>111</sup> an 'investment dispute',<sup>112</sup> or dispute 'arising in connection with investment activities'.<sup>113</sup>

While jurisdictional clauses have implications on the law that will be applied by the tribunal, jurisdiction is different from the question of the law applicable to the dispute.<sup>114</sup> It is the parties' autonomy as expressed in the

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<sup>105</sup> J Collier and V Lowe, *The settlement of disputes in international law* (OUP 2009) 227.

<sup>106</sup> Some former Communist countries limit jurisdiction to disputes 'concerning expropriation'. Eg: Article 7, Cyprus – Hungary BIT; Article 4(3), Bulgaria – Germany BIT. See: *ST-AD GmbH (Germany) v Bulgaria*, Award on Jurisdiction, 18 July 2013, PCA Case No 2011-06, para 361.

<sup>107</sup> Eg: Article 17(1), Japan – Cambodia BIT; Article 13, Austria Model BIT; Article 26(1) Energy Charter Treaty, Energy Charter Treaty, 2080 UNTS 95; 34 ILM 360 (1995) (ECT); Article 1116, The North American Free Trade Agreement 32 ILM 289, 605 (1993) (NAFTA).

<sup>108</sup> Eg: Article IX, UK – Colombia BIT; Article 11(1), Lithuania – Russia BIT.

<sup>109</sup> Eg: Article VII, US – Argentina BIT; Article 24(1), 2012 US Model BIT. Most recently, this approach has been espoused by the parties to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Article 9.19.

<sup>110</sup> Eg: *Iberdrola Energia v Guatemala*, ICSID Case No ARB/09/5, Award, 17 August 2012, para 306 (the Tribunal contrasted the scope of jurisdiction under the language 'matters governed by this agreement' with the language 'every dispute', 'any dispute' etc. concerning the investment, holding the former to be narrower in scope).

<sup>111</sup> Article 14, Rwanda – UAE BIT.

<sup>112</sup> Article 24, Israel – Japan BIT.

<sup>113</sup> Article X(1), Russia – Turkey BIT.

<sup>114</sup> It is usually accepted that there is a 'cardinal distinction' between jurisdiction and applicable law clauses as pronounced in *MOX Plant Case (Ireland v United Kingdom)*, Procedural Order No. 3, 24 June 2003, 126 ILR 310, para 19 and cited with approval in *Channel Tunnel Group v France and United Kingdom*, Partial Arbitral Award, 30 January 2007, para 139. Of course, merely calling a distinction 'cardinal' does not explain what the

governing law clause that determines whether a tribunal can hear IHL-arguments as a matter of applicable law. Ideally, the parties' consent to apply IHL to their disputes would be expressly stipulated. In the absence of a specific mention or incorporation of IHL rules in investment treaty provisions, IHL norms are applicable to investment disputes to the extent to which they are included in the parties' choice of law provisions. But many investment treaties do not contain such provisions.<sup>115</sup> When treaties do contain a choice of law clause, they are not uniform in language. Mostly, such provisions enumerate one or more of the following – the investment instrument, the law of the host State, and international law.<sup>116</sup>

Where the applicable law clause stipulates 'rules of international law' (and like formulations), IHL norms, as part of international law, will form part of the applicable law. In the absence of a choice of law clause, the determination of the applicable law depends on the arbitration rules in accordance with which the arbitration is conducted. For its popularity as a leading institution for the resolution of investment claims,<sup>117</sup> it is convenient to use the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) as an exemplifier.<sup>118</sup> Article 42 provides that, in the absence of an agreement to the contrary 'the Tribunal shall apply the law of the Contracting State party

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distinction is or how do these clauses interact (L Bartels, 'Jurisdiction and applicable law clauses: Where does a tribunal find the principle norms applicable to the case before it?' in T Broude and Y Shany (eds) *Multi-Sourced Equivalent Norms in International Law* (Hart 2011) 115, 125)).

<sup>115</sup> Until 2008, most of American BITs did not contain applicable law clause (cf: Article 30, US – Uruguay BIT; Article 30, 2012 US Model BIT). A little over a dozen of the 91 French BITs in force contain an applicable law clause, and fewer than a dozen of the UK's BITs contain applicable law clauses. The same is true for German BITs.

<sup>116</sup> Eg: Article 9, China Model BIT; Article 10(1), Argentina – Germany BIT; Article 8(4), UK – Vietnam BIT;

<sup>117</sup> According to UNCTAD, as of April 2019, most of the known investment arbitrations cases were submitted to the International Center for Settlement of Investment Disputes (ICSID) (UNCTAD, ISDS monitor <<https://investmentpolicyhub.unctad.org/ISDS>> (accessed 20 April 2019)).

<sup>118</sup> Convention on the Settlement of Investment Disputes between States and Nationals of Other States 575 UNTS 159 (ICSID Convention).



to the dispute *and* such rules of international law as may be applicable'.<sup>119</sup> 'International law', in this respect, encompasses treaties, custom, and general principals of law.<sup>120</sup>

Save for stipulations to the contrary, the application of international law to the treaty means that the secondary rules of public international law, such as the rules on attribution, State responsibility, reparations, and interpretation (including the principle of systemic interpretation), apply and that IHL, as a field of international law, forms part of the applicable law.<sup>121</sup> It follows that where public international law is the governing law the limited scope of jurisdiction of investment tribunals does not principally prevent tribunals from considering issues relating to the conduct of hostilities when these matters are raised by the litigants as part of the *applicable law*.

But just how the incorporation of IHL as part of the applicable law interacts with the limited jurisdiction of the investment tribunal is a complex question of a different order.<sup>122</sup> What seems to be agreed is that the jurisdiction of a tribunal established to hear *certain* kinds of disputes cannot be extended to *any* type of dispute between the investor and the host State, even 'if the alleged breaches are of obligations under peremptory norms, or obligations which protect essential humanitarian values', to cite the ICJ in the *Genocide Case*.<sup>123</sup>

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<sup>119</sup> Article 42, ICSID Convention. See similar language in Article 28.1, SIAC 2017 Investment Arbitration Rules (see also: Article 21.1, ICC 2017 Arbitration Rules; Article 27.1, SCC 2017 Arbitration Rules).

<sup>120</sup> Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other States (1965) 13 ICSID Reports 25). and E Gaillard and Y Banifatemi, 'The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process' (2003) 18(2) ICSID Review - Foreign Investment Law Journal, 375-411.

<sup>121</sup> J Calamita, 'Countermeasures and jurisdiction: Between effectiveness and Fragmentation' (2011) 42 Georgetown Journal of International Law 233, 276-77.

<sup>122</sup> See (n 114).

<sup>123</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Serbia and Montenegro)* (Merits) [2007] ICJ Rep 1, para 147. The Court addressed the question whether it can adjudicate alleged breaches of other international norms, not amounting to genocide. While Article 38(1) of the Court's Statute comprises such norms as part of the applicable law, the Court's basis of jurisdiction, Article IX of the Genocide Convention, restricted the Court's jurisdiction to the resolution of disputes 'relating to the interpretation, application or fulfilment' of the

This determination is consistent with the practice of investment tribunals. Relevant in this respect is the case of *Biloune v Ghana*.<sup>124</sup> Biloune was a Syrian investor that operated in Ghana. On the State's orders, he was arrested, held in custody for 13 days without charge, and finally deported. He brought a claim based on the investment agreement, arguing that Ghana's measures breached investment standards of protection. He also sought compensation for the violations of his human rights, adding that the investment tribunal is the only forum where he may seek redress for his injuries.<sup>125</sup> However, the Tribunal held that it 'lacks jurisdiction to address, as an independent cause of action, a claim of violation of human rights'<sup>126</sup> since its jurisdiction under Article 15(2) of the agreement was limited to commercial disputes arising under the contract between the parties only 'in respect of an approved enterprise'.<sup>127</sup>

The *Bernhard von Pezold v Zimbabwe* Tribunal followed a similar reasoning. Article 10(5) of the Germany – Zimbabwe BIT instructed the Tribunal to decide disputes 'on the basis of... rules of general international law'<sup>128</sup> while the Tribunal's jurisdiction was limited to disputes 'concerning the interpretation or application of this [BIT]'.<sup>129</sup> And so, the Tribunal refused to allow claims 'on the putative rights of the indigenous communities as "indigenous peoples" under international human rights law' as such fell 'outside the scope' of the Tribunal's jurisdiction.<sup>130</sup>

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Convention, thereby ousting claims that are based on 'other' international norms. Accordingly, the Court found that it had 'no power to rule on alleged breaches of other obligations under international law' irrespective of the significance of IHL norms.

<sup>124</sup> *Biloune v Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989.

<sup>125</sup> *ibid*, 202-3.

<sup>126</sup> *ibid*, 203.

<sup>127</sup> *ibid*, 188. Article 24 of the investment agreement instructed the Tribunal to decide the dispute 'according to the laws of Ghana'. Nevertheless, the Tribunal held that absent a clear indication to the contrary in Ghana's laws, international law, including human rights, forms part of the substantive applicable law.

<sup>128</sup> Article 10(5) Germany – Zimbabwe BIT.

<sup>129</sup> Article 10(1), *ibid*.

<sup>130</sup> *Bernhard von Pezold v Zimbabwe*, ICSID Case No ARB/10/15, Procedural Order No 2, 26 June 2012, paras 57–61. See also *Rompetrol v Romania*, where both parties relied extensively on the possible application of the European Convention on Human Rights. The Tribunal explained that its sole function is to decide legal disputes that arise directly out of an investment, 'and to do so in accordance with 'such rules of law as may be agreed by

But this is not what is at issue. The question, as explained, is not whether an investor can argue that the State breached IHL in investment arbitration. The question is rather, what should a tribunal to do when the investor invokes a treaty provision to assess the unlawfulness of a certain conduct, whilst *the State* invokes other international rules to justify (for want of a better term) the conduct that is allegedly inconsistent with the treaty or to narrow the scope of the treaty standard?

For instance, can a tribunal empowered *only* to resolve disputes ‘concerning expropriation’ hear a defense whereby the taking of the investment without an independent right of review or against the offer of compensation below Fair Market Value (FMV), is not an unlawful expropriation that fails to comply with the treaty rule, but rather a lawful act of dispossession during armed conflict, which is subject to different qualifications that do not include due process and do not entail FMV compensation?<sup>131</sup> Or, can a tribunal established to resolve disputes over the ‘interpretation and application’ of the investment treaty hear a defense whereby the State did not breach the FPS standard by failing to take reasonable measures to protect the investor’s property from damage during a military operation, since what is ‘reasonable’ in armed conflict is determined by IHL concepts of ‘feasible precautions’, with which the State had fully complied?<sup>132</sup>

How to deal with disputes of this type is controversial since in contradistinction to the referenced *Biloune* case, an IHL defense to an investment treaty claim does not fall plainly within the scope of the jurisdictional clause, nor clearly outside it, ‘it straddles the dividing line’.<sup>133</sup>

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the parties’. The Tribunal went on to explain that the applicable law is the investment treaty and that claim that concerns the violation of the European Convention should be submitted to the competent instance, established under this Convention (ICSID Case No ARB/06/3, Award, 6 May 2013, paras 170-172).

<sup>131</sup> This question is addressed in chapter 3.

<sup>132</sup> This question is addressed in chapter 5.

<sup>133</sup> E Cannizzaro and B Bonafe, ‘Fragmenting international law through compromissory clauses? Some remarks on the decision of the ICJ in the Oil Platforms Case’ (2005) 16(3) EJIL 481, 484.

Put a different way, a question may be asked whether an international tribunal with jurisdiction over investment disputes (or over disputes under an investment treaty) can be said to have jurisdiction over the entirety of the legal dispute, including the determination that the measure at issue complied with IHL and that this is a defense against an investment claim.<sup>134</sup>

On this point, De Brabandere suggests that, considering the specific and limited jurisdiction of investment tribunals, IHL-arguments will in effect be taken into consideration ‘only provided’ that the State can ‘effectively prove and demonstrate’ the relevance of these considerations in the event of an investment dispute.<sup>135</sup> Based on the jurisprudence of international courts and tribunals it is suggested that IHL defenses assume relevance in investment disputes and should be taken into consideration by investment tribunals when the application of IHL affords a justification (for want of a better term) for conduct potentially inconsistent with the investment treaty commitments<sup>136</sup> and when IHL norms curtail the scope of the investment standard.<sup>137</sup>

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<sup>134</sup> This question was put by Calamita in relation to countermeasures that arise from a norm extrinsic to a treaty (Calamita (n 121) 276-78. See also: K Trapp, ‘WTO Inconsistent Countermeasures—A View from the Outside’ (2010) ASIL Proceedings 264-70.

<sup>135</sup> E De Brabandere, *Investment Treaty Arbitration as Public International Law* (CUP 2014) 135.

<sup>136</sup> *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v UK)*, Preliminary Observations (Preliminary Objections) [1998] ICJ Rep 9, para 25 and ICJ Judgment of 27 February 1998, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v USA)*, (Preliminary Objections) [1998] ICJ Rep 115, para 24. There, the UK and the US argued in their defense to Libya’s claim that, their request to extradite two Libyan nationals and their refusal to cooperate with Libya in criminal proceedings, was not in breach of the Montreal Convention since these measures were adopted as a reaction to Libya’s involvement in terrorism, and as such governed by international customary law. Similarly, in the *Hostages* case the US asked the Court to assess whether the Vienna Conventions of 1961 and 1963 and the 1955 FCN Treaty had been breached by Iran as a result of the seizure and holding of US diplomatic and consular staff in Tehran by Iranian nationals. Defensively, Iran maintained that the allegedly unlawful conduct should be assessed in the broader context of previous unlawful American interference in the domestic affairs of Iran. While the ICJ ultimately rejected the Iranian argument, it was not for want of jurisdiction (*Case Concerning United States Diplomatic and Consular Staff in Tehran (USA v Iran)* (Merits) [1980] ICJ Rep 3, paras 80-86).

<sup>137</sup> *Case of the S.S. ‘Wimbledon’*, PCIJ Rep, Ser. A Vol 1, 25.

It is only when the conduct is governed by several international norms, including IHL, and this conduct falls within the scope of one or more of the treaty standards, that an investment tribunal can examine the relationship between IHL norms and investment obligations, in order to settle an investment dispute.<sup>138</sup> Such IHL-based defenses directly concern the State's treatment of the investment; they do not 'expand' the jurisdiction of the tribunal, but rather fall within its scope. Indeed, investment tribunals have exhibited some readiness to consider the concomitant international obligations of the host State when assessing its compliance with investment treaty commitments to foreign investors.<sup>139</sup>

At the same time, opening the door for IHL-based arguments risks transforming the investment tribunal 'into an unqualified and comprehensive' generalized forum<sup>140</sup> or turning the investment claim into a matter that is merely ancillary to the adjudication of the host State's conduct of hostilities, thereby circumventing and undermining the parties' consent. In 1986, Judge Jennings addressed this conundrum:<sup>141</sup>

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<sup>138</sup> *Chagos Marine Protected Area Arbitration, Mauritius v United Kingdom*, Final Award, PCA, 18 March 2015, Chapter 5; *Philippines v China*, Award on Jurisdiction and admissibility, 29 October 2015, para 393; P-M Dupuy, 'Unification Rather than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law' in (n 58) 59; Reiner and Schreuer (n 100) 84; De Brabandere – Investment Treaty Arbitration (n 135) 135.

<sup>139</sup> For instance, the *SPP v Egypt* Tribunal entertained the argument that Egypt's parallel obligations to preserve cultural property required it to interfere with the investment project, but found that, on its merits, 'the UNESCO Convention by itself does not justify the measures taken by the Respondent to cancel the project, nor does it exclude the Claimants' right to compensation.' (*SPP v Egypt*, ICSID Case No ARB/84/3, Award, 20 May 1992, para 154). See also *Suez/Vivendi v Argentina*, ICSID Case No ARB/03/19, Decision on Liability, 30 July 2010, para 262 (the Tribunal eluded that it would have been willing to hear an argument whereby human rights obligations contradict the dually applicable investment norm, thus shielding the State against the treaty claim. However, the Tribunal did 'not find a basis for such a conclusion either in the BITs or international law'). See further in: L Peterson and K Gray, 'International Human Rights in Bilateral Investment Treaties and in Investment Treaty Arbitration' IISD (April 2003) <<https://www.escripnet.org/docs/i/404561>> (accessed 1 July 2016) 28-9.

<sup>140</sup> *Ireland v United Kingdom ('OSPAR Arbitration')*, PCA, Final Award, 2 July 2003, ILM 42 (2003), para 85.

<sup>141</sup> *Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v US* (Merits) (1986) ICJ Rep 14.

Suppose hostilities, or even war, should arise between parties to an FCN treaty, then the Court under a jurisdiction clause surely *does not have jurisdiction to pass upon the general question of the lawfulness or otherwise of the outbreak of hostilities or of war...*; though of course it might *have jurisdiction for instance to decide whether there was a “war” or hostilities, for the purposes of interpreting and applying a war clause which was a term of the treaty*. If it were otherwise, there would be no apparent limit to the kinds of dispute which might in certain circumstances be claimed to come under such a jurisdiction clause.<sup>142</sup>

If so, barring treaty language to the contrary, the above review allows us not only to ascertain the jurisdictional limits to IHL-litigation in investment arbitration, but also to distinguish the possible uses of IHL by an investment tribunal. First, as Jennings suggested in the above-cited passage, IHL may serve as a potentially relevant factual consideration in the application of another source of law. For instance, when a tribunal is required to ascertain whether an ‘armed conflict’ exists for the purpose of the interpretation and application of a security exception that reserve the State’s right to take emergency measures in armed conflict or a war clause that prescribes certain treatment for situations of ‘armed conflict’.<sup>143</sup>

Second, IHL may be used as an applicable source of law (direct application)<sup>144</sup> when, say, relying on a broad definition of ‘conflict’, the State submits, in defense against an investment claim, that an IHL norm (including a permission) that was complied with, excludes the application of the breached investment standard.<sup>145</sup> Third, an investment tribunal may treat IHL as a ‘secondary’ source of law that influences the interpretation of

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<sup>142</sup> *ibid*, Dissenting Opinion of Sir Robert Jennings 528, 539; emphasis added.

<sup>143</sup> These issues are addressed in chapters 6 and 7 respectively. As noted above, in terms of ‘norm interaction’, this use of IHL as applicable law facilitates the compatibility between investment law and IHL norms through interpretive means (conflict ‘avoidance’).

<sup>144</sup> See: T Begic, *Applicable Law in International Investment Disputes* (Eleven 2005) 155-165.

<sup>145</sup> Chapter 5 deals with this instance in detail.

the primary applicable law.<sup>146</sup> For instance,<sup>147</sup> a tribunal required to ascertain what is ‘adequate and prompt’ compensation for appropriation or seizure of property, may take into account the IHL-meaning of these concepts.<sup>148</sup>

The Award in the mentioned *Von Pezold v Zimbabwe* case is illustrative of these potential uses of IHL. There, the Tribunal rejected a defense that relied on the direct application of human rights, refusing to apply the doctrine of the margin of appreciation (primary source of law). However, the Tribunal acknowledges that it ‘takes some heed’ from the jurisprudence of human rights bodies in the assessment of moral damages (secondary source).<sup>149</sup> Thus, even if an investment tribunal does not ‘import’ IHL norms to the investment dispute, it may nonetheless be guided by such non-investment considerations.<sup>150</sup>

In sum, a tribunal established to adjudicate ‘investment disputes’ or disputes concerning the ‘interpretation and application of the treaty’ (and like formulations) is endowed with the power to assess the effect produced by IHL on the applicability and application of the treaty provisions to the conduct at bar.<sup>151</sup> Whether tribunals *should*, even if they can, consider IHL-based defenses is a question of a different order, which is assessed against a separate set of considerations, such as the composition and expertise of the tribunal, the availability of other domestic and international IHL fora, and

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<sup>146</sup> H Kjos, *Applicable Law in Investor–State Arbitration* (OUP 2013) 187-89. See also *EDF v Argentina*, where Argentina referenced several human rights instruments as part of its submission that ‘obligations under investment treaties do not undermine obligations under human rights treaties, and thus, the Treaty should be construed and interpreted consistently with international canons aimed at fostering respect for human rights’ (ICSID Case No ARB/03/23, Award, 11 June 2012, para 192).

<sup>147</sup> Other interpretive techniques to avoid a potential incompatibility between investment law and IHL norms were addressed in the previous section and are further elaborated in the next chapters below.

<sup>148</sup> This example is addressed in chapter 7.

<sup>149</sup> *Von Pezold v Zimbabwe*, ICSID Case No ARB/10/15, Award, 28 July 2015, paras 460-68, 910, and footnote 95.

<sup>150</sup> Steininger (n 99) 46.

<sup>151</sup> Dupuy (n 138) 57. See also ILC, Final Report of the ILC Study Group on the Issue of Fragmentation of International Law, UN Doc. A/CN.4/L.682, para 169 (concluding similarly with respect to the applicable law in WTO disputes).

broader legitimacy debates over investment arbitration. While significant, this question is not addressed in this thesis.

## **7. Structure**

This research of the protection of foreign investments in armed conflicts proceeds as follows.

Since foreign investments are mostly regulated through treaties, the first issue that this thesis takes on is the effect of armed conflicts on the operation of investment instruments. Accordingly, chapter 2 asks: Do investment treaties remain applicable in times of armed conflict or does the outbreak of hostilities *ipso facto* abrogate investment treaties?

Ideally, the treaty will contain express provisions on its operation in hostilities. But this is not always the case. As further explained below, even when a treaty contains provisions on the treatment of investments in 'war', it is not entirely clear whether this provision also encompasses modern forms of hostilities that do not involve two or more States. Moreover, some States deliberately exclude from their recent investment instruments the obligation to guarantee the physical protection and security of investments, including in hostilities.

In the absence of treaty stipulations to govern the issue, it is necessary to ascertain the general rules of international law to govern the matter by default. Such rules have been arguably articulated by the ILC in a set of draft articles that propose that the outbreak of hostilities does not automatically abrogate treaties. However, as chapter 2 explains, this instrument is not a treaty and therefore its legal relevance emanates not from an instrumental pedigree but from reflecting custom, a proposition with which many States expressly disagree.

Since the question of hostilities' effect on investment treaties is not always resolved within the four-corners of the treaty nor by the work product of the ILC, it is useful to first identify and elucidate the legal position governing the effect of war on treaties and its rationales through conducting a historical analysis of relevant practice, jurisprudence, and doctrine. This



analysis allows the thesis to better assess the status of the work of the ILC and the general rules of international law that govern the matter absent treaty stipulations to the contrary.

Overall, it is argued in chapter 2 that under the current governing position, armed conflicts do not *ipso facto* terminate (or suspend) investment treaties, and unless terminated (or suspended) by the parties, they remain operational during armed conflicts. Consequently, absent a stipulation to the contrary, covered investments continue to benefit from substantive investment treaty standards of protection. The next step, then, is to consider what treatment, if any, these treaties prescribe in armed conflict, and how do any such standards of treatment interact with other norms of international law that apply in armed conflict. This is the focus of chapters 3 through 7.

Accordingly, chapter 3 deals with the qualifications to the State's ability to adopt measures that result in interference with an investor's ability to manage, use, or control, in a meaningful way, investments in the form of tangible objects and premises during armed conflict. In other words, the discussion deals with appropriation (including destruction) of foreign investments in times of armed conflict. Aware that the analysis of appropriation of investments is usually associated with (and often limited to) expropriation,<sup>152</sup> and in order to provide the reader with a broader and more nuanced normative context to the treatment of investments in hostilities, chapter 3 starts from a higher degree of abstraction and gradually zeroes in on particular investment treaty provisions.

First, starting from a bird's-eye view, chapter 3 briefly introduces the main differences between the legal paradigms that principally regulate State measures that interfere with foreign investments in armed conflicts – the conduct of hostilities paradigm, which derives from IHL, and the law enforcement paradigm that is mainly based on international human rights

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<sup>152</sup> On the expropriation-oriented mindset of investment jurisprudence see further in chapters 3 and 7.

law (and is not the focus of this study). This introductory discussion establishes an important proposition that underscores the different discussions in this thesis: When assessing whether a particular State measure that adversely affects investments during hostilities complies with international law, 'it is also necessary to address the role of the *jus in bello*, which gives belligerents substantial latitude to... act in ways contrary to international law in time of peace'.<sup>153</sup> For instance, an international tribunal observed that, 'the deliberate destruction of aliens' property in combat operations may be perfectly legal, while similar conduct in peacetime would result in State responsibility'.<sup>154</sup>

Turning then to the paradigm of hostilities, which is the focus of this thesis: Chapter 3 demonstrates that, by contrast to expropriation, which is predicated on the balance between the State's regulatory freedom and the protection of property rights (and is therefore qualified namely by public purpose, due process, nondiscrimination, and compensation), the authority of the State to interfere with private property under the hostilities paradigm, is circumscribed by the delicate equipoise of military necessity and humanity. As a result, international law recognizes an array of lawful interferences with private property during hostilities that are distinct from expropriation and are qualified by different conditions.

Honing in further on the dispossession and destruction of foreign investments in armed conflicts, chapter 3 demonstrates that during the first half of the 20<sup>th</sup> century, war law rules on the treatment of private property, namely as codified in The Law of The Hague, infiltrated the international law on the protection of aliens and shaped the rules on State responsibility for damage to foreign property in wartime, resulting in a consensus that appropriation of private foreign property is lawful only when justified by military considerations and against compensation, while destruction of

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<sup>153</sup> *Civilians Claims-Eritrea's Claims 15, 16, 23, and 27-32*, Eritrea v Ethiopia, Partial award, (2003) 42 ILM 1083, para 124.

<sup>154</sup> *ibid.*

property is prohibited, other than in instances of 'imperative military necessity'.

At the next step, the analysis focuses on a common mechanism in modern investment treaties – the extended war clause (EWC). Such clauses, deal with 'requisition of property by the armed forces' and with the 'destruction of property that is not required by the necessity of war' (and similar language). This analysis of the EWC also deals with the interaction of the EWC with the expropriation provision, which regulates dispossession of property irrespective of the existence of hostilities. It is suggested that under the VCLT, the ordinary meaning of the cited language of the EWC makes a reference to customary law on the treatment of alien property in wartime. Accordingly, to ascertain the meaning of the EWC, it is necessary to look to the content of customary law, which is circumscribed by war law.

In this sense, the discussion in chapter 3 comes full circle: It demonstrates not only that the distinction between the hostilities and law enforcement paradigms is crucial for the treatment of foreign investments in armed conflict generally, but that this notion is already reflected in (many) investment treaties, which contain provisions on appropriation in the context of armed conflict (the EWC) and separate rules on takings that do not necessarily relate to hostilities (expropriation provisions).

Of course, as chapter 3 explains, the fact that the language of the EWC makes a reference to war law, by way of using technical terms of art with a recognized meaning under The Hague Law, does not mean that modern investment instruments are to be interpreted in accordance with war law as it stood in the early 20<sup>th</sup> century. Rather, it is suggested that such an interpretation accommodates developments in international law. Indeed, IHL has developed considerably since the Hague Law rules on the treatment of private property and their infiltration into the customary standard of treatment. The intercommunication between IHL and investment law, more generally, has too developed since the mid-20<sup>th</sup> century. These notions are further elaborated in chapters 4 – 7.

Chapter 4 picks up on the proposition from the paragraph above whereby the interpretation of the EWC accommodates flexibility and development in international law and focuses on one such significant development – the contemporary law and policy on targeting (i.e., the deliberate process that a military commander follows in deciding against which objects she will apply force). The laws on targeting are not found in the Hague Law, the subject matter of chapter 3, but in the later instruments of the Geneva Law. Hence, from the perspective of war law, chapter 4 chronologically follows the analysis of the treatment of private property under chapter 3.

Chapter 4 complements the discussion in chapter 3 in another significant way. Chapter 4 establishes that, while The Hague Law (as addressed in chapter 3) circumscribes the destruction of property by ‘imperative military necessity’, modern IHL rules on targeting (the Geneva Law) spell-out that ‘military necessity’, with respect to attacks on targets, means that only property that makes an effective contribution to military action may be destroyed, and only if such destruction in the circumstances ruling at the time, offers a definite military advantage. Thus, to examine whether a destruction of property (including foreign investments) ‘was required by the necessity of the situation’ under the EWC, in some circumstances it is necessary to assess whether this property (including foreign investment) is a ‘military objective’ susceptible to targeting.

Turning then to assess when an object (including a foreign investment) is a ‘military objective’ susceptible of targeting, chapter 4 demonstrates that the ambiguity over the concept ‘military objective’ has resulted in the formation of several controversial classes of targets, namely – dual-use and revenue-generating targets (discussed further below). The formation of these classes of targets and the policies and practice that conflict-ridden States adopt with respect to such targets have implications for the treatment of investments during hostilities.

The chapter demonstrates that in today's reality of trade and investment liberalization, foreign investments are often made in economic sectors that are prone to dual-use classification (eg: industrial plants, ports, or factories) since in warfare the military also uses this civilian infrastructure. It is also suggested that the revenue-generating target doctrine, whereby any economic infrastructure that generate revenues for the enemy's armed forces may be lawfully targeted, is potentially incompatible with the law and policy on the promotion and protection of investments in hostilities.

The broader point that chapter 4 makes concerns the potential incompatibility between the law and policy of IHL and foreign investment, which stems from the basic notion that, under IHL, what is sauce for the goose is sauce for the gander. Since there are no separate sets of IHL rules for home and host States, and there are no special targeting rules for foreign investments, when a State adopts expansive approaches to target classification as a party to a conflict (eg recognizing that any economic asset that generates revenues for a belligerent is a lawful target), it risks 'inviting' the targeting of its foreign investments by way of reciprocity.

Another difficulty with expansive targeting policies is that they deem investments in certain economic sectors in conflict-ridden States (eg: petroleum, mining, or hydro) particularly susceptible to attacks, thereby undermining national and international agendas to promote investments, in particular in such sectors, in conflict-ridden States so as to assist in post-conflict reconstruction. Accordingly, this chapter cautiously suggests that investment law and policy may be used to induce States to observe certain limits when engaging in armed violence, and thus investments serve as an informal restraining qualification on the conduct of hostilities.

Under IHL, whenever an object (including a foreign investment) is not classified as a 'military objective', or whenever there is doubt as to its classification, it shall be treated as a 'civilian object', which must be protected from the effects of hostilities. Thus, having outlined in chapter 3 the qualifications for lawful dispossession or destruction of investments and

having circumscribed the limited instances when investments may be targeted in chapter 4, chapter 5 deals with the obligation to protect investments (civilian objects) by way of taking precautionary measures when planning or launching an attack and when defending against an attack.

Accordingly, chapter 5 first focuses on the customary standard of treatment which requires States to ‘take reasonable care’ to protect aliens and their property. Consistent with the methodology of the previous chapters, chapter 5 conducts a historical analysis of relevant authorities and suggests that, by the 20<sup>th</sup> century, the language, practice, and jurisprudence relating to provision in FCN treaties on the protection and security of aliens recognized a customary standard that required host States to exercise due diligence in order to protect foreign persons and property from damage caused by the State’s own actions and from damage caused by third parties. Although this norm first coalesced as a uniform standard, it developed into a relative ‘due diligence’ obligation that accounts for the available resources of the State in assessing its compliance.

The discussion then moves to examine the meaning and content of a ubiquitous investment treaty standard – full protection and security (FPS) – focusing on the origins, development, and meaning of FPS and on the assessment of compliance with the FPS standard. Consistent with the methodology of chapter 3, which dealt with the EWC, chapter 5 deals with the interpretation of the language ‘full protection and security’ (and similar wording) under VCLT Article 31. It is suggested that the ordinary meaning of this language refers to the customary obligation to take ‘reasonable’ care. Consequently, the meaning of the obligation to provide ‘full protection and security’ is established by the examination of the content of this relative customary standard. In practical terms this means that assessment of compliance with the FPS rule turns, to a degree, on the resources and circumstances of the host State.

Then, chapter 5 deals with the obligation to take precautionary measures in favor of civilian objects (including foreign investments) under IHL. It is argued that IHL prescribes a due diligence obligation that requires States, whether they initiate an attack or are attacked by their adversary, to do what is practical and practicable in the prevailing circumstances in order to protect foreign investments under their control from the effects of hostilities. The implication of conditioning the obligation to take precautions by what is practicable in the prevailing circumstances, as chapter 5 explains, is that the international responsibility for the obligation to take precautionary measures is, *inter alia*, circumscribed by the resources and the financial and technical capacity of the war-torn host State.

Next, chapter 5 assesses the interaction between the obligations to take precautionary measures under investment law and IHL against the backdrop of a particular set of circumstances. Although chapter 5 proposes that the FPS standard and the obligation to take precautions under IHL are both relative standards that should, in principle, lead to similar outcomes in the application against the same set of facts, the debates in investment law jurisprudence over the interpretation and application of FPS require that the analysis also looks to a situation where the application of both norms leads to different results.

For instance, a potential conflict of norms (as broadly defined above) arises where a State takes certain precautions to protect an investment from an attack, and these measures comply with IHL, in that IHL does not require the State to do more or go beyond the measures it has adopted (or: permits the State not to take other measures), but these measures simultaneously breach FPS, which holds the State to a higher standard, requiring it to adopt additional or other measures to protect the same investment in the same circumstances. Building on the broad definition of 'conflict' discussed above, chapter 5 examines whether such a conflict between the two norms may be avoided through harmonious interpretation of FPS and the IHL obligation to take precautions under the VCLT, suggesting that it may not.

Nonetheless, it is argued that the conflict can be resolved, namely by applying the *lex specialis* principle to ascertain which norm deals with the factual-matrix more closely and in more detail or goes further in the way that it deals with the situation. Overall, this exercise leads chapter 5 to suggest that under international law, States have an obligation to do what is practical and practicable in the prevailing circumstances, including the resources of the State, so as to protect foreign investments under their control from the effects of hostilities, whether they author an attack or are attacked by their adversary. It is also suggested that this is a desirable outcome that gives due respect to the limited capacity of States, in particular war-torn host States.

Having outlined the normative framework that regulates the protection of investments in armed conflict, the thesis continues to deal with the treatment of investments by looking to the effect of the reality of hostilities on investment claims. Essentially, Chapter 6 asks: Can States successfully invoke security exceptions, carve-outs, and customary excuses and justifications<sup>155</sup> as defenses against investment claims that arise from or in relation to hostilities?

First, the chapter examines whether IHL-consideration (i.e., the occurrence of hostilities, military aims, humanitarian objectives, and related circumstances) can be introduced in investment arbitration using treaty exceptions, assuming such exist, which reserve the State's right to take 'any measure which it considers necessary for the protection of its essential security interests'. This analysis focuses on the origins, scope, and meaning of security exceptions and their application in the context of armed conflict.

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<sup>155</sup> This thesis does not deal with the classification of defenses into justifications and excuses. Briefly put, justifications are defenses that go to the characteristics of the act at issue. While justifications render conducts lawful, or at least permissible, excuses are defenses that go relate to the characteristics of wrongdoing actor. Excuses exclude the negative consequences (for that wrongdoer) that arise out of an unlawful conduct. See: M Berman, 'Justification or Excuse: Law and Morality' (2003) 53(1) Duke Law Journal 1-77; V Lowe, 'Precluding Wrongfulness or Responsibility' (1999) 10 EJIL 405-411 and F Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (CUP 2018) ch 1.



It is suggested that, under a VCLT-consistent interpretation, subject to drafting to the contrary, whenever the security exception references 'war' or 'armed conflict', it also encompasses modern forms of hostilities, such as NIACs. It is also proposed that the intensity of the conflict is not dispositive for the invocation of the security exception.

That said, the suggested broad scope of the security exception, coupled with the proposition that not every measure that a host State adopts vis-à-vis foreign investments during hostilities relates to national security concerns (or to the conflict), raises concerns over the abusive invocation of the security exception. A particular concern is the extent to which the State's invocation of the exception is conclusive upon any tribunal and renders any cause-of-action with respect to which the exception was invoked unjustifiable.

On this point, chapter 6 resorts to a historical analysis of security exceptions and contextualizes the inferences from this analysis within a VCLT-consistent assessment of modern security exceptions in investment treaties. It is suggested that, in the context of armed conflict, security exceptions leave States ample room for appraisal with respect to emergency measures, however unless explicitly stated otherwise, this discretion is subject to limited judicial review.

Next, the analysis examines whether a host State can use the outbreak of conflict, the conditions and reality of hostilities, or military aims to defend against an investment claim that arises out of, or in relation to, hostilities, by invoking the pleas of necessity, distress, self-defense, or *force majeure*. This analysis demonstrates that the outbreak of armed conflict limits rather than expands the host State's arsenal of available defenses.

Finally, the discussion deals with the denial of benefits clause, which allows the State to carve-out from the definition of 'investor' certain companies due to security concerns. The analysis demonstrates that, while the denial of benefits clause may principally be invoked to safeguard security interests, it is of little use as a defense against investment claims

relating to modern hostilities, since the invocation of the clause is conditioned by the severance of diplomatic relations between the relevant States. In practice, however, situations of hostilities are more abundant than, and are not necessarily accompanied by, the official absence of diplomatic relations or an economic embargo.

Overall, it is argued that in the context of armed conflict States have discretion to adopt emergency measures that impinge upon investment obligations, and this discretion is reflected in various treaty and customary defenses. At the same time, the reality of hostilities operates in practice as a double-edged sword that imposes limitations on the State's ability to be exempt or excused from certain investment obligations, such as FPS and the war clauses. Because armed conflicts, by their very nature and essence, entail extreme and dynamic conditions, over time States have developed primary rules that are tailored for this reality. Such international norms include not only IHL norms but also other investment treaty mechanisms, such as security exceptions, war clauses, and precautionary obligations (including FPS). Each of these rules reflects an account (or a balance) of the State's military and security priorities in hostilities and other, potentially conflicting, humanitarian considerations.

The creation of such primary norms to deal with extreme conditions and threats to national security, in turn, resulted in a limitation on the application of secondary defenses, whereby States cannot use the extreme conditions of hostilities to excuse, justify, or circumvent the special primary norms that were created specifically for the regulation of the extreme conditions of hostilities. The relative length of each section in this chapter 6 is designated to reflect this state of play and to correlate to what seems to be the relative weight and primacy of these defenses in modern practice. Accordingly, the discussion of security exceptions takes up more room than the analysis of customary defenses, while the discussion of denial of benefits is the most concise in the chapter.

Chapter 7 deals with the consequences of the State's failure to provide investments with the treatment required by international law during armed conflicts. The point of departure for this analysis is that acts and omissions of a State in denying an investment the treatment guaranteed under the applicable investment treaty are internationally wrongful acts.

The previous chapters laid out the pertinent customary and treaty bases of liability capable of giving rise to a cause-of-action in relation to armed conflict in investment arbitration. These mostly comprise unlawful appropriation of property, including what may purport to be an unlawful expropriation but is in fact a different form of property dispossession (as explained in chapter 3), unlawful destruction of property (subject to the analysis of chapters 3 and 4), and the failure to take precautions in and against attacks (i.e., a violation of FPS standard and/or the IHL obligation to take precautions as per the discussion in chapter 5). These standards, like most investment standards, are silent with respect to the consequences of their violation. Accordingly, chapter 7 assesses whether the reality of armed conflict affects the obligation to make reparations in an adequate form for losses owing to the destruction or appropriation of investments and if so, how.

First, the chapter looks at the compensation that IHL prescribes for the above identified bases of liability. It is argued that States are under an obligation, vis-à-vis States and individuals (including foreign investors) to make reparation in the form of 'adequate' compensation for violations of IHL norms, including for unlawful appropriation and destruction of private property (foreign investments inclusive) or for the failure to take precautions in favour of civilian objects (including foreign investments). It is proposed that the notion of 'adequate' compensation is determined according to the circumstances of each case, accounting also for the gravity of the violation and the resources of the violating State. This analysis also discusses the prevalent practice on *ex gratia* compensations, which are awarded for losses in the context of hostilities even when there was no violation of IHL.

Having outlined the IHL rules on compensation for losses to investments owing to armed conflict, the chapter proceeds to elucidate the rules on compensation for losses owing to hostilities under investment treaties. Here, the discussion focuses on a common treaty mechanism – the plain war clause (PWC), which instructs that, ‘investors whose investments suffer losses owing to war shall be accorded compensation that are no less favorable than that which the host State accords to its own investors and/or to investors of third parties in like situations’ (and like formulations).

As regards the debates over the meaning of this language and the function of the clause, it is argued that the PWC duplicates a portion of the nondiscrimination obligation with respect to compensation. Consistent with the methodology in other chapters, this discussion is assisted by a historical analysis of the development of the PWC, which demonstrates that the PWC serves, and was introduced to early trade instruments with the intention to serve, an important function: In a reality where war reparations are not limited to violations of international law and legal obligations, the PWC effectively guarantees that the host State will be obliged to compensate the foreign investor whenever it pays war compensation for whatever legal or moral reason. In this respect, the IHL-informed historical backdrop assists to resolve an interpretive debate over the meaning and scope of an investment treaty standard and to ‘avoid’ a potential conflict with IHL by way of reading the contemporary function of the modern investment treaty mechanism in light of the prevailing practice on *ex gratia* reparations in modern warfare.

Next, Chapter 7 picks up the discussion of the EWC where chapter 3 left off. Chapter 3 suggested that the EWC prescribes primary rules on the treatment of foreign property in armed conflict. Namely, the EWC includes a pronouncement of the State’s right to appropriate private property in armed conflict subject to certain qualifications and it codifies the customary prohibition on the destruction of private property unless when

required by 'the necessity of war'. Additionally, EWC instruct that any such appropriation and destruction of property denote 'adequate compensation'. As the former two elements of the EWC were addressed in chapter 3, chapter 7 focuses on the meaning and scope of the requirement to accord 'adequate compensation'.

Given that most investment instruments include an obligation to pay 'adequate compensation' against expropriation, an important interpretive question that arises here is whether the expression 'adequate compensation' in the EWC is effectively a cross-reference to the expropriation provision and thus entails the Fair Market Value standard (FMV) of the destroyed or appropriated property at the relevant time? Or, is 'adequate' also informed by IHL-considerations, and if so, what would be the practical effect of that? Here, a VCLT-consistent analysis on the language of EWCs and expropriation provisions demonstrates that a sweeping conclusion that the adjective 'adequate' in the EWC necessarily means FMV in all instances cannot be reached.

Then, the analysis examines whether, and to what extent, the proposed IHL meaning of 'adequate' compensation can be taken into account in the interpretation of the EWC. Here, as with previous chapters, the analysis attempts to harmonize IHL and investment law through interpretive means and thus, to avoid a potential conflict between the EWC and the IHL rules on compensation for destruction or dispossession of property. It is suggested that by taking the IHL standard into account in assessing what is 'adequate' compensation under the EWC the interpreter must look beyond the FMV of the investment at the time of the injuring measure, and assess the 'adequacy' of the compensation in proportion to the gravity of the violation and the circumstances of each case, including the State's resources, abilities, and concomitant international obligations.

At the fourth step, chapter 7 suggests that the occurrence of an armed conflict, rather than the laws regulating hostilities (IHL), is also a circumstance that affects the award of compensation in various forms.

Namely, it is suggested that the existence of hostilities should be contextualized in the determination of the heads of damage, the assessment of causation and the valuation, and it can be used to cap the award in order to prevent crippling results. Overall, this chapter suggests that investment tribunals should consider IHL standards of compensation and the occurrence of hostilities in their assessment of compensation for losses to foreign investments in the context of hostilities.

Finally, while this thesis, as mentioned, does not presume to offer an exhaustive research of the conflict of norms in international law, nor is it a study about the interaction of legal regimes, as such, chapter 8 adopts an inductive perspective that suggests some broader inferences regarding the different levels of interaction between investment law and IHL. Accordingly, the analysis outlines the ways in which IHL may be said to affect the interpretation and application of investment norms and the potential effect that investment law and policy may have on IHL.

The concluding chapter also attempts to understand why, notwithstanding the fact that the historical analysis in the thesis demonstrates that in many ways IHL and investment law evolved in a complementary, and even symbiotic way, contemporary IHL practitioners and jurisprudence mostly disregard investment law (and vice-versa). It is suggested that, among many potential theories, the phenomenon may also be explained by the development of international law and its sub-fields and by the change in the education and the qualifications of international lawyers.

It is suggested that the contemporary treatment (i.e., the teaching and practice) of IHL and investment law as technical, niche areas of the law, rather than as fields of public international law with potentially similar origins, may explain why, by contrast to doctrine and jurisprudence from the 20<sup>th</sup> century and earlier, which identified the connection between war law and the law on the treatment of aliens and their property, many international

lawyers today do not conceive of these fields of law as related and disregard the implications thereof.

#### **8. The Main Objectives of The Research and its Target Audience**

Finally, before proceeding to the substantive arguments, it is worth understanding who these arguments are for and what is it that they aim to achieve.

As noted, the main aim of this study is to clarify the international legal framework for the protection of foreign investments in times of armed conflict. To that end, the study deals not only with the meaning and content of the potentially relevant investment law norms and their application in the context of armed conflicts, as was done in recent literature on the issue, but also with the meaning and content of potentially relevant IHL norms and their application to investments. The thesis seeks to have a gap-filling impact in academic literature by looking at the potential effects that IHL may have on the interpretation and application of relevant investment norms and at the potential effects that investment law and policy may have on the conduct of hostilities.

It is not the purpose of this study to cover the entire body of international law concerning normative conflicts and regime interaction, but rather to provide a contemporary and more detailed analysis of the law concerning investment protection in conflicts, and thereby to provide a broader analytical framework of the normative reality in which investments operate during hostilities. In this respect, the thesis provides an overall argument that the potential for conflict between investment law and IHL is a significant issue of growing relevance, as the two regimes (through their norms) may – and do in fact – regulate the same conduct and the same factual-matrix with different objectives in mind, but that general international law mostly (but not entirely) has the tools that allow to resolve any such conflict through interpretive means and through priority rules of conflict resolution.

Further, by clarifying particular issues concerning the interpretation and application of relevant investment standards of protection in hostilities (the existing law), the study assists to form a critical view of the law. Thus, the clarification of the meaning and content of the war clauses, the standard of diligence under the FPS obligation, or the scope of the security exception, informs our assessment of the adequacy of these standards and, in turn, may lead to potential reform. Put differently, the contribution of this doctrinal study is not only in the clarification of what the law is, but also in the assistance to determine what the law should be given the types of challenges that hostilities present for the protection of investments and in light of the national and international policies that States wish to promote.

Correspondingly, the target audience of this research is broad. First, investment lawyers will find this work useful as it is concerned with an issue of increasing relevance that, thus far, has not been addressed in a manner that thoroughly accounts for the effect that IHL has on the interpretation and application of investment standards of protection. Additionally, investment lawyers may find in this thesis several workable tools and useful concepts that they can apply, should they wish to do so, to the assessment of investment protection *outside* the context of armed conflict.

The analysis of the meaning and scope of the FPS standard (chapter 5), for one, is as relevant to, say, the State's obligation to remove squatters from the investor's real-estate or to protect the property of the investor during protests. The examination of war clauses (chapters 3 and 7), in turn, offers an important clarification of the origins, scope, and function of these treaty mechanisms that is useful outside the context of armed conflict. Likewise, the discussion of scope and reviewability of security exceptions in investment treaties (chapter 6) is relevant for other national emergencies.

Second, this study takes on (and suggests the resolution of) several debates over the modern practice of warfare. The inferences from these analyses are relevant for IHL lawyers and army practitioners *irrespective* of the regulation of foreign investments. For instance, the research deals with



the contested interaction between the norms of the Law of The Hague on the destruction of private property and the Geneva Law rules on targeting (chapters 3 and 4). Additionally, the analysis focuses on contentious practices of targeting of dual-use objects and bombing of revenue-generating targets (chapter 4), which have direct relevance to current military operations. Likewise, the discussion of the obligation to take precautionary measures in and against attack (chapter 5) is relevant for any analysis of contemporary urban warfare. Further, the treatment of the individual's right to remedy for violations of IHL (chapter 7) adds the perspective of investment law to the existing IHL scholarship.

Third, 'generalist' international lawyers will find the research interesting for its assessment of the development of the law on the effect of the war on the operation of treaties, since the analysis of chapter 2 applies, subject to necessary adjustments, to other categories of treaties. Finally, this thesis is relevant for social and political scientists who focus on the study of foreign investments and armed conflict as well as for those interested in the historical development of international law. Overall, this study seeks to contribute to the existing literature of international law and to bring more clarity to debated issues in the law and policy of foreign investment, while also exposing IHL lawyers to a record of relevant authorities, which they have traditionally overlooked in the research of the law and policy of war.

## **Chapter 2**

### **The Effect of Armed Conflicts on the Operation of Investment Treaties**

#### **1. Introduction**

The first step in this study deals with the question of whether investment treaties apply in times of hostilities. This question, however, has no pithy answer.

Ideally, the treaty will contain express provisions on its operation in hostilities. But this is not always the case. As explained in chapters 3 and 7, while provisions on ‘losses owing to armed conflict’ are common, they are not as ubiquitous as rules on, say, expropriation or FPS provisions. Even when a treaty contains provisions on the treatment of investments in ‘war’, it is not entirely clear whether such provision also encompasses modern forms of hostilities that do not involve two or more States.<sup>156</sup> Moreover, recently some States have begun to deliberately exclude from their investment instruments any and all obligation to guarantee protection and security of investments (FPS).<sup>157</sup>

In the absence of treaty stipulations, it is necessary to ascertain the general rules of international law to govern the matter by default. Such rules have been arguably articulated by the ILC in the Articles on the Effect of Armed Conflict on Treaties (the ‘2011 ILC Articles’ or ‘ILC Articles’, depending on context),<sup>158</sup> which propose that the outbreak of hostilities does not automatically abrogate treaties. However, it should be borne in mind that the ILC Articles are not a treaty and therefore their legal relevance

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<sup>156</sup> This issue is addressed, namely, in chapter 6, section 2 (the scope of security exceptions) and in chapter 7, section 3 (the scope of the plain war clause).

<sup>157</sup> For instance, the Brazil – Guyana BIT (signed 13 December 2018, not in force) excludes FPS and Article 4(3) stresses that, ‘for greater certainty ... “full protection and security” [is] not covered by this Agreement and shall not be used as, interpretative standards in investment dispute settlement procedures’. Such a stipulation also appears in the Brazil – UAE BIT (signed 15 March 2019, not in force).

<sup>158</sup> ILC, Draft Articles on the Effect of Armed Conflict on Treaties with Commentaries, Report of the International Law Commission, 63rd Session, UN Doc A/66/10, adopted by the UNGA in Res 66/99, 9 December 2011 (2011 ILC Articles).

emanates not from an instrumental pedigree but from reflecting custom, a proposition that many States expressly reject.

Since the question of hostilities' effect on investment treaties is not always resolved within the four-corners of the treaty nor by the text of the ILC Articles, it is useful to consider the issue from a higher degree of abstraction and to address a broader long-standing controversy in public international law: Does war abrogate treaties? The difficulty with resolving this question is that the response to it has changed over many years. In 1673, for instance, King Charles II informed the Scottish judges that the war with the Dutch 'certainly' voided the treaty of Breda.<sup>159</sup> A century later, in 1758, Vattel asserted that, as a rule, 'the conventions, the treaties made with a nation, are broken or annulled by a war arising between the contracting parties'.<sup>160</sup>

By the late 20<sup>th</sup> century it appeared that 'the passage of time [brought] with it the realization that there are many exceptions to this statement'<sup>161</sup> that war terminates treaties. In 1985, the Institut de Droit International (IDI) went even further and proposed that the outbreak of hostilities does not *ipso facto* terminate or suspend treaties 'between the parties to the armed conflict'.<sup>162</sup> But, in 2005 the Ethiopia – Eritrea Claims Commission (EECC) returned to the view that, 'there is a broad consensus that bilateral treaties, especially those of... economic nature, are at the very least suspended by the outbreak of a war'.<sup>163</sup> As further explained below, some commentators reference this view to demonstrate that the issue of hostilities effect on investment treaties is far from settled.

To extract a cohesive legal position on the effect of war on the operation of treaties from the significant, yet inconsistent, record of State

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<sup>159</sup> Cited in: Lord McNair, *The Law of Treaties* (OUP 1986) 698.

<sup>160</sup> E de Vattel, *The Law of Nations or the Principles of Natural Law*, Book III (Philadelphia, 1758) 371, section 17

<sup>161</sup> McNair (n 159) 699.

<sup>162</sup> Article 2, Institut De Droit International, *The Effects of Armed Conflicts on Treaties* (Helsinki Session, 1985).

<sup>163</sup> *Economic Loss throughout Ethiopia–Ethiopia's Claim 7 (Partial Award) (2005)* 26 RIAA 445, para 18.

practice, jurisprudence, and doctrine, a nuanced examination is required. Specifically, any analysis of this issue should account for the diversification and development of the notion of 'war' into the legal concept of 'armed conflict' and the changes in the law and policy of treaties and treaty-making over the years. These issues are addressed in section 2. Then, section 3 outlines the progressive development of international law on the effect of war on treaties. It is argued that the traditional view that war automatically abrogates all treaties gradually made way for certain exceptions, which resulted in the emergence of an opposite position whereby war does not *ipso facto* abrogate certain treaties.

Having established in Section 3 that by the close of the 20<sup>th</sup> century it was accepted that the outbreak of hostilities does not automatically abrogate certain treaties due to their explicit provisions and subject-matter, section 4 turns to assess the content and status of the 2011 ILC Articles. It is suggested that while the 2011 ILC Articles, as a whole, are not a codification of customary law, certain Articles reflect custom.

Finally, the inferences from these analyses are used to assess the fate of investment treaties. It is argued that under the current governing position, absent treaty stipulations to govern the matter, armed conflicts do not *ipso facto* terminate (or suspend) investment treaties, and unless terminated (or suspended) by the parties, they remain operational during armed conflicts. Consequently, covered investments continue to benefit from substantive investment treaty standards of protection.

## **2. The Relevant Authorities and Their Assessment**

To properly distil the legal position on the effect of armed conflicts on the operation of investment treaties, it is necessary to identify the relevant sources of law and how those sources relate to one another in proper context.<sup>164</sup>

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<sup>164</sup> Article 38, ICJ Statute.

As regards treaties, two instruments are potentially pertinent to the issue: The VCLT and the 2011 ILC Articles. Ostensibly, the VCLT contains a specific provision (Article 73) on ‘cases of...outbreak of hostilities’.<sup>165</sup> However, Article 73 merely provides that the VCLT ‘shall not prejudice’ any question that may arise in regard to a treaty from the outbreak of hostilities. The ILC deliberately ‘decided not to include... any provisions relating to the effect of the outbreak of hostilities upon treaties’ in the VCLT,<sup>166</sup> because the participants at the conference leading to the drafting of the VCLT perceived the issue as too complex to be resolved in the framework of the law of treaties.<sup>167</sup> Thus, although touching upon the issue and highlighting its controversial nature, the VCLT adds nothing substantive to the discussion.<sup>168</sup> This is important context for assessing views, such as the Australian position (2017) whereby, the VCLT ‘should continue to be the primary source of law on [the] topic’ of the effect of armed conflicts on treaties.<sup>169</sup>

The 2011 ILC Articles, in turn, are to be treated with care. The 2011 ILC Articles are not a treaty and should not be treated as such. The legal relevance of the 2011 Articles emanates from reflecting custom, not from

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<sup>165</sup> Article 73, VCLT. The provision was adopted with a 91:0:0 vote.

<sup>166</sup> See commentaries to draft article 69 (now 73) in: ILC, ‘Draft Articles on the law of treaties with commentaries’ UN Doc A/CN.4/SER.A/1966/Add.1 (1966), 112, 267. The ILC ‘concluded that it was justified in considering the case of an outbreak of hostilities between parties to a treaty to be wholly outside the scope of the general law of treaties to be codified in the present articles; and that no account should be taken of that case or any mention made of it in the draft articles’.

<sup>167</sup> ILC, ‘Fourth report of the *Special Rapporteur*, Ian Brownlie’, UN Doc A/CN.4/589, 14 November 2007, paras 25-8.

<sup>168</sup> I Sinclair, *The Vienna Convention on the Law of Treaties* (2<sup>nd</sup> edn, Manchester University Press 1984) 165; M Villiger, *Commentary on the Vienna Convention on the 1969 Law of Treaties* (Martinus Nijhoff 2009) 899, 904. To a degree, that the VCLT is silent on the effect of hostilities on the operation of treaties is consistent with the fact that this instrument offers little guidance on treaty breaches and responses, categories of treaties, and other ‘general law’. On the limits of the VCLT and the reasons thereof, see: C Tams, ‘Regulating Treaty Breaches’ in M Bowman and D Kritsiotis (eds) *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (CUP 2018) 440, 442-46.

<sup>169</sup> See the declaration of Ms McDougall before UNGA Sixth Committee, Summary Record of the 17<sup>th</sup> meeting, A/C.6/72/SR.17, item 86 (‘State comments 2017’). State declarations are addressed in detail in section 4 below.

an 'instrumental pedigree'.<sup>170</sup> At the same time, not every product by the ILC is necessarily an accurate expression of pre-existing customary law. This is only logical given that the ILC was established by the UN General Assembly (UNGA) to 'initiate studies and make recommendations for the purpose of... encouraging the progressive development of international law and its codification'.<sup>171</sup>

Accordingly, the text of the 2011 ILC Articles is not the first – but the last – port of call in this analysis. First, the discussion ascertains the international law on the point using the traditional rules of the doctrine of sources and interpretation. To that end, the analysis examines State declarations before international tribunals, official correspondences and diplomatic acts, and legal pleadings. Then, the content and status of the 2011 ILC Articles is assessed against these authorities and in consideration of the drafts that preceded the 2011 Articles and the comments that governments submitted to the ILC and the Sixth Committee of the UNGA regarding the 2011 Articles.

Next, the conduct of States is critical to ascertain the formation and the existence of custom. State practice on war's effect on treaties, however, is very much a function of two interlinked, yet independent, challenging aspects in which this legal issue arises:<sup>172</sup> 'armed conflict' and 'treaties'. First, it is challenging to determine the effect of hostilities on 'treaties' (as a whole) given the wide range of treaty categories. Indeed, judicial and scholarly jurisprudence mostly represent the view that the question of whether treaties survive the outbreak of hostilities is resolved according to

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<sup>170</sup> A similar position was expressed with respect to a different work product of the ILC, see M Pappas, 'Circumstances Precluding Wrongfulness in International Investment Law' (2016) 31(2) ICSID Review 484, 487-88.

<sup>171</sup> Article 31(1)(a), UN Charter. See further: UN, 'Documents of the United Nations Conference on International Organization, San Francisco, 1945' (UN Information Organization 1945) Vol III, documents 1 and 2; Vol VIII, document 1151; and, Vol IX, documents 203, 416, 507, 536, 571, 792, 795 and 848. See also: D Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship between Form and Authority' (2002) 96 AJIL 857, 867-72.

<sup>172</sup> A Prouty, 'The Effect of War in Law what happens to their treaties when states go to war?' (2013) 2(2) CJICL 227, 233.

the type of treaty involved.<sup>173</sup> Accordingly, the following analysis focuses on FCN treaties, which are considered to be the predecessors of modern investment instruments, making it plausible that the legal position on the effect of armed conflicts on investment instruments would not be disconnected from the legal position on FCNs.<sup>174</sup>

It is also notable that war may have various effects on the operation of FCN and investment treaties. Potentially, the outbreak of hostilities may lead to the abrogation of treaties by way of withdrawal from, or termination or suspension of the treaty. In this respect, the study is concerned with the question of automatic termination of investment treaties. This examination is also relevant, *mutatis mutandis*, to the question whether hostilities lead to the automatic suspension of investment treaties.<sup>175</sup>

Further, the concept of 'armed conflicts' itself raises a set of difficulties.<sup>176</sup> Traditionally, States used to declare 'war'. This proclamation assisted in ascertaining the official outbreak of hostilities as well as the exact time when war commenced.<sup>177</sup> For sake of clarity, such declarations were often accompanied by statements as to the fate of the treaties between the belligerents, or treaties with third States.<sup>178</sup> However, under modern warfare, not only do States no longer declare war as a matter of

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<sup>173</sup> McNair (n 159) 703, noting that there is a 'need of discriminating between different categories of treaties for the purpose of ascertaining the effect of the outbreak of war upon them'.

<sup>174</sup> On FCN treaties, see the discussion in chapter 1. On the effect of FCN standards on modern investment provisions, see the discussion in chapters 5 and 6.

<sup>175</sup> As addressed below, the 2011 ILC Articles, as most modern jurisprudence, do not prescribe a separate law for the assessment of suspension or termination of treaties as a result of hostilities.

<sup>176</sup> Villiger (n 168) 901-02.

<sup>177</sup> Eg: when the Turks declared a 'holy war' on multiple countries, they also addressed the fate of pre-war treaties ('Proclamation of the "Holy War", the Fetva, 15 November 1914', reported in English: US Naval War College, *International law documents: neutrality, breaking of diplomatic relations, war, with notes 1917* (Washington: Government Printing Office, 1918), 220-21 ('Turkey, having declared a holy war on Serbia and its allies, treaties, conventions, and agreements concluded between Turkey and Serbia cease to have effect, thus the treaty of March 1, 1914, terminates from the 1st of December').

<sup>178</sup> See: ILC, 'The effect of armed conflict on treaties: an examination of practice and doctrine: Memorandum by the Secretariat ILC', UN Doc A/CN.4/550, paras 3-5 ('ILC Study').

practice, but they are principally prohibited from doing so, for a declaration of war is a potential breach of the *jus cogens* prohibition on the use of force.<sup>179</sup> In fact, modern warfare is not concerned with 'wars' but with 'armed conflicts' of varying scopes, intensity, and kind. Armed conflicts, in particular the more pervasive kind of NIACs, are rarely accompanied by official proclamations, making it difficult to ascertain when the conflict commenced or ended.<sup>180</sup>

As it is not always clear when an armed conflict began (or ended), it is also difficult to distinguish non-performance of a treaty obligation 'from an actual legal effect' of armed conflicts on the treaty itself.<sup>181</sup> In practical terms this means that State practice on the effect of hostilities on treaties is manifested (and assessed) differently before and after the reforms of the mid-20<sup>th</sup> century (the adoption of the UN Charter (1945) and the Geneva Conventions (1949)).

Subsidiary means for the determination of rules of law are of limited assistance in ascertaining the law. The application and interpretation of treaties in wartime was mostly addressed by national courts in hindsight, sometimes after the passage of decades and even centuries. As a result, judicial determinations on the effect of a certain war on a specific treaty were often informed by the consequences of the war and the notion of prevailing

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<sup>179</sup> Articles 2(4) and 51, UN Charter, 1 UNTS XVI, 1945. For further discussion of the effect of the UN Charter on the issue see: ILC Study (ibid) para 8 nn 39 and Pronto (n 172) 230, 239. For the widespread opinion that Article 2(4) of the UN Charter constitutes a *jus cogens* norm, see among many: J Crawford, *The Creation of States in International Law* (2<sup>nd</sup> edn., OUP 2006) 146 and Y Dinstein, *War, Aggression And Self-Defence* 99-104 (4<sup>th</sup> edn, CUP 2005).

<sup>180</sup> See: *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995) para 70. For the acceptance and development of this position in IHL, see the discussion in: C Greenwood, 'International Humanitarian Law and the Tadic Case' (1996) 7 EJIL, 265-83; S Vite', 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations' (2009) 91 IRRC, 69-94; D Kritsiotis, 'The Tremors of Tadić' (2010) 43 Israel Law Review 262-300.

<sup>181</sup> ILC Study (n 178) para 4; S McIntyre, *Legal Effects of World War II on Treaties of the United States* (Springer 1958) 10 and Y Ronen 'Treaties and Armed Conflicts' Tams et al (eds) *Research Handbook on The Law of Treaties* (Edward Elgar Publishing 2014) 543-44.



peace.<sup>182</sup> When courts addressed the question of war's effect on treaties in a timely fashion, they did so within the four-corners of the treaty subject-matter of litigation, not in an attempt to develop or distil international law. As regards investment tribunals that were constituted to hear treaty claims that arise out of, or in connection to, hostilities, they have completely ignored the question.<sup>183</sup>

Scholarship also leaves a lot to be desired. In fact, Sir Cecil Hurst remarked already in 1921 that, 'there are few questions upon which people concerned with the practical application of the rules on international law find text-books less helpful than that of the effect of war upon treaties...'<sup>184</sup> Indeed. While multiple books<sup>185</sup> and many doctrinal articles<sup>186</sup> have been written on the topic during the first half of the 20<sup>th</sup> century, fewer academic pieces were dedicated to the issue during the second half of the century.<sup>187</sup> The scope of the discussion on the effect of war on treaties in *Oppenheim's International law* over the years is illustrative of the doctrinal contribution to the determination of the law. While the first two editions of *War and*

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<sup>182</sup> Eg: Italian courts did not rule on the effect of the WWII on extradition treaties until 1970 (*In re Barnaton Levy and Suster Brucker*, Court of Appeal, Milan (30 October 1970), cited in ILC Study (n 178) 7. The UK declared, in a 200 years delay, that the 1790 Nootka Sound Convention had been terminated in 1795 due to the war between Spain and GB. (reported in: M Akehurst 'United Kingdom Materials on International Law 1983' (1983) 54(1) British Ybk Intl L 370).

<sup>183</sup> Eg: *AAPL v Sri Lanka*, ICSID Case No ARB/87/3, Award, 27 June 1990, para 59. The Tribunal ascertained that, 'there is no doubt that the destruction of the [investment] took place during the hostilities' but paid no attention to the effect the civil war may have had on the operation of the BIT. This award is analyzed in detail in chapters 5 and 7.

<sup>184</sup> C Hurst, 'The Effect of War on Treaties' (1921) 2 British Ybk Intl L 37, 38.

<sup>185</sup> Eg: R Jacomet, *La guerre et les traités: étude de droit international et d'histoire diplomatique* (1909); H Tobin, *The Termination of Multipartite Treaties* (Columbia University Press 1933) and ILC Study (n 178) para 8.

<sup>186</sup> Eg: J Moore, 'The Effect of War on Public Debts and on Treaties – The Case of the Spanish Indemnity' (1901) 2(1) Columbia Law Review 209-223; Hurst (n 184); A McNair, 'Les effets de la guerre sur les traités' (1937) 59 Recueil des cours de l'Académie de Droit International 527; A de La Pradelle, 'The Effect of War on Private Law Treaties' (1948) 2(4) International Law Quarterly 555-76; R Rank, 'Modern War and the Validity of Treaties: A Comparative Study (Part I)' (1953) 38(3) Cornell Law Quarterly 321-55; R Rank, 'Modern War and the Validity of Treaties (Part II)' (1953) 38(4) Cornell Law Quarterly 511-40.

<sup>187</sup> C Chinkin, 'Crisis and the Performance of International Agreements: The Outbreak of War in Perspective' (1980-81) 7 Yale Journal of World Public Order 177. For the sake of completeness, as mentioned, several studies were conducted during this period, including the mentioned studies of the ILC and IDI.

*Neutrality*<sup>188</sup> briefly addressed the point of ‘cancellation of treaties by war’ in the framework of the section on the ‘Effects of the Outbreak of War’,<sup>189</sup> later versions added little to the discussion, mostly referring to earlier editions.<sup>190</sup>

Scholarly contributions from the 21<sup>st</sup> century are scant and inconsistent. While IHL specialists mostly represented the view that armed conflicts plainly abrogate trade and investment treaties,<sup>191</sup> commentators from the field of international economic law maintain that these instruments are not automatically terminated by war,<sup>192</sup> and ‘generalists’ focused on the 2011 ILC Articles, as such, but not on the law that these 2011 Articles purport to represent.<sup>193</sup>

Against the backdrop of the foregoing observations, section 3 proceeds to distil a cohesive legal position on the effect of hostilities on the operation of FCN treaties.

### **3. A Progressive Development of Treaty Law: From Abrogation to Continuity**

This section argues that a progressive development of international law occurred during the 19<sup>th</sup> and 20<sup>th</sup> centuries, whereby the legal position on the effect of war on FCN treaties moved away from a presumption of discontinuity, but for a few instances, to a presumption of continuity, with

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<sup>188</sup> L Oppenheim, *International law: A Treatise*, Vol II War and Neutrality (London: Longmans 1906), 106-8, at section 99; L Oppenheim, *International law: A Treatise*, Vol II War and Neutrality (London: Longmans 1912), 128-30, at section 99.

<sup>189</sup> *ibid.*

<sup>190</sup> Eg: Sir R Roxburgh (ed) *Oppenheim's International law: A Treatise*, Vol II: War and Neutrality (3<sup>rd</sup> edn, London: Longmans, 1921), 145-47, section 99 (repeating the content of the previous editions). The seventh edition elaborated more on the issue (H Lauterpacht, *Oppenheim's International law: A Treatise*, Vol 2 (7th edn, London: Longmans 1952) 302-6). But subsequent editions mostly added nothing (Sirs R Jennings and A Watts (eds), *Oppenheim's International law: A Treatise*, Vol 1 (9th edn, Harlow: Longman 1992) 1310).

<sup>191</sup> L Green, ‘The Law of War in Historical Perspective’ (1998) 72 *International Law Studies* 39. However, see Milanović – Lost origins (n 60) 103 (treating the 2011 ILC Articles as a statement of the law).

<sup>192</sup> Eg: C Schreuer, ‘The protection of investments in armed conflicts’ in (n 58) 3.

<sup>193</sup> Ronen – Treaties and Armed Conflicts (n 181) 543-44; F Paddeu, ‘Self-Defence as a Circumstance Precluding Wrongfulness: Understanding Article 21 of The Articles on State Responsibility’ (2015) *British Ybk Intl L*, 23.

some exceptions. To that end, the analysis offers a chronological review of contemporaneous jurisprudence, doctrine, and State practice.

As of the 19<sup>th</sup> century, the traditional view amongst jurists and diplomats was that, but for few narrow exceptions, treaties did not survive war. The British-American dispute over fishing rights in the Grand Bank under the 1783 Paris Treaty,<sup>194</sup> where Great Britain (GB) also recognized the independence of the US, is illustrative of the prevailing and opposing positions. On behalf of the US, John Quincy Adams, then US Ambassador to the Court of St James's, submitted that the American fishing rights under the Paris Treaty could not be terminated by the outbreak of war between the parties, since war cannot abrogate treaties recognizing the establishment and independence of a State.<sup>195</sup> By contrast, Lord Bathurst, the Secretary of State for War and the Colonies, replied that, 'to the position of this novel nature GB cannot accede'.<sup>196</sup> He argued that, Britain 'knows no exception to the rule that, all treaties are put an end to by the subsequent war between the same parties.'<sup>197</sup>

Notwithstanding Bathurst's stance, the British and American positions were not unreconcilable. In 1817, for instance, the British High Court of Admiralty in *The Louis* case asserted that, 'treaties...it must be remembered, are perishable things and their obligations are dissipated by the first hostility'.<sup>198</sup> However, Lord Stowell also remarked that, 'at the same time it may be hoped that so long as the treaties do exist, and their obligations are sincerely and reciprocally respected, the exercise of a right' under a treaty would be respected.<sup>199</sup>

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<sup>194</sup> Article 3, The Paris Peace Treaty of 30 September 1783.

<sup>195</sup> US Congress (ed) *American State Papers: Documents, Legislation, and Executive* Vol IV (US Congress, Washington, 1832) 352, letter from Adams to Bathurst dated 25 September 1815.

<sup>196</sup> *ibid*, 354, letter from Lord Bathurst to Adams dated 30 October 1815.

<sup>197</sup> For sake of completeness, this dispute was resolved with the conclusion of a convention in 1818, which restated the fishing rights under dispute, but 'neither side yielded its convictions [regarding the fate of treaties] to the reasoning of the other' (see: *ibid*, 362-405; McIntyre (n 181) 44).

<sup>198</sup> *Le Louis* (1817) 2 Dods 210, 258.

<sup>199</sup> *ibid*

The American judiciary was willing to go further than the British Court. For instance, in 1823 in the matter of *Society for Propagation of the Gospel v Town of New Haven*<sup>200</sup> The Supreme Court of the US (SCOTUS) was asked to determine whether title that had been acquired over property under Article 9 of the 1794 Jay Treaty was extinguished by the 1812 Anglo-American War. SCOTUS held that it is 'not inclined to admit the doctrine... that treaties become extinguished, *ipso facto*, by war between the two governments.'<sup>201</sup> On the contrary, the Court considered itself 'satisfied, that [this] doctrine is not universally true.'<sup>202</sup> On this point, the Court reasoned that a distinction should be drawn between 'treaties of such a nature, as to their object and import, that war will put an end to them',<sup>203</sup> and 'treaties... professing to aim at perpetuity, and to deal with the case of war as well as of peace'.<sup>204</sup>

This position gained traction across the Atlantic.<sup>205</sup> In 1830, 13 years after *The Louis* and 7 years after SCOTUS's decision in *Society for Propagation of the Gospel v Town of New Haven*, Sir John Leach delivered the opinion of the Court in *Sutton v Sutton*,<sup>206</sup> concerning the effect of war on the 1794 Jay Treaty. The Master of Rolls found that, 'it is a reasonable construction that it was the intention of the Treaty that the operation of the Treaty should be permanent, and not depend upon the continuation of a state of peace...' Therefore, 'British Subjects, who now hold lands in the

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<sup>200</sup> *Society for Propagation of the Gospel v Town of New Haven*, 21 U.S 464 (1823).

<sup>201</sup> *ibid*, 29.

<sup>202</sup> *ibid*

<sup>203</sup> *ibid*

<sup>204</sup> *ibid*, 30.

<sup>205</sup> For instance, in 1854, during the Crimean War, the British Government addressed the effect of the war on the applicability a pre-war loan treaty with Russia and maintained that it remained operative and binding (Cited in McNair (n 159) 697). See also the British position with respect to the effect of the outbreak of the Austro-Prussian war (V Bruns, *Fontes Juris Gentium, Digest of the diplomatic Correspondence of the European States, 1856-1871*, Ser B Vol 1 (Berlin Carl Heymanns Verlag for Institut für ausländisches öffentliches Recht und Völkerrecht 1932) 795). See further Article 35: Research in International Law Under the Auspices of the Faculty of the Harvard Law School, 'Law of Treaties' (1935) 29 AJIL, Supp 973, 1183, 1185 and McNair (n 159) 700, document dated 11 February 1864.

<sup>206</sup> Cited in: J Dunlap (ed) *Reports of Cases Decided in the High Court of Chancery*, Vol V (NY: Gould, Banks & Company 1844) 665-76.

Territories of the [US] and American Citizens who now hold lands in the Dominions of His Majesty' under the provisions of the 1794 Jay Treaty, 'shall continue to hold them'.<sup>207</sup>

Scholarship followed suit. In his 1840 treatise Kent ascertained that, 'as a general rule the obligations of treaties are dissipated by hostility, and they are extinguished and gone forever unless revived by a subsequent treaty'.<sup>208</sup> Nevertheless, he observed that as for treaties that 'contemplate a permanent arrangement of national rights, or which by their terms are meant to provide for an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war'.<sup>209</sup> Notably, the US – Mexico Claims Commission cited Kent when it held that the 1831 US – Mexico FCN was not abrogated by war and therefore 'the expulsion of [US] citizens from their places of residence and business in Mexico, during the existence of the late war... was in violation of their rights secured by treaty'.<sup>210</sup>

The debate between the US and Spain over the 1795 FCN is illustrative of the prevailing views at the close of the 19<sup>th</sup> century. On 8 May 1898, Spain sent an official decree to the US Secretary of State,<sup>211</sup> where it asserted that, 'war existing between Spain and the US terminates all agreements, compacts, and conventions that have been in force up to the present between the two countries',<sup>212</sup> including the 1795 FCN. Spain was willing, subject to a special agreement, to leave operative only one provision from the FCN, Article 13, which mandated that in case of a war foreign

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<sup>207</sup> *ibid.* See further discussion of the *Suttan* case in: J Abdy (ed) *Kent's commentary on international law* (Cambridge 1966) 421; McNair (n 159) 711-12; and, McIntyre (n 181) 47-8. For similar positions expressed in Italian and French domestic courts, see: de La Pradelle (n 186), 560-61.

<sup>208</sup> J Kent, *Commentaries on American law* (NY: Printed by the author, 1840) 177.

<sup>209</sup> *ibid.* See also: McIntyre (n 181) 51.

<sup>210</sup> Cited in J Moore, *History and digest of the international arbitrations to which the United States has been a party*, Vol IV (Washington: Government Printing Office, 1898) 3334-46. See also: McIntyre (n 181) 51 and ILC Study (n 178) fn 58.

<sup>211</sup> Annexed in: S Tucker *Almanac of American Military History*, Vol 1 (ABC-CLIO 2013) 1242.

<sup>212</sup> *ibid.* See: Moore (n 210) 209-223.

merchants shall be granted a year to leave the countries freely, they would be protected from injury, and their property would be protected from takings.<sup>213</sup> The US rejected the Spanish position completely, arguing that war does not affect FCN treaties. As regards Article 13 the US emphasized that, it 'does not consider treaty provisions expressly applicable to war between contracting parties as abrogated by war, and therefore cannot propose or make new agreement embodying the conditions of article 13.'<sup>214</sup>

Whereas the 19<sup>th</sup> century witnessed the formation of several exceptions to the rule that treaties do not survive war, the 20<sup>th</sup> century developed these exceptions until the presumption changed from discontinuity to continuity of treaties. Notable in this regard and illustrative of the legal position *antebellum* is the British – American fisheries dispute. In 1910, the Permanent Court of Arbitration in The Hague (PCA) adjudicated the dispute over the interpretation and application of fisheries rights under the 1818 FCN<sup>215</sup> and the effect of war on its operation.<sup>216</sup> The Tribunal asserted that, 'international law in its modern development recognizes that a great number of treaty obligations are not annulled by war, but at most suspended.'<sup>217</sup>

McIntyre identified the Tribunal's position as a catalyst for progressive development. He argued that, 'the international lawyers sitting on the tribunal and their brethren elsewhere' were becoming increasingly concerned with the desirability of recognizing that some treaties survive war between the parties.<sup>218</sup> Indeed, two years later, the IDI published the 1912 draft articles on the effect of war on treaties, and maintained that war 'does

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<sup>213</sup> Article 13, US – Spain FCN treaty (or: Treaty of San Lorenzo) (27 October 1795). The provision also guaranteed 'full satisfaction' in case foreign merchants or their property are injured by war.

<sup>214</sup> Cited in McIntyre (n 181) 52 (emphasis added).

<sup>215</sup> GB – US FCN treaty (30 October 1818).

<sup>216</sup> Compromis concluded on 27 January 1909, reported and cited in J Scott, *The Hague Court Reports* (OUP 1916) 141-46.

<sup>217</sup> *The North Atlantic Coast Fisheries Case, Great Britain v United States*, Award, XI RIAA 167 (1910) reported in *ibid*, 146, 159.

<sup>218</sup> McIntyre (n 181) 53-4.

not affect the existence of treaties, conventions and agreements, whatever their title or object, between the belligerent States'.<sup>219</sup> In 1913, Westlake, as a representative of British scholarship, adopted this line of jurisprudence and recognized 'several exceptions' to the 'general rule that war abrogates the treaties existing between the belligerents'.<sup>220</sup> Such exceptions include treaties 'which are intended to establish a permanent condition of things' and treaties that include 'stipulations which confer rights intended for use daily in daily life having nothing no conceivable connection with causes of war of peace', such as private proprietary rights of aliens under FCN treaties.<sup>221</sup>

As regards WWI, the contemporaneous view seems to be that the War did not abrogate FCN treaties. In 1917, for instance, Wilson, the President of the US (POTUS) and his Secretary of State analyzed the effect of WWI on the applicability of the 1799 US – Prussia FCN. Secretary of State Lansing argued that the FCN is not abrogated by war but rather 'is in force until terminated in accordance with the terminating article of the treaty...'.<sup>222</sup> President Wilson agreed: 'It is clear to me, as it is to you, that we cannot arbitrarily ignore this treaty. It was made for war, not for peace, – for just such relations between ourselves and Germany as have now arisen'.<sup>223</sup> Yet, Wilson introduced an exception to this continuity in the form of the State's security interests. He argued that, 'the treaty cannot have been intended to extend privileges to those who might from any reasonable point of view be thought to be plotting or intending mischief against us'.<sup>224</sup>

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<sup>219</sup> Institut De Droit International, 'Effets de la guerre sur les Conventions internationales et sur les contrats privés' 25 *Annuaire de l'Institut de Droit International* (1912) 612.

<sup>220</sup> J Westlake, *International Law*, Pt II: War (2<sup>nd</sup> edn, CUP 1913) 29-30.

<sup>221</sup> *ibid.*

<sup>222</sup> US Department of State, *Paper Relating to the Foreign Relations of the United State*, Supp 2: The World War (1918) 169. See McIntyre's discussion on these correspondences (n 197) 56-8.

<sup>223</sup> *ibid.*, 170, letter dated 8 May 1917.

<sup>224</sup> *ibid.* A similar position arises from a 1918 correspondence between the Secretary of State to the Alien Custodian and Lansing, with respect to provisions in the Prussian FCN, 'which permit subjects of those states to take or hold real property' in the US (State Papers (n 195), 55-9 (letter dated 10 September 1918)). For further analysis of this correspondence

Further, in *Schultz v Raimes* (1917),<sup>225</sup> while the US was still at war, the New York District Court was required to address the status of the Prussian FCN and the rights that emanate therefrom.<sup>226</sup> The Court held that as long as the Prussian FCN was not ‘denounced as inoperative, it would seem to confer upon alien enemies of German nationality, notwithstanding the existence of a state of war’.<sup>227</sup> Similarly, in 1917, the Court of Chancery of New Jersey refused to stay a suit brought by a German national resident in the US, for the preservation of rights as a stockholder in a New Jersey corporation. The German national argued for the protection of treaty rights under US – Prussian FCNs, while the Defendant maintained that the FCN was abrogated by WWI. Chancellor Lane recognized the continued operation of the FCN treaty.<sup>228</sup>

The *interbellum* period followed a similar line. In the 1920 case of *Techt v Hughes*,<sup>229</sup> the NY Court of Appeal was required to decide whether heritage rights under the 1848 US – Austria FCN remained in force notwithstanding hostilities between the States. Justice Cardozo noted that, ‘the effect of war upon the existing treaties of belligerents is one of the unsettled problems of the law’, and while ‘the older writers sometimes said that treaties ended *ipso facto* when war came, [t]he writers of our own time reject these sweeping statements.’<sup>230</sup> Accordingly, he asserted that the case turns on whether the provision at bar is inconsistent with US national security interests. On this point he held that there is ‘nothing incompatible

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and its meaning see McIntyre (n 181) 56-7 and J Scott, *The Treaties of 1785, 1799, and 1828 between the United States and Prussia* (OUP 1918) Preface.

<sup>225</sup> *Fritz Schulz v Raimes & Co* 99 Misc 626, 164 NY Supp. 454 (City Ct NY, 1917).

<sup>226</sup> *ibid.*

<sup>227</sup> *ibid.* See further: J Garner, ‘Treatment of Enemy Aliens’ (1919) 12(3) AJIL 22, 45-6 and Case Note: ‘The Effect of War upon Treaties and Private Rights under Treaties (1928-29) 38 Yale Law Journal, 514-20 and

<sup>228</sup> *Posset v D’Espard*, 100 Atl. 893 (1917). See also the discussion of the case in A Hunsaker, *The Effect of War upon Treaties* (University of Illinois, 1919) 48.

<sup>229</sup> *Techt v Hughes* 229 N.Y. 222 (N.Y. 1920).

<sup>230</sup> *ibid.*, 244.



with the policy of the government, with the safety of the nation, or with the maintenance of the war in the enforcement of this treaty'.<sup>231</sup>

In 1929, in *Karnuth v US*,<sup>232</sup> SCOTUS held that Article 3 of the 1794 Jay Treaty, which allows reciprocal passage over the US – Canada border, was abrogated by the 1812 War. Although under a cursory reading this decision represents a break with the Court's jurisprudence, a closer look reveals that the decision is on the continuum of the progressive development of the law. The Court observed that, it was 'sometimes asserted, especially by the older writers, that war *ipso facto* annuls treaties of every kind between the warring nations, [however this view] is repudiated by the great weight of modern authority.'<sup>233</sup>

Analyzing such 'modern authority', SCOTUS distinguished three potential levels at which treaties upholding private rights affect national policy during war. Reciprocal inheritance treaties affect national policy the least, and thus remain operative during armed conflict; extradition treaties somewhat engage national security and are often construed as suspended during war; and, treaties that guarantee the private right to cross an international border during war have the largest effect on national security, and are thus abrogated.<sup>234</sup> If so, it were the particular circumstance of the case, and not a sweeping legal position, that predicated the Court's decision that Article 3 of Jay's Treaty was abrogated by the outbreak of hostilities.

Judicial jurisprudence concerning the effect of WWII on FCN treaties represents similar thinking. In 1947, in *Clark v Allen*,<sup>235</sup> SCOTUS dealt with the fate of inheritance provisions under the 1923 US – German FCN treaty. There, the Court did not adopt the default rule that war abrogates treaties.

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<sup>231</sup> *ibid.*

<sup>232</sup> *Karnuth v United States* 279 U.S. 231 (1929).

<sup>233</sup> *ibid.*, 237; applied in: *Goos v Brocks*, 2117 Neb. 750, 225 N.W. 15 (1929); reaffirmed: *Clark v Allen*, 331 US 503 (1947). For a detailed analysis of this case and subsequent case law affirming them, see: McIntyre (n 181) 58-76.

<sup>234</sup> *ibid.* The Exchequer Court of Canada reached the same result on similar facts (*Francis v The Queen* 1955 ILR 591, 603 (1955) (dismissed on appeal by the Canadian Supreme Court on other grounds).

<sup>235</sup> *Clark v Allen*. Applied *inter alia*: *Brownell v San Francisco*, 271 F.2d 974 (Cal. 1954).

Rather, following the methodology of *Karnuth v US*, the Court focused on the question whether the treaty provisions are compatible with national policy in time of war and held that the Treaty was not abrogated by WWII.<sup>236</sup> Notably, while German, Dutch, and French courts advanced different views with respect to the effect of WWII on some of their FCN treaties,<sup>237</sup> a nuanced analysis of judicial jurisprudence demonstrates that, on balance, there is a shared agreement between States that commercial aspects of FCN treaties were not abrogated (terminated or suspended) by WWII.<sup>238</sup>

State practice during the second half of the 20<sup>th</sup> century, as inferred from positions before international tribunals, supports the view that FCN treaties are not automatically abrogated by armed conflicts. For instance, because Iran's application to the ICJ in the *Oil Platforms* case relied on the compromissory clause in the US – Iran FCN, Iran argued that the Treaty was still in force notwithstanding the outbreak of hostilities in 1979.<sup>239</sup> The same may be inferred from *Nicaragua v US*, where the ICJ considered that the US – Nicaragua FCN remained in force notwithstanding the hostilities.<sup>240</sup> Arguably, the fact that the US later refused to participate in the

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<sup>236</sup> *ibid*, 514. However, *ibid* at 510, the Court did consider certain parts of the right to be abrogated by war given their incompatibility. For a different determination of a lower instance see *Ex Parte Arakawa* 79 F. Supp. 468 (E.D. Pa. 1947), where the Court held with respect to the US – Japan FCN that even if it was not lawfully terminated before the attack on Pearl Harbor, the treaty 'was totally abrogated, or at least suspended, when Japan struck at Pearl Harbor. For a thorough analysis of the implementation of *Clark v Allen*, see: McIntyre (n 181) 248-70

<sup>237</sup> For German courts see: R Sonnenfeld, 'Succession and Continuation, A Study on Treaty Practice in Post-War Germany' (1976) 7 NYBI 91, 111 (1976). For Dutch jurisprudence see: *Nederlandsche Spoorwegen v Stichting Nederlandsche Groenten* (28 January 1948) reported in Lauterpacht (n 40) 439. For the French Court of Cassation, see *Lovera v Rinald*, Cass., 22 June 1949, S. 1949.1.161.

<sup>238</sup> ILC Study (n 178) 47-50.

<sup>239</sup> *Oil Platforms (Iran v United States)*, written pleadings, Memorial of the Government Submitted by the Islamic Government of Iran, pp 55-57, paras 2.03-2.07 (8 June 1993). Iran also cited the US State Department, which argued in 1983 in Congress that, because 'it has not been terminated in accordance with its terms... the Treaty of Amity remains in force between the United States and Iran'. Indeed, the ICJ based its jurisdiction on the FCN (*Oil Platforms*, para 125).

<sup>240</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v US)*, (Jurisdiction and Admissibility) ICJ Rep 1984, para 113(1)(b) (14 votes to 2 finding jurisdiction under the FCN treaty).

case and denounced the FCN *under its terms* is indicative, in itself, of the fact that the US construed the FCN to be unaffected by the hostilities.

The foregoing review of authorities demonstrates that by the mid-20<sup>th</sup> century, the law on the effect of armed conflict on treaties moved away from the traditional view that war abrogates all treaties. For the sake of completeness, it is important that a thorough review of FCN-litigation reveals not only that FCN treaties were not automatically terminated by wars but that they were not automatically suspended, nor regarded as suspended, by war either.<sup>241</sup>

It also arises from the review of authorities that two schools seem to have emerged in the 20<sup>th</sup> century on the effect of hostilities on treaties. Under the first, the effect of armed conflict on treaties is determined by the question 'whether the signatories of the treaty intend that it should remain binding on the outbreak of war?'<sup>242</sup> This intention is inferred either from the explicit provisions of the treaty or implicitly from the object and purpose of the instrument. This view was advanced by eminent scholars, such as Sir Cecil Hurts, Lord McNair, and Borchard.<sup>243</sup>

However, because it is often difficult, if not 'wholly fantastic', as McDougal put it,<sup>244</sup> to identify the intention of the parties to the treaty, a second school of thought was born. Under this approach, which grew from American practice and jurisprudence, the fate of the treaty is mostly a function of its compatibility with 'the conduct of war' and the national security policy of the State. Notable in this respect is a correspondence between the

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<sup>241</sup> ILC Study (n 178) 43-44.

<sup>242</sup> Hurst (n 184) 40; I Shearer (ed), *Starke's International Law* (11<sup>th</sup> edn., Butterworths 1994) 409.

<sup>243</sup> *ibid*; A McNair, 'La terminaison et la dissolution des traités' (1928) 22 Hague recueil, 459, 511; E Borchard, 'The Effects of War on the Treaty of 1828 with Prussia' (1932) 26 AJIL 528, 585; J Lenoir, 'The Effect of War on Bilateral Treaties, with Special Reference to Reciprocal Inheritance Treaty Provisions' (1946) 34 Georgetown Law Journal 129, 173; C Hyde, *International Law Chiefly as Interpreted and Applied by the United States* Vol 2 (2<sup>nd</sup> edn., Little Brown and Company 1945) 1547.

<sup>244</sup> M McDougal, 'International law, power, and policy: A contemporary conception' (1953) 82 Hague recueil 133. 152-53.

US State Department and the Department of Justice, where both agreed that:

With respect to the effect of war on the operation of treaty provisions generally... The determinative factor is whether or not there is such incompatibility between the treaty provisions in question and the maintenance of a state of war as to make it clear that a given provision should not be enforced.<sup>245</sup>

However, this second, compatibility approach is not without flaws, since it potentially reserves the State's right to terminate unilaterally, and even arbitrarily, a treaty for the way its provisions are perceived by its courts and governmental bodies. Eventually, the fallacies of both approaches yielded a more modern way of thinking. Starting from the 1960s, it is possible to identify in international scholarship a new, combined approach that attempted to ascertain the intention of the parties with respect to the fate of the treaty in war while at the same time accounting for the tendency of certain categories of treaties to infringe upon the State's national security discretion.<sup>246</sup> Against this historical backdrop, the next section assesses the legal position that is expressed in the 2011 ILC Articles.

#### **4. The 2011 ILC Articles on the Effect of Armed Conflicts on Treaties**

In 2010, 10 years after including the 'Effects of Armed Conflicts on Treaties' as a topic in its long-term work program,<sup>247</sup> the ILC prepared a first draft of articles.<sup>248</sup> In 2011, a set of 18 articles was adopted (second reading) and presented to the UNGA together with commentaries and

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<sup>245</sup> Letter from the Department of State to the Department of Justice, dated 18 March 1949, cited in M Whiteman, *Digest of International Law* Vol 14 (US Government Printing 1970) 504. See also at 508 (citing a letter of the Chief of Protocol of the State Department to the Tax Commissioner of Ohio, dated 29 March 1949, where an identical language was used).

<sup>246</sup> Eg: J Starke, *An Introduction to International Law* (5<sup>th</sup> edn, London: Butterworths, 1963) 408-10; H Verzijl (ed) *International Law in Historical Perspective* (Springer 1973) 371, 387; Shearer – *Starke's International Law* (n 242) 492-94.

<sup>247</sup> ILC, Report of the International Law Commission on the work of its 52<sup>nd</sup> Session, UN Doc A/55/10, paras 726-29.

<sup>248</sup> ILC, 'Draft Articles on the Effects of Armed Conflict on Treaties', UN Doc A/65/10 ('2010 Draft').

recommendations.<sup>249</sup> The 2011 ILC Articles are the result of extensive study of case law, scholarly jurisprudence, State practice, and previous attempts to codify this area of international law,<sup>250</sup> which led the ILC to adopt 'the general principle of legal stability and continuity'.<sup>251</sup>

Under Article 3, 'the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties as between States parties to the conflict, and as between a State party to the conflict and a State that is not'.<sup>252</sup> This language informs that under the modern legal position, war does not lead to the automatic termination or suspension of treaties alike. What also follows from this language is that the Articles cover not only situations of two belligerents that are simultaneously parties to (say) a treaty, as the proposition advanced by the 1985 IDI draft articles,<sup>253</sup> but also the broader effect hostilities may have on the operation of treaties.

Thus, the Articles are relevant to a situation where, say, Russia and Ukraine are parties to a treaty and they are also involved in hostilities,<sup>254</sup> and as relevant to a situation when only one of the contracting parties to a treaty (say, Israel) is undergoing hostilities in its territory, while the other contracting party, say, Japan is not involved in the hostilities between Israel and the Hamas.<sup>255</sup>

It follows from the previous section that Article 3 reflects a well-established position in international law. It also enjoys wide endorsement by States today. In 2010, for instance, China considered Article 3 to be 'conducive to maintaining the stability of international relations'.<sup>256</sup> Colombia thought it to be 'consistent with the general principles of international law'

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<sup>249</sup> UNGA Res 66/99 (9 December 2011).

<sup>250</sup> Namely, the 1912 IDI study (n 219), the 1935 Harvard Research on the Law of Treaties (Harvard Research (n 205), 1183-1204), and the 1985 IDI draft (n 162). For additional studies considered by the ILC, see ILC Study (n 178) para 7.

<sup>251</sup> ILC Report at the UNGA 52<sup>nd</sup> Session (n 247) para 214.

<sup>252</sup> Article 3, 2011 ILC Articles.

<sup>253</sup> (n 162)

<sup>254</sup> Eg: Russia – Ukraine BIT.

<sup>255</sup> Israel – Japan BIT.

<sup>256</sup> ILC, 'Effects of armed conflicts on treaties Comments and information received from Governments', UN Doc A/CN.4/622 (15 March 2010), 10 ('State Comments 2010').

and the VCLT,<sup>257</sup> and Poland ‘applauded’ this assertion.<sup>258</sup> States also supported the provision during the 2014 and 2017 discussions before the Sixth Committee.<sup>259</sup> The African Group, for one, stated that ‘the basic principle that armed conflicts did not lead to the termination or suspension of treaties was already supported by customary international law’, and maintained that Article 3 ‘would be binding on States regardless of the status of the draft articles’.<sup>260</sup> El Salvador, on its part, explicitly referred to the language of Article 3 as a ‘codification’.<sup>261</sup>

Based on the *pacta sunt servanda* principle,<sup>262</sup> Article 4 of the ILC Articles adds that, where a treaty contains a provision on its operation in hostilities, this provision shall continue to apply.<sup>263</sup> It is noteworthy that in its previous drafting, Article 4 was concerned with treaties which contain an ‘express’ provision on their operation in times of armed conflicts.<sup>264</sup> Thus, a treaty prescribing reparations for ‘losses owing to war or other armed conflict’ (and like formulations) would be a treaty with an ‘express provision on its operation’ in hostilities.<sup>265</sup>

The requirement that the provision be of an ‘express’ nature was omitted from the 2011 Articles as ‘it was found that such a qualifier could be unnecessarily limiting, since there were treaties which, although not expressly providing therefor, continued in operation by implication’ due to the subject-matter and nature of the treaty.<sup>266</sup> Indeed, many rules may be designated to regulate conduct and situations which are as relevant in

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<sup>257</sup> *ibid.* Similarly Ghana and Portugal ‘welcomed’ and supported the provision.

<sup>258</sup> *ibid.*, 11.

<sup>259</sup> UNGA Sixth Committee, Summary Record of the 18<sup>th</sup> meeting, A/C.6/69/SR.18, item 84 (‘State comments 2014’) and State comments 2017 (n 169).

<sup>260</sup> State comments 2014 (*ibid.*) para 10; State comments 2017 (*ibid.*) para 5. See also the Greek and Russian principal endorsement (paras 18-9)

<sup>261</sup> State comments 2017 (*ibid.*) para 19. See also the Greek and Russian principal endorsement (para 18)

<sup>262</sup> 2010 State Comments (n 256) 18 and ILC, ‘First Report on the Effects of Armed Conflicts on Treaties’ UN Doc. A/CN.4/627 (22 March 2010), para 78 and nn 93.

<sup>263</sup> Article 4, 2011 Articles.

<sup>264</sup> Article 7, 2010 Draft (n 248).

<sup>265</sup> This provision is addressed in the next chapter 3.

<sup>266</sup> Commentary to Article 4, 2011 ILC Articles.

peace as in wartime, even without a clear stipulation that they are operative 'in times of armed conflict' (eg: protection of persons and property, detention, etc.).

Like Article 3, Article 4 is consistent with a long pedigree of case-law and jurisprudence. It also benefits from a rather broad consensus amongst States. In 2010, Poland even suggested deleting Article 4, since it considered that it 'states the obvious, and it is not needed in view of the general principle' that treaties are not *ipso facto* terminated by hostilities.<sup>267</sup> No State made any declaration, positive or negative, with respect to Article 4 before the Sixth Committee in 2014 and 2017.<sup>268</sup> Nonetheless, that the provision is endorsed may be inferred from the fact that while some provisions were specifically typified by States as 'progressive development', Article 4 was not.<sup>269</sup>

Article 5 represents the next stage of the inquiry if the treaty does not contain wording regulating continuity or if the application of Article 4 proves inconclusive.<sup>270</sup> The provision requires that, in the absence of a clear indication in the text of the treaty itself, 'the rules of international law on treaty interpretation [VCLT] shall be applied to establish whether a treaty is susceptible to termination, withdrawal, or suspension in the event of an armed conflict'.<sup>271</sup> It is important that Article 5 is not concerned with the intention of the *parties*, but rather with the treaty. In line with the interpretive approach of the VCLT and mindful of the aforementioned difficulty to find

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<sup>267</sup> State Comments 2010 (n 256) p 18.

<sup>268</sup> *ibid*, 3-8.

<sup>269</sup> Eg: Comments by the Nordic States and Singapore before the Sixth Committee (State comments 2017 (n 169) paras 6 and 17. See also Sudan's position on the definitive weight of the language of the treaty (*ibid*, para 12).

<sup>270</sup> Commentaries to Article 5, 2011 ILC Articles.

<sup>271</sup> Article 5, 2011 Articles. If the analysis under Article 4 and 5 proves inconclusive, Article 6 will apply. Article 6 highlights certain criteria, including criteria external to the treaty, which may assist in ascertaining the fate of treaty: the nature of the treaty and the characteristics of the armed conflict

the parties' intention,<sup>272</sup> the ILC deliberately rejected the inclusion of a reference to 'the intention of the parties to the treaty'.<sup>273</sup>

Next, the 2011 Articles stipulate a list of treaty categories which due to their nature and subject-matter continue to apply in hostilities (Article 7 and the Annex to Article 7).<sup>274</sup> This list, as the ILC stressed, 'offers approximations rather than hard and fast rules'. In other terms, 'treaties do not continue in operation simply because they fall into one of the listed categories'.<sup>275</sup> Notably, FCN treaties are enumerated in the Annex to Article 7.<sup>276</sup> This does not mean however that FCNs are necessarily unaffected by armed conflicts. It only indicates that as a matter of practice FCN treaties mostly remained operational in armed conflicts due to their subject-matter and provisions, and therefore they made their way to the indicative list in the Annex.<sup>277</sup> Such a proposition is fully consistent with the overwhelming majority of jurisprudence and literature on the issue.

In contradistinction to Articles 3 and 4, which enjoyed the endorsement of States, the list of treaty categories Annexed to Article 7 drew several objections. In 2010, the US posited that some FCN provisions may not 'carry the necessary implication of their continuance'<sup>278</sup> and Switzerland objected to the inclusion of FCN treaties in the Annex to Article 7 altogether. While the Swiss objection was rejected by the Special Rapporteur who asserted that the inclusion of FCNs in the Annex 'reflects practice',<sup>279</sup> reservations as to the inclusion of FCNs in the Annex were expressed by other States in 2014 and 2017. Russia agreed that, 'by and

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<sup>272</sup> The title of Article 5, 'application of rules on treaty interpretation', indicates that Article 5 is not concerned with treaty interpretation generally, but rather with specific situations where the existing rules on treaty interpretation are to be applied.

<sup>273</sup> This is due to objections from both States and ILC members (Commentaries to Article 5, 2011 Articles). See also State comments 2014 (n 259) para 11 (Finland); State comments 2017 (n 169) para 17 (Singapore).

<sup>274</sup> Article 7, 2011 ILC Articles.

<sup>275</sup> First Report on the Effects of Armed Conflicts on Treaties (n 262) paras 53-4.

<sup>276</sup> *ibid*, Annex to Article 7, lit e and ILC Study (n 178) 42-7.

<sup>277</sup> *ibid*, para 69.

<sup>278</sup> 2010 State Comments (n 256) p 17.

<sup>279</sup> First Report on the Effects of Armed Conflicts on Treaties (n 262) para 69.



large [Article 7] was based on a well-founded premise', but stated that 'the list of treaties [in the Annex] required further discussion.'<sup>280</sup> Singapore agreed that FCN provisions remain operational during hostilities but only insofar as these provisions deal with 'private rights',<sup>281</sup> and Malaysia maintained that, 'further discussion was needed' on the indicative list of treaties referred to in Article 7, 'which remained unclear, particularly... treaties of friendship, commerce and navigation.'<sup>282</sup> Only El Salvador seemed to explicitly support the inclusion of the indicative list of treaties in the Annex to Article 7.<sup>283</sup>

Importantly, the proposition that armed conflicts do not terminate (or suspend) FCN treaties does not prevent the parties to the treaty from terminating (or suspending) it, subject to necessary procedure.<sup>284</sup> On this point, Article 9 of the 2011 ILC, which mirrors VCLT Article 65, establishes a duty of notification of termination, withdrawal, or suspension from the treaty.<sup>285</sup> At the same time, Article 9 recognizes the inherent right of the other State to raise an objection, which would remain unresolved, until a solution is reached through means of pacific dispute settlement in accordance with the UN Charter.<sup>286</sup> Additionally, Article 18 enshrines the possibility of termination, suspension, or withdrawal of a treaty arising from the application of other rules of international law, namely under the VCLT Articles 55-62.<sup>287</sup> Article 18 is designated to 'dispel the possible implication' that the occurrence of an armed conflict gives rise to a *lex specialis* precluding the operation of other grounds for termination, withdrawal, or suspension.<sup>288</sup>

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<sup>280</sup> *ibid*, 4; State comments 2017 (n 169) para 18.

<sup>281</sup> State Comments 2014 (n 259) 6.

<sup>282</sup> State comments 2017 (n 169) para 40.

<sup>283</sup> *ibid*, para 19.

<sup>284</sup> Article 8, 2011 ILC Articles.

<sup>285</sup> Article 9, *ibid*.

<sup>286</sup> Article 9(3), *ibid*.

<sup>287</sup> Article 18, *ibid*; Articles 55-62, VCLT.

<sup>288</sup> Commentaries to Article 18. For State declarations, State comments 2014 (n 259) Cuba (para 21); State comments 2017 (n 169) Uruguay (para 35)

While the reception of the aforementioned 2011 Articles is on balance positive, it is not clear that States construe the Articles as binding rules of law that accurately reflect custom. For instance, Greece maintained that it follows the concepts expressed in Article 3, but it did not clarify if it felt legally obliged to conduct itself this way because this is a rule of customary law or because this is a desired progressive development of the law, which it is happy to endorse.<sup>289</sup> Finland asserted that some of the Articles deal with 'mainly untouched domain calling for the progressive development of the law rather than its codification'.<sup>290</sup> Singapore specifically identified Articles 2, 5, 6, 7 and the Annex as leaning 'more towards progressive development than codification'.<sup>291</sup> And, Russia asserted in 2014 and 2017 that, 'all in all, the draft articles under consideration could not be regarded as reproducing norms of international customary law... They could be useful as a guide for States and might enable future practice to develop'.<sup>292</sup>

Further, most States do not perceive the 2011 Articles as suitable for codification. For instance, the US spelled-out that it 'did not support the elaboration of a convention on the topic'.<sup>293</sup> The African Group expressed a more moderate view in 2014 and 2017 whereby, 'while the draft articles contributed considerably to the development of international law... their elaboration in the form of a binding legal instrument' is not desirable.<sup>294</sup> Further down the line, Australia and the Nordic countries 'agreed that an attempt to elaborate a convention at this present time [October 2017] would be premature', but viewed the Articles as providing 'valuable guidance'.<sup>295</sup> Portugal was more reserved and opined that the Articles will 'be suitable for an international convention' at a later stage.<sup>296</sup> Only Cuba expressed its

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<sup>289</sup> State Comments 2014 (ibid) para 39; State Comments 2017 (ibid) para 44.

<sup>290</sup> State comments 2017 (ibid) para 6.

<sup>291</sup> ibid, para 17.

<sup>292</sup> State comments 2014 (n 259) para 20; ibid, para 18.

<sup>293</sup> 2010 State comments (n 256) para 22.

<sup>294</sup> State comments 2014 (n 259) para 9 and State comments 2017 (n 169) para 4.

<sup>295</sup> State comments 2017 (ibid) paras 7-8.

<sup>296</sup> ibid, para 46; State comments 2014 (n 259) para 34.

willingness to ‘continue to work towards the elaboration of a convention on the effect of armed conflicts on treaties’.<sup>297</sup>

Even so, the suitability of the Articles as a whole for codification is not a definitive indication of the current or future status of *each* Article.<sup>298</sup> Although the adoption of the Articles ‘in the form of a multilateral treaty would give [States] durability and authority’,<sup>299</sup> these outcomes may be achieved absent codification, as Crawford noted in the context of a different set of eminent ILC articles, the 2001 ILC Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA).<sup>300</sup> For instance, the VCLT, an ILC work product, was adopted in the form of a convention, and ‘had a stabilizing effect’ and a continuing influence on customary international law.<sup>301</sup> ARSIWA, conversely, were not codified in treaty form but adopted by the UNGA. Nonetheless, the ARSIWA have since been regularly applied by States and adjudicative fora as reflective of customary law.<sup>302</sup> In fact, the lack of treaty codification has been said to allow ‘for a continued process of legal development’ by international courts and tribunals and State practice.<sup>303</sup>

Scholarship that has addressed the 2011 ILC Articles does not greatly assist in determining their status.<sup>304</sup> For instance, in 2014, Ronen

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<sup>297</sup> State comments 2014 (ibid) para 22.

<sup>298</sup> Eg: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Merits) [1997] ICJ Rep 7, paras 55, 79, 83 – the ICJ referred to several provision, but not to the entirety of the ILC product, as customary. Similarly, the VCLT is considered to mostly reflect customary law; not in entirety (see for eg: *Advisory Opinion on the Legal Consequences for the State of the Continued Presence of South Africa in Namibia* (Advisory Opinion) [1971] ICJ Rep 16, para 94.

<sup>299</sup> J Crawford et al., ‘The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: Completing the Second Reading’ (2001) 12 EJIL 964, 969.

<sup>300</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56<sup>th</sup> Session, Supp No 10, at 43, UN Doc A/56/10 (2001) (ARSIWA).

<sup>301</sup> Crawford et al (n 299) 969.

<sup>302</sup> See S Olleson, ‘the impact of the ILC’s articles on responsibility of states for internationally wrongful acts’ (2007-11) British Institute of International and Comparative Law

<[http://www.biicl.org/files/3107\\_impactofthearticlesonstate\\_responsibilitypreliminarydraftfinal.pdf](http://www.biicl.org/files/3107_impactofthearticlesonstate_responsibilitypreliminarydraftfinal.pdf)>

<sup>303</sup> ibid.

<sup>304</sup> See Conclusions 13-14, Identification of customary international law (n 13).

noted that the ‘Articles cannot be regarded as codification of customary law, but constitute an important stage in the progressive development of international law’.<sup>305</sup> Yet, she did not elaborate whether her position concerns *every one* of the ILC Articles, or the Articles as a *whole*. In 2013 and again in 2018, Schreuer asserted, but did not explain why, that the ILC Articles ‘may be taken as reflecting the current state of international law’.<sup>306</sup> Pronto, a senior member of the ILC Secretariat, was more cautious, and referred only to Article 3 as reflective of ‘the contemporary default position’.<sup>307</sup>

As for arbitral practice and judicial decisions, the 2011 ILC Articles have yet to be directly considered. Nonetheless, a recurring thorny issue that arises over the status of the Articles concerns their compatibility with the aforementioned 2005 Partial Award in Claim No 7 by the EECC.<sup>308</sup> Although this decision preceded the ILC Articles by six years,<sup>309</sup> it merits consideration since it is one of the few cases in the 21<sup>st</sup> century to directly address the continued operation of economic obligations in times of hostilities. What is more, this decision is often, mistakenly, referred to in investment scholarship as indicating that armed conflicts do abrogate treaties.<sup>310</sup>

There, the EECC was required to determine whether Eritrea breached certain bilateral treaties and therefore owed compensation to

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<sup>305</sup> Ronen (n 181) 548. Paddeu – Self-defence (n 193) fn 123 citing Ronen in support of the contention that ‘ILC’s Articles on the matter are not considered to reflect customary law’.

<sup>306</sup> Schreuer – Investments in armed conflict (n 192) 3; C Schreuer, ‘War and peace in international investment law’ (2018) 1 TDM, 1.

<sup>307</sup> Pronto (n 172) 235.

<sup>308</sup> *Ethiopia–Ethiopia’s Claim 7*. See also Final Award, Pensions, Eritrea’s Claims 15, 19, and 23, para 29 (19 December 2005), 45 ILM 633 (2006).

<sup>309</sup> The EECC cited Brownlie’s first report (ILC, ‘Effects of armed conflicts on treaties’, first report on the effects of armed conflicts on treaties by Mr. Ian Brownlie, Special Rapporteur, a/cn.4/552, 21 April 2005). The ILC was of the view that the use of Brownlie’s report in the Claims Commission evidences the ‘current relevance of the question’ and the need to ‘take account of policy consideration’ in the drafting of the Articles (ILC, ‘Summary record of the 2926th meeting, meeting’ (2007) UN Doc A/CN.4/2926 para 27). The Commentaries to the 2011 Articles do not mention the EECC.

<sup>310</sup> Eg: Paparinskis – Circumstances precluding wrongfulness (n 170) 492.

Ethiopia. To that end, the Commission had to first establish whether the agreements remained in force once the conflict broke. Since Eritrea did not give notice of any act of termination or suspension of the treaty, the claim turned on ‘the issue of the *automatic* termination of bilateral agreements with the outbreak of a conflict’.<sup>311</sup> Although the Commission observed that the issue is ‘currently debated in the literature’, it ‘nevertheless’ held that ‘there is a broad consensus that bilateral treaties, especially those of... economic nature, are at the very least suspended by the outbreak of a war’.<sup>312</sup>

True, this conclusion seems to contradict the 2011 Articles and what was identified as the governing law. However, a careful review of the jurisprudence of the EECC demonstrates that the Commission’s decision is mostly consistent, but not fully congruent, with the ILC Articles and law that they reflect.<sup>313</sup> First, the Commission’s starting point was that, ‘the parties’ presumed intent is generally seen as a key factor in determining a treaty’s wartime status, even though such intent often is not clear from treaty texts’.<sup>314</sup> Additionally, following the footsteps of the ILC Articles, and the legal position that they reflect, the EECC examined, first, whether the subject-matters of the five economic treaties at issue are susceptible to termination, and second, whether the features of the armed conflict affect its operation.<sup>315</sup>

Against this backdrop, the Commission noticed that four of the five treaties subject-matter concerned transportation links between Ethiopia and Eritrea and that their application in the prevailing circumstances was directly affected by the conflict in a manner that deemed them inoperative. Indeed, transportation agreements are specifically enumerated by the ILC Commentaries to the 2011 Articles as an example of treaties that may be

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<sup>311</sup> *Ethiopia–Ethiopia’s Claim 7*, para 18.

<sup>312</sup> *ibid.*

<sup>313</sup> See further: S Murphy et al, *Litigating War: Mass Civil Injury and the Eritrea-Ethiopia Claims Commission* (OUP 2013) 390-94.

<sup>314</sup> *Pensions, Eritrea’s Claims 15, 19, and 23*, para 29.

<sup>315</sup> *ibid.*; Article 6, 2011 ILC Articles.

adversely affected by the outbreak of hostilities.<sup>316</sup> Arguably then, with a grain of context, the jurisprudence of the Commission does not take away from what was established as the prevailing legal position. In any event, decisions of arbitral bodies do not create law. These are subsidiary means that assist to determine the content of the law. As for the relative value of this award in the determination of the law, it is outweighed by a long and consistent record of authorities to the contrary.

Overall, it may be noted that the 2011 Articles are not legally binding as a convention, and it is doubtful that they will ever be codified. It may also be suggested that, as a whole, the 2011 Articles do not reflect pre-existing customary law. Nevertheless, some of the provisions are reflective of custom. Pointedly, it is argued that, as a matter of established law, FCN treaties (Article 7) are not *ipso facto* abrogated by the outbreak of hostilities (Article 3) *because* FCNs contain provisions on their operation in hostilities (Article 4), they were intended to apply in wartime (Article 5), and they create proprietary private rights that are unaffected by the outbreak of hostilities (Article 6). With this, the analysis turns to examine the effect of armed conflicts on investment treaties, the modern form of FCN treaties.

## **5. Conclusion: Investment Treaties Are Not Ipso Facto Abrogated by Hostilities**

Having established the pertinent principles to ascertain the effect of hostilities on treaties, the provenance of these principles, and their status, this section concludes the discussion with the effect of armed conflicts on investment treaties.

Subject to the remarks above concerning recent trends to omit certain provisions from investment instruments, and without derogating from the proposition that absent treaty language to the contrary, the default rules as set out above will govern the question of hostilities' effect on the operation of treaties, the first – and practically only – step of this inquiry

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<sup>316</sup> Commentary to Article 6, 2011 ILC Articles, para 4. This is consistent with the reviewed jurisprudence of SCOTUS.

concerns the wording of the treaty. Hence, the investment instrument itself is determinative of the effect hostilities would have on it.<sup>317</sup>

Under Article 4 of the 2011 Articles, which reflects a well-established legal position, where a treaty contains a provision on its operation in armed conflicts, it shall continue to apply. As the next chapters explain in detail, investment instruments frequently contain several different provisions on their operation in armed conflicts. These provisions include explicit rules concerning the State's right to appropriate and destroy the property of the foreign investor during armed conflict (chapter 3) and the obligation to compensate foreign investors thereof (chapter 7). Investment treaties also usually prescribe the obligation to take precautionary measures in favor of investments against the effects of hostilities (chapter 5) and exceptions that reserve the State's right to take any measure for the protection of its security interests during armed conflict (chapter 6).

If so, in principle, the outbreak or existence of an armed conflict does not terminate, in and of itself, the operation of investment treaties. This proposition coincides with State practice. One will struggle to point to a single explicit statement by a State that its investment treaties were *ipso facto* terminated (or suspended) by the outbreak of hostilities. In fact, it appears that conflict-ridden States negotiate, conclude, and ratify investment treaties in parallel to their participation in hostilities, thereby indicating that such countries do not conceive hostilities as negatively affecting their international trade and investment obligations.

For instance, Israel has been in a continuous state of emergency since 19 May 1948 (four days after Israel was established).<sup>318</sup> Yet, during the last 70 years of national emergency and wars, Israel concluded over 50 different investment-related instruments. Notably, the 2006 Israel – Guatemala BIT was negotiated alongside the Second Lebanon War and it

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<sup>317</sup> ILC Articles, commentary to Article 4.

<sup>318</sup> Article 9(1), Law and Administration Ordinance, 1 Laws of the State of Israel (enacted 19 May 1948). The state of emergency has since then been extended annually, most recently on 11 July 2018.

entered into force in the midst of Operation Cast Lead,<sup>319</sup> and the 2012 Israel – Ukraine BIT entered into force in November 2012 during Operation Pillar of Defence.<sup>320</sup> Also of note is that Russia signed a BIT with Palestine in November 2016, although both entities are (and were at the relevant time) embroiled in protracted hostilities.<sup>321</sup> But it is not just belligerent parties that conclude investment treaties in the face of hostilities, but also neutral States who enter into investment agreements with conflict-ridden States, thus indicating that they too do not perceive armed conflicts to be, quite literally, a ‘deal-breaker’. For instance, Japan concluded a BIT with Ukraine in 2015 against the backdrop of the hostilities in eastern Ukraine.<sup>322</sup>

Overall, this chapter demonstrated that, whether the investment treaty includes explicit language to that effect, or the matter is governed by default by ‘general international law’, the outbreak or existence of armed conflict does not, in and of itself, terminate investment treaties. The same is true for the prevailing legal position (and dearth of practice) concerning the automatic suspension of investment treaties by hostilities.<sup>323</sup> This argument is also supported by the fact that although, as noted, States are free to include a provision that instructs that armed conflict leads to the suspension or abrogation of some or all of the terms of the investment treaty, they do not include any such language in investment instruments.<sup>324</sup> Put a different

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<sup>319</sup> The Israel – Guatemala BIT was signed on 7 November 2006 and entered into force on 16 January 2009. The Second Lebanon War broke on 12 July 2006 and ended in September 2006. Operation Cast Lead took place between 27 December 2008 and 18 January 2009.

<sup>320</sup> Operation Pillar of Defence took place on 14 – 21 November 2012; Israel – Ukraine BIT entered into force on 20 November 2012.

<sup>321</sup> Russia – Palestine BIT (signed 11 November 2016, not in force).

<sup>322</sup> Japan – Ukraine BIT (signed 5 February 2015, entered into force 26 November 2015).

<sup>323</sup> There is no modern practice or declarations to point to the automatic suspension of treaties. The ILC Articles and the studies predicating them point to no such conclusion either.

<sup>324</sup> Eg: the Chicago Convention on International Civil Aviation instructs that, ‘in case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutral’. (Article 89, Chicago Convention on International Civil Aviation (opened for signature 7 December 1944) 15 UNTS 296.



way, in armed conflict, the termination or suspension of investment treaties is invocable subject to certain qualifications, it is not automatic.

Of course, the assertion that investment treaties remain operative is only the first step in the analysis of the regulation of investments in armed conflict. At the next step, it should be asserted what treatment, if any, these treaties prescribe in armed conflict, and how does any such treatment interact with other international norms that regulate the conduct of hostilities.<sup>325</sup> Accordingly, having established the applicability of investment treaty norms, the next chapters address the application of these standards in armed conflict.

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<sup>325</sup> On this point, the ILC clarified that, 'the implication of continuity does not affect the operation of the law of armed conflict as *lex specialis* applicable to armed conflict' (Commentaries to the Annex to Article 7).

## **Chapter 3**

### **Appropriation and Destruction of Foreign Investments in Armed Conflicts**

#### **1. Introduction**

The previous chapter established that the outbreak of armed conflict does not, in and of itself, abrogate the operation of investment treaties and thus, investment standards of protection continue to apply in armed conflict. Accordingly, this chapter deals with the customary and treaty standards of treatment of investments during armed conflict. This discussion examines the limits and qualifications to the State's authority to interfere with the ability to manage, use or control, in a meaningful way, investments in the form of tangible objects and premises during armed conflict, focusing mainly on appropriation and destruction of property.

The use of intrusive measures or lethal or potentially lethal force against private property by the State's armed forces and law-enforcement officials in armed conflict is governed by two different legal paradigms: The conduct of hostilities paradigm, which derives from IHL, and the law enforcement paradigm that is mainly based on international human rights law. This discussion does not presume to offer definitive ways to determine when the State's conduct falls within the paradigm of hostilities and when, by contrast, such conduct is regulated by the law enforcement paradigm. The following analysis rather examines how the distinctions between both paradigms affect the treatment of foreign investments in armed conflicts.

Accordingly, section 2 briefly introduces the main differences between the legal paradigms that regulate State measures that interfere with foreign investments in armed conflicts – the conduct of hostilities paradigm, which derives from IHL, and the law enforcement paradigm that is mainly based on international human rights law (and is not the focus of this study). This introductory discussion establishes an important proposition that underscores not only this chapter but also the following

analyses in this thesis: When assessing whether a particular State measure that adversely affects investments during hostilities complied with international law, 'it is also necessary to address the role of the *jus in bello*, which gives belligerents substantial latitude to... act in ways contrary to international law in time of peace'.<sup>326</sup> For instance, the deliberate destruction of aliens' property in combat operations 'may be perfectly legal, while similar conduct in peacetime would result in State responsibility'.<sup>327</sup>

Section 3 establishes that the State's authority under the law enforcement paradigm to lawfully interfere with private property, in the form of expropriation, is qualified by several conditions that reflect a balance between the right of the State to regulate property in its territory and the protection and respect of private property rights. The inferences from this discussion are then used to compare and contrast the permitted interferences with property under the paradigm of hostilities.

Turning then to the paradigm of hostilities, which is the focus of this thesis, section 4 compares and contrasts expropriation (as a form of lawful interference with private property) with the interferences that IHL allows in times of hostilities. It is established that, by contrast to expropriation, which is predicated on the balance between the State's regulatory freedom and the protection of property rights, the authority of the State to interfere with private property under the hostilities paradigm, through dispossession and destruction of property, is circumscribed by the delicate equipoise of military necessity and humanity. As a result, international law recognizes an array of lawful interferences with private property during hostilities that are distinct from expropriation and are qualified by different conditions, which do not necessarily comprise the requirement of, say, due process.

Honing in further on the dispossession and destruction of foreign investments in armed conflicts, section 5 demonstrates that during the first half of the 20<sup>th</sup> century, war law rules on the treatment of private property,

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<sup>326</sup> *Civilians Claims-Eritrea's Claims 15, 16, 23, and 27-32*, para 124.

<sup>327</sup> *ibid.*

namely as codified in The Law of The Hague, infiltrated the international law on the protection of aliens and shaped the rules on State responsibility for damage to foreign property in wartime, resulting in a consensus that appropriation of private foreign property is lawful only when justified by military considerations and against compensation while destruction of property is prohibited, other than in instances of 'imperative military necessity'.

At the next step, the analysis of section 6 focuses on a common mechanism in modern investment treaties – the extended war clause (EWC). The EWC deals with 'requisition of property by the armed forces' and with the 'destruction of property that is not required by the necessity of war' (and similar language). In this respect, section 6 also deals with the interaction of the EWC with the expropriation provision, which regulates dispossession of property irrespective of the existence of hostilities. It is suggested that under the VCLT, the ordinary meaning of the cited language of the EWC makes a reference to customary law on the treatment of alien property in wartime. Accordingly, to ascertain the meaning of the EWC, it is necessary to look to the content of customary law, which is circumscribed by war law.

In this sense, the discussion in chapter 3 comes full circle: It demonstrates not only that the distinction between the hostilities and law enforcement paradigms is crucial for the treatment of foreign investments in armed conflict generally, but that this notion is already reflected in investment treaties, which contain provisions on appropriation in the context of armed conflict (the EWC) and separate rules on takings that do not necessarily relate to hostilities (expropriation provisions).

Overall, this discussion proposes that just as it is well-established today that not every lethal measure that results in loss of life in armed conflict is necessarily an arbitrary deprivation of life in violation of human rights instruments since the paradigm of hostilities may deem this loss of life lawful, not every dispossession of property in armed conflict is

necessarily a lawful or an unlawful expropriation since the paradigm of hostilities may allow it.

## **2. The Conduct of Hostilities and the Law Enforcement Paradigms**

Before determining whether a certain State measure, which resulted in the total or partial dispossession of a foreign investment, complied with international law, it is necessary to ascertain the applicable legal paradigm against which the lawfulness of this measure will be assessed. This section presents the international legal regimes governing the use of force and intrusive measures against property in armed conflicts and addresses briefly the main differences between these two paradigms.

The use of intrusive measures or lethal or potentially lethal force against private property by the State's armed forces and law-enforcement officials is governed by two different legal paradigms in armed conflict: The conduct of hostilities paradigm, which derives from IHL, and the law enforcement paradigm that is mainly based on international human rights law. This is the consequence of the fact that in the modern practice of warfare, the State's armed forces are performing, or are expected to conduct, not only combat operations against the adversary but also law enforcement missions that aim to maintain or to restore public security and law and order.<sup>328</sup>

However, notwithstanding the coexistence of both paradigms in practice, international law does not provide clear guidelines to determine which situations in the context of an armed conflict are governed by the

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<sup>328</sup> In particular NIACs and hostilities involving occupied territories. See Article 43, HR and Article 42, GC III, which both deal the obligation of an occupying power to maintain public order and safety and the authority of a detaining State to use force as a last resort against POWs attempting to escape. See further: ICRC, Expert Meeting Report, The Use of Force in Armed Conflicts: Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms, January 2012 <<https://www.icrc.org/en/publication/4171-use-force-armed-conflicts-expert-meeting>> (accessed 20 November 2018) and ICRC, Expert Meeting Report, Occupation and Other Forms of Administration of Foreign Territory, Third Meeting of Experts: The Use of Force in Occupied Territory (2012) <<https://www.icrc.org/en/publication/4094-occupation-and-other-forms-administration-foreign-territory-expert-meeting>> (accessed 20 June 2018); K Watkin, 'Use of force during occupation: law enforcement and conduct of hostilities' (2012) 94 (885) IRRC 267-315.

hostilities paradigm and which are covered by the law enforcement paradigm. For the purposes of the present analysis of the treatment of foreign investments in armed conflict, it is important to recall that IHL rules were crafted to reflect the reality of armed conflict and thus, IHL is predicated on the assumption that the use of force and the ability to interfere with individual rights are inherent to hostilities. At the same time, the authority to take such measures is not unlimited. It is constrained by the principles of distinction, necessity, humanity, and proportionality.<sup>329</sup>

By contrast, human rights law is based on different assumptions, it is not designed to regulate extreme circumstances that anticipate the use of lethal force. Human rights law was initially conceived to protect individuals from abuse by their State. And this is important. While similar principles, such as necessity, proportionality, and precautions seem to underscore both regimes, these notions entail different meanings and different application under each legal paradigm.<sup>330</sup>

As further explained below, under the hostilities paradigm the notion of 'necessity' means that lethal force, which may result in the total destruction of property, may be directed against lawful targets as a 'first resort', subject to a proportionality assessment. 'Military necessity' under IHL does not translate into an obligation to resort to less-destructive (or deadly) means. In contrast, the use of lethal force in law enforcement operations may be employed only as a 'last resort', subject to strict or 'absolute' necessity.<sup>331</sup>

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<sup>329</sup> See discussion in chapter 1.

<sup>330</sup> See: ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, December 2015 <<https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>> (accessed 20 November 2018) and ICRC – *The use of force in armed conflict* (n 328) 8-10.

<sup>331</sup> This notion is not absolute. Deadly force may be used as first resort when it is necessary to protect persons against an imminent threat to their lives or serious injury or when lethal force is the only way to prevent the perpetration of a serious crime that possesses grave threat to life.

Another difference concerns the principle of proportionality. The proportionality principle under the law enforcement paradigm requires balancing the risks posed by an individual (and his property) against whom force might be used, on the one hand, with the potential harm to this person (and his property) and others uninvolved, on the other. In contrast, IHL proportionality balances the military advantage anticipated from an attack against a military objective (human and non-human targets) with the expected incidental harm to the civilian population (persons and objects) from this attack.

Further, the notion of precautions is distinct. Under the hostilities paradigm, as further explored in chapter 5, the obligation to take feasible precautionary measures requires the belligerents to take constant care to spare the civilian population, civilians, and civilian objects.<sup>332</sup> In contrast, the law enforcement paradigm instructs that *all* precautions be taken to avoid, as far as possible, the use of force, as such, and not merely to prevent and minimize incidental civilian death and injury or damage to civilian objects.<sup>333</sup>

The differences between the two paradigms have practical implications on the State's authority to interfere with private property. Under the law enforcement paradigm, it is axiomatic that States have broad authority to regulate the use and ownership of movable and immovable objects within their territory. Whenever foreign investors position their

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<sup>332</sup> See further in chapter 5.

<sup>333</sup> In contrast to IHL, the principle of precautions is not anchored in treaty instruments specifically, it derives from other principles. The notion of precautions was developed in the jurisprudence of human rights bodies, namely the ECtHR. Eg: *McCann v UK*, Judgment, Merits and Just Satisfaction, App No 18984/91[1995] ECHR 31, paras 150 and 194; *Ergi v Turkey*, App No 23818/94, Report of European Commission of Human Rights of 20 May 1997, and judgment of the European Court of Human Rights of 28 July 1998, para 79. *Case of Neira Alegría et al v Peru*, Merits, IACHR Series C No 20 [1995] IACHR 3, para 62; *Case of Montero Aranguren et al (Detention Center of Catia) v Venezuela*, Preliminary objection, merits, reparations and costs, IACHR Series C no 150, (IACHR 2006), para 82; UN Human Rights Committee (HRC), General Comment No 6, The Right to Life (article 6), 30 April 1982, UN Doc HRI/GEN/1/Rev.1, para 3. See also Principle 5, UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eight UN Congress on the Prevention of Crime and the Treatment of Offenders and welcomed by UNGA Res 45/166, 18 December 1990.

property in the territory of another State, they subject this property to the States' authority to regulate the use and ownership of objects within its territory. Such foreign property thus becomes susceptible to legislative and administrative acts that may interfere with its use and ownership.<sup>334</sup> The most intrusive State interference with the right to use property happens when the owner is completely deprived of the ability to use or own the property, usually as a result of its direct appropriation or destruction.<sup>335</sup>

To prevent abusive interferences with private property, virtually all investment treaties include provisions that reflect the recognition of the State's right to regulate property but place some limitation on the exercise of this said right. As further explored below, under customary law, as reflected in modern investment instruments, expropriation is lawful if it serves a public purpose, is conducted in a manner that is not arbitrary or discriminatory, follows principles of due process, and is against compensation. But not every taking of private foreign property for public objectives by State officials during armed conflict is necessarily expropriation that is governed by the law enforcement paradigm. Some takings by State officials during armed conflict are governed by a separate legal paradigm.

On this point and relying on the substantive distinctions between the hostilities and law enforcement paradigms, the EECC stressed that, while 'peacetime rules barring expropriation continue to apply' during armed conflicts, 'it is also necessary to address the role of the *jus in bello*, which gives belligerents substantial latitude to place freezes or other discriminatory controls on property... or otherwise to act in ways contrary to international law in time of peace'.<sup>336</sup> 'Under the *jus in bello*', as the Commission rightly noted, 'the deliberate destruction of aliens' property in

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<sup>334</sup> For an overview of various interferences with investment worldwide during the 20<sup>th</sup> century see: C Dugan et al *Investor-State Arbitration* (OUP 2008) 430-41; Salacuse (n 17) 64-78.

<sup>335</sup> *Fireman's Fund v Mexico*, ICSID Case No ARB(AF)/02/1, Award, 17 July 2006, para 176(a).

<sup>336</sup> *Civilians Claims-Eritrea's Claims 15, 16, 23, and 27-32*, para 124.



combat operations may be perfectly legal, while similar conduct in peacetime would result in State responsibility'.<sup>337</sup>

The substantive differences between the governing legal paradigms make it crucial that the international responsibility of States for the dispossession of foreign investments in situations of armed conflict be assessed in a nuanced way that goes beyond the four-corners of investment treaty provisions on expropriation, lest a tribunal mistakenly finds a lawful requisition to be an unlawful expropriation for want of due process, thereby holding a State responsible where its international responsibility is simply not invoked.<sup>338</sup> To mitigate such concerns, when approaching the assessment of appropriation of foreign investments in armed conflict it is necessary to first determine whether the State's conduct falls within the conduct of hostilities paradigm or, by contrast, within that of law enforcement.<sup>339</sup> Only then, the lawfulness of the measure can be assessed against the identified applicable legal regime.

### **3. Expropriation of Foreign Investments under the Law Enforcement Paradigm**

Under the law enforcement paradigm, the State's authority to take measures that result in interference with private property has been circumscribed in recent years mainly by international human rights law and international investment law.<sup>340</sup> These fields of law have developed rather analogous standards for assessing the lawfulness of measures that interfere with the right to use or own private property, including 'investments', namely in the framework of expropriation. It is not the purpose of this analysis to conduct a thorough discussion of the law on expropriation, but rather to sketch the pertinent elements of such measures so as to use these in the following sections to illuminate and contrast the rules on

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<sup>337</sup> *ibid.*

<sup>338</sup> The relationship between these measures is addressed in detail below.

<sup>339</sup> As explained in chapter 1 (introduction), conflict classification is outside the scope of the present thesis.

<sup>340</sup> For an analysis of human rights see: J Sparkling, *The International Law of Property* (OUP 2014) 257-66

appropriation of foreign investments during armed conflicts. Accordingly, this section outlines the cumulative qualifications of lawful expropriation and briefly elucidates each condition.

An overwhelming majority of investment treaties qualify expropriation with the requirements that the taking is for a public purpose, in a non-discriminatory manner, under due process of law, and against the payment of compensation.<sup>341</sup> Essentially, these conditions are a crystallization of customary law.<sup>342</sup> Although these conditions are sometimes expressed using different language, their essence has not changed substantively over the years.<sup>343</sup>

Public purpose (or: 'public interest',<sup>344</sup> 'public benefit',<sup>345</sup> 'public order and social interest',<sup>346</sup> etc.) is used as term of art<sup>347</sup> that requires the taking be motivated by pursuance of legitimate welfare objectives, in contrast to a

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<sup>341</sup> The same conclusion arises from a review of national laws on the protection of investments. Most of these laws describe the conditions for a lawful expropriation and provide guidelines on the amount of compensation. The conditions under which an expropriation is lawful have been standardized to the point that laws authorize expropriations for the public benefit, without discrimination, against compensation and under due process of law (UNCTAD, World Investment Report 2017, at 106-7 <[http://unctad.org/en/PublicationsLibrary/wir2017\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf)> (accessed 1 June 2018). Under human rights law, the limitations of the right are similar. A lawful taking ought to comply with: the principle of legality; the principle of public interest; and the principle of proportionality.

<sup>342</sup> These principles were recognized as such at the time of the conclusion of the very first BIT, see: McNair 'The Seizure of Property and Enterprises in Indonesia' (1959) 6(3) Netherlands Journal of International Law 218-56; G Christie, 'What constitutes a taking of property under international law?' (1962) 38 British Ybk Intl L 307– 338; E Lauterpacht, 'Issues of compensation and nationality in the taking of energy investments' (1990) 8(4) Journal of Energy and Natural Resources Law, 241–250.

<sup>343</sup> For sake of completeness, some treaties also require that the expropriation will not violate contractual undertakings, eg: Article 5(2), Bulgaria – France BIT; Article II(3) US – Tunisia BIT.

<sup>344</sup> Article 133, China – Peru Free Trade Agreement (FTA).

<sup>345</sup> Article 4(1), Germany – Pakistan BIT (signed 1 December 2009, not in force).

<sup>346</sup> Article 811 (and footnote 7), Canada – Colombia FTA.

<sup>347</sup> See for instance the footnote accompanying Article 9.10 in the Peru – Singapore FTA, which clarifies that, 'for the purposes of this Article, public purpose refers to a concept in customary international law...' Likewise the Canada – Colombia FTA clarifies that public purpose 'shall be interpreted in accordance with international law...' see further discussion in UNCTAD, Series on Issues in International Investment Agreements II: Expropriation: A sequel (2012) <[https://unctad.org/en/Docs/unctaddiaeia2011d7\\_en.pdf](https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf)> (accessed 30 May 2016).

purely private gain or an illicit end.<sup>348</sup> In practice, States have identified, among other goals, environmental, social, economic, and health objectives and military, security, economic and political aims as ‘public purposes’ that predicate expropriation. Investment tribunals seem to have afforded a margin of appreciation to States in determining whether an expropriation serves a public purpose.<sup>349</sup>

Non-discrimination reflects a customary standard whereby expropriation that is predicated solely on the affiliation of the alien to a different racial, religious, or ethnic group, is forbidden. Nonetheless, some distinctions between different types or groups of investors may be predicated on relevant (non-discriminatory) reasons.<sup>350</sup> ‘Due process’, in turn, is a wide term which mostly requires that the measure (expropriation) complies with procedures established in domestic legislation and that the affected investors will be allowed to have the case reviewed before an independent and impartial instance (right to an independent review).<sup>351</sup> Further, the expropriation process must be free from arbitrariness.<sup>352</sup>

Finally, practically all investment instruments contain stipulations, at a varying degree of detail, which refer to the standard of compensation and valuation method, date for determining compensation, convertibility, and payment of interest. Most of these instruments have adopted some version of the ‘Hull Formula’, which requires that compensation should be ‘prompt,

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<sup>348</sup> *Walter Fletcher Smith Claim* (1929) II RIAA 915, 917-918; *Liberian Eastern Timber Corporation (LETCO) v Liberia*, Award, 31 March 1986, 26 ILM 647, 664-667; *James v UK*, Merits, App No 8793/79 (A/98), [1986] ECHR, paras 38-52.

<sup>349</sup> See generally the discussion in: R Dolzer and M Stevens, *Bilateral Investment Treaties* (Martinus Nijhof 1995) 104-5; Newcombe and Paradell (n 30) 370-72.

<sup>350</sup> *Feldman v Mexico*, ICSID Case No ARB(AF)/99/1, Award, 16 December 2002, para 137. See further Newcombe and Paradell (ibid) 373-74.

<sup>351</sup> Eg: Article XX, Montenegro – Switzerland BIT; Article 4(3) Austria – Mexico BIT. For arbitral practice that focused on the requirement of due process and its breach see eg: *Middle East Cement v Egypt*, ICSID Case No ARB/99/6, Award, 12 April 2002, para 143; *ADC v Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006, para 435.

<sup>352</sup> *Elettronica Sicula SpA (ELSI) (United States v Italy)* (Merits) [1989] ICJ Rep 15, para 128. ‘Arbitrariness’ was defined as ‘a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.’

adequate and effective'.<sup>353</sup> 'Prompt' normally means that a payment for the expropriated property should be made without undue delay. The 'effective' benchmark requires that the payment be made in a realizable, exchangeable, and readily transferable currency. Since the term 'adequate' is more elusive, most instruments provide further guidance as to what is an 'adequate' payment; chiefly, by prescribing that 'adequate' denotes the 'fair market' value (FMV) of the expropriated investment.<sup>354</sup>

FMV reflects the attempt to find the price the property would trade at in a hypothetical commercial transaction between a willing seller and a willing buyer, 'in circumstances in which each had good information, each desired to maximize his financial gain, and neither was under duress or threat, the willing buyer being a reasonable person.'<sup>355</sup> In practice, arbitral tribunals have based compensation on FMV even when the treaty did not use the language 'fair' or like adjectives to qualify the payments.<sup>356</sup> The FMV standard and its application in cases of damage owing to hostilities is address in chapter 7 below.

In arbitral practice, in particular before 2006, this FMV standard has been often treated as a stipulation on the *consequence* of a failure to comply with the provision on expropriation, rather than as one of the conditions for a lawful expropriation.<sup>357</sup> But this is not accurate. First, the explicit language of treaty provisions on expropriation is silent on the consequences of their breach. There is nothing in the explicit wording that addresses a breach of the provision. In fact, according to the ordinary meaning of practically all

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<sup>353</sup> S Ripinsky and K Williams, *Damages in International Investment Law* (BIICL 2008) 78-9; N Nikièma, 'Compensation for expropriation', IISD 2013.

<sup>354</sup> Eg: Article 6(2), US Model BIT 2012; Article 10.9 US – Chile FTA; 1110.2, NAFTA. Some treaties prescribe 'actual value', 'real value', 'market value', 'genuine value', etc.

<sup>355</sup> *Starrett Housing Corp v Iran*, 19 December 1983, 4 Iran-USCTR 122, 201.

<sup>356</sup> FMV was applied also in cases when the treaty mandate 'real', 'actual', 'just', or 'genuine' value. See: *Siemens v Argentina*, ICSID Case No ARB/02/8, Award and Separate Opinion, 6 February 2007, para 353; *Vivendi Universal v Argentina*, ICSID Case No ARB/97/3, Award, 20 August 2007, para 8.2.10.

<sup>357</sup> Eg: *Santa Elena v Costa Rica*, ICSID Case No ARB/96/1, Final Award, 17 February 2000, paras 71-83, 92-5; *Metalclad v Mexico*, ICSID Case No ARB(AF)/97, 20 August 2000, Award, para 113; *Tecmed v Mexico* (Award) para 118.

investment treaties, compensation is but one of the *qualifications* for a lawful expropriation. Further, the analytical distinction in international law between primary and secondary rules means that the standard of compensation for *unlawful* expropriations that do not comply with the qualifications of the treaty, is to be found elsewhere, namely in the customary principle of ‘full reparation’, whereby compensation shall cover any financially assessable damage including lost profits insofar as it is established.<sup>358</sup> This customary standard requires putting the aggrieved investor in the economic position it would have possessed, hypothetically, but for the wrongful conduct, thus setting the date of valuation for the time of the award, not the taking.<sup>359</sup>

In this respect, the 2006 *ADC v Hungary* case marked a shift in arbitral jurisprudence. There, the Tribunal stressed the distinction between lawful and unlawful expropriation for purposes of compensation and applied the full reparation standard to the unlawful expropriation of ADC’s investment.<sup>360</sup> However, the jurisprudence that followed *ADC* indicates that the distinction between lawful and unlawful expropriations is often more apparent than real. Ratner’s extensive study<sup>361</sup> demonstrates that some tribunals did not rely on the distinction between lawful and unlawful dispossession of investments in their award of damages; they simply applied FMV reflexively.<sup>362</sup> In some cases, tribunals noted the difference between lawful and unlawful takings, but did not consider this difference

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<sup>358</sup> Articles 31 and 26, ARSIWA.

<sup>359</sup> *ADC v Hungary*, paras 480-99, 521.

<sup>360</sup> *ibid*, pars 429-44. See also: *Siemens v Argentina* (Award), paras 349–52; *Vivendi v Argentina* (Award), paras 8.2.3–5; *Saipem SpA v Bangladesh*, Award, ICSID Case No ARB/05/7, Award, 30 June 2009, para 201.

<sup>361</sup> S Ratner, ‘Compensation for Expropriations in a World of Investment Treaties: Beyond the Lawful/Unlawful Distinction’ (2017) 111(1) AJIL 7-56.

<sup>362</sup> Eg: *Rumeli Telekom v Kazakhstan*, ICSID Case No ARB/05/16, Award, 29 July 2008, para 785; *Sistem Muhendislik v Kyrgyz Republic*, ICSID Case No ARB(AF)/06/1, Award, 9 September 2009, paras 121, 156, 159; *Occidental v Ecuador*, ICSID Case No ARB/06/11, Award, 20 September 2012, para 707; *Abengoa y Cofides v Mexico*, ICSID Case No ARB(AF)/09/2, Award, 12 April 2013, para 681; *SAUR v Argentina*, ICSID Case No ARB/04/4, Award, 22 May 2014, para 85; *Tenaris and Talta-Trading E Marketing v Venezuela*, ICSID Case No ARB/11/26, Award, 29 January 2016, paras 512-17.

relevant for assessment of damages.<sup>363</sup> In other instances, arbitrators accepted the distinction between compensation for lawful and unlawful expropriation, but the actual outcome, in contrast to the *ADC* case, was the same.<sup>364</sup> This is because in contrast to many properties that decline in value following the expropriation, the value of *ADC*'s investment had risen significantly. Therefore, in that case the distinction between the treaty and the customary standards of reparation translated into concrete figures, but this is rarely the case. This arbitral practice notwithstanding, the analytical difference between lawful and unlawful conduct stands.

A related question that arises from the distinction between lawful and unlawful expropriation is whether the failure to compensate for expropriation deems the conduct unlawful. Some tribunals suggested that 'an expropriation wanting only a determination of compensation by an international tribunal is not to be treated as an illegal expropriation'.<sup>365</sup> Rather, as the Tribunal in *Tidewater v Venezuela* explained, it 'has to be considered as a provisionally lawful expropriation'.<sup>366</sup> This argument postulates that, since 'the tribunal dealing with the case will determine and award... compensation', the failure to award compensation is only a temporary technicality, not a violation of international law.<sup>367</sup> On this point, the European Court of Human Rights (ECtHR) suggested that expropriation that lacks only compensation entails lesser wrongfulness; it does not trigger the same consequences as an inherently illegal taking.<sup>368</sup> For instance,

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<sup>363</sup> Eg: *Gemplus and Talsud v Mexico*, ICSID Case No ARB(AF)/04/3, Award, 16 June 2010, para 8-25; *Unglaube v Costa Rica*, ICSID Case No ARB/08/1, 16 May 2012, paras 305-18; *Guaracachi v Bolivia*, UNCITRAL, PCA Case No 2011-17, Award, 31 January 2014, paras 441-44 and 613-15; *British Caribbean Bank v Belize*, PCA Case No 2010-18, Award, 19 December 2014, paras 241 and 261; and *Rusoro Mining v Venezuela*, ICSID Case No ARB(AF)/12/5, Award, 22 August 2016, paras 639-46 and 646.

<sup>364</sup> Eg: *Siemens v Argentina* (Award); *Yukos v Russia*, paras 1581-85, 1758-69, 1826-27.

<sup>365</sup> *Tidewater v Venezuela*, ICSID Case No ARB/10/5, Award, 13 March 2015, para 140-41.

<sup>366</sup> *ibid.*

<sup>367</sup> *ibid.*, para 141. See also: *Venezuela Holdings v Venezuela*, ICSID Case No ARB/07/27, Award, 9 October 2014, paras 301, 306.

<sup>368</sup> *Papamichalopoulos v Greece*, App No 33808/02, Judgment of 31 October 1995, Series A No 330-B, 59-60; *The former King of Greece v Greece* [GC], App No 25701/94, ECHR

expropriation that results in discrimination and which was committed for the personal profit of the members of the government ‘appears to be a graver wrong’ than, say, the dispossession of property for public purpose that is tainted by illegality merely for the absence of accompanying payments.<sup>369</sup> Both views are problematic.

First, not only that the ‘provisional legality’ reasoning of the *Tidewater v Venezuela* case conflates primary and secondary obligations, it also undermines the parties’ consent and the jurisdiction of the tribunal, and potentially opens any subsequent decision to challenges on jurisdictional grounds.<sup>370</sup> The mandate of the *Tidewater* Tribunal, like that of most tribunals, was ‘limited to determining’ whether there is a breach of the treaty, whether such breach ‘has caused damages to the national concerned, and, if such is the case, the amount of compensation.’<sup>371</sup> A tribunal so constituted cannot declare that the expropriation was lawful and, at the same time, award compensation. In other terms, this tribunal is only authorized to award compensation, as a modality of reparation, *if* there is a ‘breach’ of the treaty. In other terms still, unless explicitly provided otherwise, investment tribunals usually do not have authority to quantify the amount of payments due under the treaty as a primary obligation but, rather, to assess the lawfulness of the expropriation and award damages if it is found unlawful.<sup>372</sup>

At any rate, at its highest it may be said that the ‘legality’ of a taking that lacks in compensation is provisional when the State and the investor merely disagree on the amount owed,<sup>373</sup> or when the payment is reasonably delayed.<sup>374</sup> The proposition is far less convincing when the State bluntly

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2000, para 90; *Case of D.H. and Others v The Czech Republic*, App No 57325/00, 13 November 2007, para 70.

<sup>369</sup> D Khachvani, ‘Compensation for Unlawful Expropriation: Targeting the Illegality’ (2017) 32(2) ICSID Review 385, 387. Ripinsky and Williams (n 353) 67.

<sup>370</sup> See further in: Khachvani (ibid) 387-91.

<sup>371</sup> Article 8(3), Barbados – Venezuela BIT.

<sup>372</sup> Khachvani (n 369) 390.

<sup>373</sup> *Tidewater v Venezuela*, para 136-38; Salacuse – The Law of Investment Treaties (n 17) 354-56.

<sup>374</sup> *ConocoPhillips v Venezuela*, ICSID Case No ARB/07/30, Decision on Jurisdiction and the Merits, 3 September 2013, para 394.

refuses to compensate.<sup>375</sup> The argument that, ‘the lack of compensation does not make the taking ... *eo ipso* wrongful’<sup>376</sup> is likewise problematic. It seemingly assumes that the cumulative requirements that must be met in order for a taking to be lawful differ in significance and, that there is a certain trade-off between these qualifications.<sup>377</sup> However, there is nothing in the explicit language of investment treaties or State practice to indicate that compensation is conceived by States (or investors) as *less* significant than, say, due process of law.

A more accurate statement of the law on this point would account for the important distinction between rights and remedies.<sup>378</sup> The obligation to provide reparations for a breach of a primary obligation arises once a breach of the primary rule is ascertained. In this case, the primary rule requires conduct that comprises several different acts and omissions, including the act, or refusal, of offering compensation. If the State refuses to compensate where the provision mandates it to do so, one aspect of the multifaceted conduct is breached, and the conduct is therefore tainted with illegality. This wrongful act gives rise to the obligation to compensate ‘as a modality of reparation’.<sup>379</sup> This form of compensation therefore originates from a different source.<sup>380</sup>

To recapitulate, the law enforcement paradigm allows for lawful interferences with private property. In investment law, the category of lawful measures against property mostly encompasses expropriation. Since the underpinning rationale of this measure is that public welfare requires that private property be taken in certain instances, lawful expropriation

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<sup>375</sup> *Von Pezold v Zimbabwe* (Award), paras 743–744; *Unglaube v Costa Rica*, para 305.

<sup>376</sup> (nn 34)

<sup>377</sup> Khachvani (n 369) 387.

<sup>378</sup> *Sedco Inc v National Iran Oil Co* (1986) 10 Iran-USCTR 189, 203, Separate Opinion of Brower (‘it is important to note that Claimant’s remedies, in contrast to its rights, are not limited by [the FCN]’); A Cohen Smutny, ‘Compensation Due in the Event of an Unlawful Expropriation: The ‘Simple Scheme’ Presented by *Chorzów Factory* and Its Relevance to Investment Treaty Disputes’ in D Caron et al (eds) *Practising Virtue: Inside International Arbitration* (OUP 2015) 628.

<sup>379</sup> Khachvani (n 369) 388.

<sup>380</sup> *Amoco International Finance v Iran* (1987) 15 Iran-USCTR 189, para 194.



comprises several qualifications, including the obligation to pay compensation.

#### **4. Appropriation and Destruction of Property under the Paradigm of Hostilities: The Hague Law**

As with the law enforcement paradigm, the State's right to interfere with private property during hostilities is not unlimited.<sup>381</sup> Yet, whereas the authority of the State to interfere with private property under the law enforcement paradigm reflects a balance between the State's regulatory freedom and the protection of property rights, the right to interfere with private property under the hostilities paradigm is circumscribed by the principles of military necessity and humanity, which pervade contemporary IHL in both a general and a specific sense.<sup>382</sup>

This section proceeds as follows. As an introductory point, the concepts 'property' and 'enemy property' are addressed first. Then, the section proceeds to outline several permitted measures that result in the deprivation of property during armed conflict, focusing specifically on the qualifications for lawful dispossession of private property and the prohibition to destroy property, unless when 'imperatively demanded by the necessities of war'. Overall, this section demonstrates that relative to the law enforcement paradigm, the State's prerogative to interfere with the right to own or enjoy private property in hostilities is potentially broader, but it is not unlimited. The balance between military and humanitarian considerations translates into several cumulative qualifications that bound the ability to dispossess private property.

IHL recognizes various derogations from the principle that private property must be respected and protected in the conduct of hostilities, such as – destruction, neutralization, capture, confiscation, seizure,

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<sup>381</sup> Kent (n 208) 92; W Lawrence, 'The Laws of War, the Constitution and the War Power. The liability of the Government to pay War Claims' (1874) 22(5) The American Law Register (1852-1891), reprinted by The University of Pennsylvania Law Review 265, 272-75.

<sup>382</sup> See discussion in chapter 1.

sequestration, angary, and requisition.<sup>383</sup> Each of these forms comprises several different subparts that reflect a particular balance between military requirements and humanitarianism.<sup>384</sup> Therefore, to assess whether a measure against private property complies with international law, it is necessary to accurately typify and identify the measure at hand.

Traditionally, the scope of lawful measures that a State was allowed take against private property turned on the classification of any such property into enemy property and the property of loyal citizens and neutrals. Conventional wisdom held that, ‘the belligerents are entitled to exercise measures against enemy persons and property from which neutrals are free’.<sup>385</sup> International humanitarian law, however, does not define the composite concept ‘enemy property’, or the terms ‘enemy’ and ‘property’ separately. Nonetheless, practice, doctrine, and jurisprudence support the determination that ‘property’ encompasses all kinds of movable assets, real property, and intangible property such as intellectual property rights, shares, and claims to money.<sup>386</sup> As for the term ‘enemy’, in warfare it signifies the adverse State and its *armed* forces. Whether, and when, *private* persons are to be characterized as ‘enemy’, is determined mostly by domestic legislation, on the basis of a person’s nationality or domicile or doing business within the enemy State. This question is left outside the scope of the present discussion.

The composite concept of ‘enemy property’, in turn, originates from ancient warfare practices whereby the victorious party had unlimited powers

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<sup>383</sup> For sake of completeness, there are other forms of taking of private or public movable property (including enemy military equipment) for private or personal use, such as pillage. But these are not recognized under IHL as lawful conducts and are therefore left outside the scope of this discussion.

<sup>384</sup> J Shinobu, *International Law in the Shanghai Conflict* (Maruzen, Tokyo, 1933) 56.

<sup>385</sup> E Borchard, ‘Private pecuniary claims out of war’ (1915) 9(1) AJIL 113, 120; E Borchard, *The diplomatic protection of citizens abroad: or, The law of international claims* (New York: Bank Law Publishing, 1916) 253.

<sup>386</sup> This has been recognized at least as early as the Nuremberg Tribunals, see: *IG Farben Trial. Trial of Carl Krauch et al*, case No 57 (1948) 45–46; *Trial of Alfred Felix Alwyn Krupp et al*, case No 58 (1948) 164.

over the property of its vanquished adversary.<sup>387</sup> Over time, the ability to arbitrarily appropriate spoils of war made way for the obligation of belligerents to protect enemy property in their territory.<sup>388</sup> This notion was codified in 1899 and reaffirmed in 1907 in The Hague Regulations, whereby the destruction or appropriation of enemy property must not be adopted as means of injuring the enemy, unless military necessity so requires. By the second decade of the 20<sup>th</sup> century, the influence of the Hague Law was that the treatment of private foreign property turned less on its classification into neutral or enemy property and focused more on military needs:

Neutral and enemy property in hostile territory are in general subject to the same treatment. Where such property is seized or destroyed for strategic reasons directly incident to belligerent action, the private owners need not be compensated for their losses.<sup>389</sup>

Against this backdrop, the analysis proceeds to outline the various permitted interferences with private property under IHL and their qualifications.

Requisition is a formal authoritative demand in belligerent occupation for the temporary or permanent use of movable or immovable property or services, in return to compensation.<sup>390</sup> The right to requisition is secondary to the primary duty of the occupying power, which is ensuring the survival, safety, health, or wellbeing of the occupied population.<sup>391</sup> Accordingly, customary law, as reflected in The 1907 Hague Regulations,<sup>392</sup> mandates immediate cash payments against requisition or the issuance of receipts

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<sup>387</sup> Lawrence (n 381) 275-76. C Huberich, *The law relating to trading with the enemy together with a Consideration of the Civil Rights and Disabilities of Alien Enemies and of the Effect of War on Contracts with Alien Enemies* (New York: Baker, Voorhis & Company 1918) 3.

<sup>388</sup> See generally: E Borchard, 'Are We Entitled to Confiscate Enemy Private Property?' (1923) 23 Columbia Law Review 383-87; P Jessup, 'Enemy Property' (1955) 49(1) AJIL 57-62.

<sup>389</sup> Borchard – Diplomatic Protection (n 385) 255.

<sup>390</sup> Articles 52-6 HR.

<sup>391</sup> Article 55, GC IV.

<sup>392</sup> For earlier authorities see: J B Moore, *International Arbitrations* Vol IV (US Government Printing Office 1898), 3720-722; C Eaglton and F Dunn, 'Responsibility for Damages to Persons and Property of Aliens in Undeclared War' (1938) 32 ASIL Proceedings 127, 130.

that will guarantee a payment as soon as possible.<sup>393</sup> As with other forms of property dispossession, the requirement to pay compensation is a condition of the lawfulness of requisition.<sup>394</sup> Hence, 'requisition, though lawful when originally made, becomes unlawful, when after a reasonable time no adequate compensation was paid'.<sup>395</sup>

Aside from requisition, customary law traditionally recognized more specific forms of deprivation of property. 'Angary' is the right of the belligerent to requisition certain *neutral* property for his own usage, subject to 'exceptional' military necessities, and in return for compensation.<sup>396</sup> The type of neutral property that may be acquired *jure angaria* mostly comprised merchant vessels and other means of transportation and ammunition.<sup>397</sup> 'Sequestration' conversely,<sup>398</sup> is the temporary use or taking of private *enemy* property in order to prevent it from being used against the sequestering State during hostilities.<sup>399</sup> Because the public purpose at the heart of sequestration is narrow and specific (not to allow the property to be used against the State), sequestration, unlike angary, traditionally took the form of asset freezing. Notably, sequestration and angary are no longer mentioned in contemporary military manuals or in post-1977 sub-sets of

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<sup>393</sup> Article 52, HR. Borchard – Private pecuniary claims (n 385) 133-35; M Bothe, 'Limits of the right of expropriation (requisition) and of movement restrictions in occupied territory.' Section 610, Australia, Law of Armed Conflict, Commanders' Guide (March 1994) cited in ICRC – Customary IHL Study (n 38) practice relating to Rule 51. The meaning of 'adequate' compensation under IHL is further addressed in chapter 7.

<sup>394</sup> McNair – The Seizure of Property (n 342) 250.

<sup>395</sup> *ibid.*

<sup>396</sup> Borchard - Private pecuniary claims (n 385) 119, 122, 133; W Heintschel von Heinegg, 'The right of Angary' in (n 31).

<sup>397</sup> H Lauterpacht, 'Angary and Requisition of Neutral Property' (1950) 27 British Ybk Intl L 455, 455-459

<sup>398</sup> As regard the difference between these measures, Wilson maintained that, 'it is in fact very difficult, and perhaps not always essential, to determine just where the line of demarcation between angary and requisition runs' (G Wilson, 'Taking Over and Return of Dutch Vessels, 1918-1919' (1930) 24(4) AJIL 694, 698). Lord McNair construed angary as a form of requisition for particular military aims, but considered that both requisition and angary denote full compensation (McNair – The Seizure of Property (n342) 249-51). But, see Lauterpacht – Angary and Requisition (n 397) 455-56, who disagreed with them.

<sup>399</sup> T Kleinlein, 'Sequestration' in (n 31) para 1.

IHL.<sup>400</sup> This development of international law is consistent with the abovementioned shift from examining the status of the foreign property (neutral – enemy) to analyzing the military necessity that justifies an interference, at least in warfare on land.<sup>401</sup>

Relative to the above, confiscation and seizure are more intrusive forms of acquisition. ‘Confiscation’ refers to permanent appropriation of certain types of property without compensation.<sup>402</sup> As a limitation to this broad power, a belligerent can only confiscate movable property belonging to the enemy State, which can be used for military operations.<sup>403</sup> ‘Seizure’ entails the temporary taking of State or private immovable or movable property. Seized property has to be returned after the cessation of hostilities, otherwise the seizing authority is obliged to compensate the owner.<sup>404</sup>

Two terminological clarifications are due at this point with respect to the different measures outlined above. First, in practice, the term ‘seizure’ is used by some commentators and in some instruments to refer to any uncompensated appropriation, without distinguishing confiscation.<sup>405</sup> However, as explained, these are not the same measures.<sup>406</sup> Additionally, in colloquial form, ‘requisition’ is sometimes used to describe any

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<sup>400</sup> See: ICRC – Customary IHL Study (n 38) practice on rule 51, see also US Army, International and Operational Law Department The Judge Advocate General’s Legal Center & School, Operational Law Handbook (17<sup>th</sup> edn. 2017), Chapter 2 – Appendix B and the references to other modern manuals therein.

<sup>401</sup> To be sure, the authority of the belligerent to take such measures still exists, it is however flanked by more modern conducts. As further explained in the next chapter 4, IHL moved from distinguishing between enemy and neutral property to a distinction between civilian objects and military objectives.

<sup>402</sup> ICRC – Customary IHL Study (n 38) Rule 51.

<sup>403</sup> The occupier cannot confiscate, but is entitled to use without compensation, publicly owned real property, as well as forests, parks, farms, mines, and agricultural estates that are situated in the occupied territory

<sup>404</sup> *Loss of Property in Ethiopia Owned by Non-Residents - Eritrea's Claim 24* (Ethiopia v Eritrea) Partial Award, 19 December 2005, 42 ILM 1056, para 21-6.

<sup>405</sup> See: Oppenheim, (7<sup>th</sup> edn) (n 190) section 143 and accompanying notes 12-16; Stanford Law Review, ‘Foreign Seizure of Investments: Remedies and Protection’ (1960) 12(3) Stanford Law Review, 606-37.

<sup>406</sup> See further: KD Santerre, ‘From Confiscation to Contingency Contracting: Property Acquisition on or Near the Battlefield’ (1989) 124 Military Law Review 111-61; DoD LOAC Manual (n 34) Section 11.4.

appropriation in hostilities against compensation. However, in the proper legal sense, requisition denotes a taking by an *occupying* power. Thus, not every reference to ‘requisition’ in scholarship and jurisprudence necessarily entails or references occupation. This is a point to which the discussion returns below.

Finally, subject to certain conditions, enemy property may be lawfully and deliberately destroyed during hostilities. Article 23(g) of the Hague Regulations, which reflects customary law,<sup>407</sup> prohibits the destruction of the enemy’s property, ‘unless such destruction be imperatively demanded by the necessities of war’.<sup>408</sup> ‘Destruction’ denotes certain *conduct*, such as burning houses or ‘setting ablaze, demolishing, or otherwise damaging property’,<sup>409</sup> but it does not require a particular *result*, such as the complete shattering of property. It is accepted that ‘badly damaged property may be akin to partial destruction’, which qualifies as ‘destruction’.<sup>410</sup> The phrase ‘imperatively demanded by the necessities of war’, in turn, is an exceptional language that modifies the content of the humanitarian rule on the protection of property to which it is attached.

Because IHL has been developed to reflect a realistic balance between military and humanitarian considerations, each IHL rule that permits a particular conduct in hostilities constitutes ‘the result of ‘equations’ that already include the ‘necessity-factor’’.<sup>411</sup> Such equations may appear as an explicit element of the *lex scripta* using the language ‘necessity’ or

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<sup>407</sup> See: ICRC – Customary IHL Study (n 38) Rule 50.

<sup>408</sup> Article 23(g), Hague Regulations.

<sup>409</sup> *Prosecutor v Mbarushimana* (Decision on the confirmation of charges), ICC-01/04-01/10 (16 December 2011), para 174. See also: *Prosecutor v udacumura* (Decision on the Prosecutor’s Application under Article 58), ICC-01/04-01/12, 13 July 2012, paras 51–2; *Prosecutor v Ntaganda* (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Bosco Ntaganda), ICC-01/04-02/06 (9 June 2014), paras 72–3; *Prosecutor v Katanga*, (Judgment pursuant to article 74 of the Statute) ICC-01/04-01/07 (7 March 2014), paras 917–18, 924.

<sup>410</sup> *Prosecutor v Katanga*, para 891.

<sup>411</sup> N Melzer, *Targeted Killing in International Law* (OUP 2008) 287; N Hayashi ‘Requirements of military necessity in international humanitarian law and international criminal law’ (2010) 28 Boston University International Law Journal, 39 50-2.

implicitly.<sup>412</sup> Where a norm that mandates a certain humanitarian treatment anticipates a 'potential collision' with military considerations, it adjusts the balance by expressly permitting 'deviations' from the humanitarian rule insofar as such deviations are required by military necessity.<sup>413</sup> Article 23(g) is one such case.<sup>414</sup> In other words, Article 23(g) is a rule on the protection of property that also prescribes the conditions for its exemption; it is not a permission to destruct property. Nor is it a justification or an excuse for an unlawful destruction of property.<sup>415</sup>

Measures that are required by 'the necessity of war' are not limited to measures that are required to secure the submission of the enemy.<sup>416</sup> For instance, in the *William Hardman* case, the Anglo-American Tribunal was established to hear a claim for reimbursement for losses of personal property by a British subject in Cuba when American forces, during the Spanish-American War, burned certain houses as health measures. The Tribunal held that the measures taken by the American force for the maintenance of its sanitary conditions constituted military necessity. Thus, the destruction of private foreign property was allowed and no compensation was due.<sup>417</sup> In *Hostage*, as another example, the Military Tribunal held that, 'the destruction of public and private property by retreating military forces which would give aid and comfort to the enemy

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<sup>412</sup> M Schmitt, 'Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance' (2010) 50(4) Virginia Journal of International Law 295, 801-5.

<sup>413</sup> Hayashi – Military necessity (n 411) 51.

<sup>414</sup> Schmitt – Military Necessity (n 412) 802. See other examples using the language 'imperative necessities', 'urgent military necessity', and 'not justified by military necessity', respectively in: Articles 8, 33-4, 50 GC I; Articles 8, 28, 51, GC II; Article 126, GC III; Articles 49, 53, 143, 147, GC IV.

<sup>415</sup> As further explained in chapter 6, no amount of necessity can justify or excuse what is otherwise unlawful under IHL. H Lauterpacht (ed) *International Law Reports*, Vol 16 Annual Digest of Public International Law Cases 1949 (CUP 1955) 543; Schmitt – Military necessity (n 412) 798; Melzer (n 411) 279-85; Hayashi – Military necessity (n 411) 52. Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn, CUP 2010) 18.

<sup>416</sup> APV Rogers, *Law on the Battlefield* (Manchester University Press 2012) 4-6; Hayashi – Military necessity (n 411) 60.

<sup>417</sup> *William Hardman v US (GB v US)* (1913) 6 RIAA 25, 26.

may constitute a situation coming within the exceptions contained in Article 23(g).<sup>418</sup>

To recap, under the hostilities paradigm States have a broad, but not unfettered, discretion to interfere with private property. This authority is circumscribed by military and humanitarian considerations, which translate into rules on the protection of private property from appropriation and destruction. As further explained in chapter 7, the violation of these rules is a violation of IHL that mandates reparation.<sup>419</sup>

### **5. The Hague Law and the Customary Standard of Treatment of Foreign Property in War**

Having identified the main qualification on the dispossession of foreign investments under the law enforcement paradigm and the limits to the State's ability to appropriate and destroy private property under IHL, this section deals with the customary standard of treatment of foreign investments in armed conflict.

It is suggested that during the 20<sup>th</sup> century, The Hague Law rules on the treatment of property infiltrated the law on State responsibility for losses to alien property during war.<sup>420</sup> This development occurred in the framework of claims for injuries to, or wrongful seizures of, private foreign property by revolutionists during civil unrest and by armed forces during the World Wars. In turn, this progressive development resulted in the emergence of a set of specific customary rules on State responsibility for damage to private foreign property in war. And so, only eight years after the adoption of 1907 Hague Conventions and Regulations Borchard observed that, 'a long course of practice and The Hague Regulations have given some authority

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<sup>418</sup> *US v List (Hostage case)*.

<sup>419</sup> As a treaty provision, Article 23(g) applies to international armed conflicts only. However, by virtue of its customary status it also applies to NIACs. On this point, see Articles 8(2)(b)(xiii) and 8(2)(e)(xiii), Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force 1 July 2002, 2187 UNTS 90. On the distinction in the wording of these provisions, see: W Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2<sup>nd</sup> edn, OUP 2016) 269-70, 295-96.

<sup>420</sup> Borchard – Diplomatic protection (n 385) 246.



to certain rules for the treatment of alien property in the country of the territorial sovereign'.<sup>421</sup>

American practice is illustrative.<sup>422</sup> Following the Spanish – American War, the US Court of Claims and SCOTUS repeatedly addressed the legal status of American property in Cuba.<sup>423</sup> Notably, these American instances consistently held that, the 'property of citizens of the United States in Cuba was during the war with Spain to be regarded as enemy property subject to the laws of war, and to be destroyed whenever military necessity so demanded'.<sup>424</sup> In *Herrera v US* (1912)<sup>425</sup> SCOTUS clarified that, 'all persons residing [in Cuba] pending the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States, their property enemy's property and subject to seizure, confiscation and destruction'.<sup>426</sup>

During the 1920s and 1930s the policy of the State Department with respect to international claims on behalf of its nationals was that, 'war damages which are caused in due course in the conduct of hostilities do not ordinarily form the basis for international reclamation.'<sup>427</sup> What was considered as 'due course in the conduct of hostilities' was 'determinable by reference chiefly' to war law.<sup>428</sup> Similarly, Borchard explained in 1915 that, 'no compensation is due to private individuals, on account of injuries to their persons or property, resulting from legitimate acts of war.' As for 'what is a legitimate act of war', it is answered by reference to 'The Hague Regulations, and the instructions issued by national to their own armies.'<sup>429</sup>

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<sup>421</sup> Borchard – Private pecuniary claims (n 385) 117, 128.

<sup>422</sup> For similar State practice, as expressed in the domestic legislation of Australia, India, New Zealand, France, the Netherlands, and the UK, see: C Fraleigh, 'Compensation for war damage to American property in allied countries (1947) 41(4) AJIL 748, 749-53.

<sup>423</sup> On the role of domestic courts in the formation and identification of customary law see authorities in (nn 12- 13).

<sup>424</sup> The same was held with respect to the treatment of Spanish property in the US. Eg: *Juragua Iron Co., Ltd. v United States*, 212 U.S. 297, 306, 308-309 (1909); *Herrera v United States*, 222 U.S. 558 (1912); *Diaz v United States*, 222 U.S. 574 (1912).

<sup>425</sup> *Herrera v United States*, 564, 569, 572, 573.

<sup>426</sup> *ibid.*

<sup>427</sup> Statement of the Legal Adviser of the Department of State (Hackworth) to A Johnson dated 7 June 1937, cited in: Digest of international law, Vol 5 (1943) 684.

<sup>428</sup> *ibid.*

<sup>429</sup> Borchard – private pecuniary claims (n 385) 123.

In 1922, for instance, the State Department rejected the application of the Standard Oil Company of New York to bring a claim for the losses caused to the company in the Greek bombardment of Samsun, because the bombardment of American property was justified under the Hague Conventions.<sup>430</sup> On the same grounds, the US refused to file a compensation claim against Germany for losses to American property that resulted from the bombardment of Almería, Spain.<sup>431</sup> In 1923, as another example, the US contended before that Anglo-American Claims Commission that it was entitled to treat a British-owned property 'as having the character of enemy property', and insofar as its destruction 'was a necessity of war [it gave] rise to no obligation to make compensation'.<sup>432</sup> The Commission agreed and maintained that British property was 'subject to destruction without compensation in case of necessity of war'.<sup>433</sup> The Commission also explained that requisition of foreign property in wartime for certain purposes is a right of the belligerent; this right is 'not absolute but limited, and is in reality only itself acquired in consideration of the payment of compensation'.<sup>434</sup>

Along a similar line, international fora that were established during the 20<sup>th</sup> century to hear claims for the interferences with private foreign property during hostilities, such as the Netherlands – Venezuelan Claims Commission,<sup>435</sup> the US – Venezuelan Claims Commission,<sup>436</sup> the Mixed

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<sup>430</sup> MS. Department of State, file 468.11St21, cited in: 'war losses' 5 Digest of international law, §536, 693-94. See also: The opinion of Commissioner Nielsen in the case of *MacAndrew & Forbes Co. (US v Turkey)*, cited in: *ibid*, 691.

<sup>431</sup> Response of the US State Department, 20 November 1937, cited in: *ibid*, 694 ('The Department does not consider that it would be warranted in making any representations to the German Government in the matter. It is not the practice of one state to compensate the nationals of another state for losses suffered by them with respect to their property in a third country as the result of [lawful] bombardment').

<sup>432</sup> *Eastern Extension, Australasia and China Telegraph Company, Limited (GB v US)* (1923) VI RIAA 112-14.

<sup>433</sup> *ibid*, 73, 76

<sup>434</sup> *ibid*, 115.

<sup>435</sup> Eg: *J Dania Bembelista (Netherlands v Venezuela)* X RIAA (1903) 716-17.

<sup>436</sup> Eg: *American Electric and Manufacturing Co. (US v Venezuela)* IX RIAA (1903) 306-10.

Claims Commission (US – Germany),<sup>437</sup> the Spanish Treaty Claims Commission,<sup>438</sup> the Nicaragua Mixed Claims Commission,<sup>439</sup> the American –Turkish Claims Settlement,<sup>440</sup> and Max Huber in the Spanish Zone of Morocco,<sup>441</sup> all assumed that the destruction and appropriation of private foreign property were lawful only subject to the qualifications of military necessity and the limitations of customary war law.<sup>442</sup>

Codification attempts that were made by the League of Nations also evince the relationship between the Hague Law and the protection of foreign property abroad.<sup>443</sup> Illustratively,<sup>444</sup> Basis 21 of the 1930 Hague Codification Conference was formulated based on the positions of the participating States regarding the instances when the State is under an obligation to compensate aliens for losses to their property owing to various forms of hostilities. From these responses, the Codification Commission distilled a consensus over the standard of treatment of private foreign property in war and the consequences of its violations.<sup>445</sup> Basis 21 read:

A State is not responsible for damage caused to the person or property of a foreigner by its armed forces or authorities [...] The State must, however:

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<sup>437</sup> Eg: *Administrative Decision VII (US and Germany)* VII RIAA (1925) 248.

<sup>438</sup> See: US Government, Final report of the Spanish treaty claims commission (2 May 1910) (US Government Printing Office 1910) 10-15.

<sup>439</sup> See: O Schoenrich, 'The Nicaraguan Mixed Claims Commission' (1915) 9(4) AJIL 859-69.

<sup>440</sup> F Nielsen (ed), *American-Turkish Claims Settlement: Opinions and Report* (US Government Printing Office 1937) 154-55, 174-75.

<sup>441</sup> *Affaire des biens britanniques au Maroc espagnol (Espagne contre RoyaumeUni)* II RIAA (1925) 645.

<sup>442</sup> Borchard – Diplomatic Protection (n 385) 255.

<sup>443</sup> League of Nations Committee of Experts for the Progressive Codification of International law, Questionnaire No. 4: Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners (adopted by the Committee at its Second Session, held in January 1926) reported in: AJIL, Special Supplement, 'Questionnaire No 4: Responsibility of States for Damage done in their Territories to the Person or Property of Foreigners' (1926) 20(3) AJIL 176-203. While the works and conclusions of this Subcommittee were widely criticized, this part was welcomed. See E Borchard, 'Responsibility of States for Damage Done in their Territories to the Person or Property of Foreigners' (1926) 20(4) AJIL 738, 744-45.

<sup>444</sup> See likewise: Article 7, Responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers, Session de Lausanne 1927.

<sup>445</sup> Rosenne (ed) *League of Nations Conference for the Codification of International Law (1930)* Vol II (Oceana Publications, Inc., New York, 1975) 538.

- (1) Make good damage to foreigners by the requisitioning... their property by its armed forces or authorities;
- (2) Make good damage caused to foreigners by destruction of property by its armed forces or authorities, or by their orders, unless such destruction is the direct consequence of combat acts;
- (3) Make good damage caused to foreigners by acts of its armed forces or authorities where such acts manifestly went beyond the requirement of the situation or where its armed forces or authorities behaved in a manner manifestly incompatible with the rules generally observed by civilized States...<sup>446</sup>

It should be clarified that the term 'requisition' in the above-cited Basis 21 is used as a shorthand for a taking of private property for military purposes against compensation, and *not* in its strict-sense as a formal demand of the occupying force for the use of property or services. A review of the materials from which the language of Basis 21 derives supports this view. The Codification Commission asked States to express their opinion on the international responsibility for damage to the property of foreigners owing to 'requisitions, etc.'<sup>447</sup> This question did not focus on belligerent occupation nor was it limited to measures qualifying as requisition specifically. Indeed, States did not direct their responses to situations of occupation or 'requisition' pointedly, they rather used the terms 'appropriation', 'requisition', and 'confiscation' interchangeably.<sup>448</sup> Overall, it is suggested that the cited Basis 21 reflects the governing legal position on the standard of treatment of private foreign property during war and the State's responsibility to compensate for losses to such property.

Contemporaneous scholarship supports this proposition.<sup>449</sup> Brochard explained that under the prevailing legal position, the standard of

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<sup>446</sup> *ibid*, 529. See also pp 526-31, esp the positions of Germany, Finland, GB, Hungary, Norway, NZ, and Poland. This Basis 21 is further analyzed in chapter 7.

<sup>447</sup> *ibid*, 526 - Point IX.

<sup>448</sup> *ibid*, see the response of GB, which also bound India and NZ (527-28), Finland (527) and Czechoslovakia (529). See also the Conclusions Annexed to the Report of M Guerro, Rapporteur of the Committee of Experts for the Progressive Codification of International law (*ibid*, 252-53).

<sup>449</sup> C Hyde, *International Law: Chiefly as Interpreted and Applied by the United States* Vol II (Little, Brown, and Company Boston, 1922) 306-8; E Borchard, 'The Law of Responsibility of States for Damage Done in their Territory to the Person or Property of Foreigners' (1929) 23(2) Supplement: Codification of International Law AJIL 131, 167.

treatment of private foreign property during war ‘may be measured by the state’s obligation... to observe the rules of international law and of war’.<sup>450</sup> Also of note here is Eagleton, who handily summarized the customary standard of treatment of alien property during war:

The belligerent may requisition, but he must pay for what he takes; he may destroy or damage, but only... that property which, unless seized or destroyed, presents an obstacle to a military operation or jeopardizes the safety of his troops. If the belligerent does not observe these principles, he may be held responsible in international law, and may be called upon to make reparation...<sup>451</sup>

## **6. Modern Investments Treaty Provisions Incorporate Customary IHL Rules on Appropriation and Destruction of Private Property**

This section focuses on the treaty standard of treatment of investments during armed conflict as expressed in the language of the EWC. It is suggested that under the customary rules of treaty interpretation, the language ‘requisition by forces and authorities’ and ‘destruction not required by the necessity of the situation’ are terms of art that make a reference to customary law. Therefore, the meaning of the treaty rule in the EWC is ascertained through the content of the customary norms on requisition and destruction of foreign private property in wartime.<sup>452</sup> It is also suggested that an IHL-informed meaning of the EWC brings further clarity to practical, contested aspects of the provision, namely the burden of proof and the threshold of invocation.

Many investment instruments, including the instruments of conflict-ridden States contain explicit stipulations that prescribe a right to compensation under certain circumstances.<sup>453</sup> These treaty mechanisms are known as EWC. For instance, Article 9 of the Morocco – Nigeria BIT (2016) reads:

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<sup>450</sup> Borchard – Diplomatic Protection (n 385) 246.

<sup>451</sup> Eagleton and Dunn (n 392) 129-30.

<sup>452</sup> Chapter 7 returns to the language of the EWC in the analysis of compensation to foreign investors for losses to their property in armed conflict.

<sup>453</sup> This is how this provision is referred to by UNCTAD. According to publicly available information approximately 1,000 instruments contain EWC.

- 1) Investors of one Party whose investments in the territory of the other Party suffer losses due to war, armed conflict, revolution, state of national emergency, insurrection, civil disturbances or other similar events...
- 2) ... resulting from:
  - a) requisitioning of their property by its forces or authorities; or
  - b) destruction of their property by its forces or authorities, which was not caused in combat action or was not required by the necessity of the situation;shall be accorded restitution or adequate compensation.<sup>454</sup>

The cited language ordinarily indicates that such clauses encompass instances when, say, a Moroccan investment in Nigeria suffers losses owing to its destruction by Nigerian forces in the framework of a military operation against the Niger Delta Avengers.<sup>455</sup> This clause also covers the 'requisition' or 'destruction' of, say, a Nigerian investment in Morocco by Moroccan forces during a massive protest in Rabat. A separate question is what do these concepts of 'destruction' and 'requisition' mean in the context of investment treaties? As this is an interpretive issue, it is resolved by way of applying the customary rules of treaty interpretation, as codified in the VCLT.

The first element of the general rule of interpretation under VCLT Article 31 requires giving the terms of the treaty an ordinary meaning, i.e., identifying the 'regular, normal, or customary use of the term'.<sup>456</sup> The idea is that words are interpreted in the technical and professional meaning they have in the particularly relevant community of word-users.<sup>457</sup> Therefore, to ascertain the ordinary meaning of 'requisition' and 'destruction not required

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<sup>454</sup> Article 9 Morocco – Nigeria BIT (signed 3 December 2016, not yet in force). The following discussion focuses on the paragraph 2, while paragraph 1 and the standard of compensation under the EWC are addressed in chapter 7 below.

<sup>455</sup> B Muhammad, Hostilities in Nigeria's Niger Delta blamed on government neglect (*DW* 11 July 2017) <<http://www.dw.com/en/hostilities-in-nigerias-niger-delta-blamed-on-government-neglect/a-41270034>> accessed 2 May 2018.

<sup>456</sup> Article 31, VCLT; G Schwarzenberger 'Myths and Realities of Treaty Interpretation' (1968) 9 *Virginia Journal of International Law*, 1–19; O Dörr et al, *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) 543; R Gardiner, *Treaty Interpretation* (OUP 2017) 162–70.

<sup>457</sup> T Wälde, 'Interpreting Investment treaties: Experiences and Examples' in C Binder al (eds) *International Investment Law for the 21<sup>st</sup> Century* (OUP 2009) 771; 1966 Draft Articles on the Law of Treaties with Commentary (n 166) 542.

by the necessity of armed conflict', under Article 31(1), the interpreter is required to look not to dictionaries but to the manner in which these phrases were used in 'the parlance of lawyers'<sup>458</sup> 'in the particular context' of investment treaties,<sup>459</sup> i.e., to the technical meaning of these expression.

The analysis of State practice, jurisprudence, and doctrine in section 4 above demonstrates that in the first half of the 20<sup>th</sup> century, the language 'requisition by the armed forces' and 'destruction not required by the necessity of war' (and like formulations) was used in the context of State responsibility for losses to alien property during war as a reference to customary war law. Post-WWII authorities followed the same practice. The words of the Abs – Shawcross draft Convention on Investment Abroad may be taken as representative of the prevailing legal position in 1960, whereby 'the generally accepted laws of war delineated the treatment of aliens':<sup>460</sup> First, 'the destruction of or damage to the property of an alien is wrongful, unless it is required by the circumstances of urgent necessity'.<sup>461</sup> Second, 'requisition by the authorities' of foreign property is considered a 'valid exercise of belligerent rights' in return for compensation.<sup>462</sup>

Importantly, as with the language of Basis 21 of the Hague Codification Conference,<sup>463</sup> the term 'requisition' is used in modern investment instruments as a shorthand for appropriation of private property by the State's armed forces during armed conflict for military needs and against compensation. By using the term 'requisition' in investment treaties States do *not* intend to prescribe rules for the taking of investments in

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<sup>458</sup> G Gottlieb, 'The Interpretation of Treaties by Tribunals', ASIL Proceedings, 63<sup>rd</sup> Annual Meeting, 24–26 April 1969, 122, 131; U Linderfalk, *On The Interpretation of Treaties The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007) 65-7; *Aguas del Tunari v Bolivia*, ICSID Case No ARB/02/3, Decision on Jurisdiction, 21 October 2005, para 230.

<sup>459</sup> Gardiner (n 456) 291.

<sup>460</sup> H Abs and H Shawcross, 'Draft convention on investments abroad' (1960) 9(1) *Journal of Public Law*, 115-124, see Article V (Abs – Shawcross Draft Convention).

<sup>461</sup> L Sohn and R Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 545, 551-52 (Article 9)

<sup>462</sup> *ibid*, 553-56.

<sup>463</sup> (n 448)

occupation specifically.<sup>464</sup> In fact, ‘occupation’ is *not* enumerated under a single war clause as one of the ‘situations’ covered by the provision (eg: ‘war, armed conflict, revolution, state of national emergency’). That being so, there is no reason to assume that ‘requisition’ under the EWC pertains to a situation that is *not* stipulated in the provision (occupation) but does *not* pertain to any of the situations that are expressly covered by the provision.

Moreover, a strict-IHL reading of ‘requisition’ whereby the scope of takings covered by the EWC is *limited* to situations of occupation alone, leaving out all other prevalent forms of armed conflict, leads to an absurd outcome that cannot be reconciled with practice. Why would States address the protection of investments in belligerent occupation but not, say, in NIACs, the more prevalent type of hostilities? Arguably, some States (eg: Israel) might be interested in arranging the regulation of foreign investments in occupied territories, which may explain why a provision on requisition (*senso stricto*) will appear in their investment treaties. However, this does not explain over 1,000 other treaty mechanisms of States that have no involvement in occupation and no reason to arrange the regulation of dispossession of investments in occupation specifically.<sup>465</sup>

Accordingly, it is argued that the term ‘requisition’ in the EWC is a technical term with a ‘special’ meaning, in the sense of VCLT Article 31(4),<sup>466</sup> which is not the *jus in bello* ordinary meaning of the term. Although the VCLT does not explain how or where to find the special meaning of a

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<sup>464</sup> Articles 46-47, 52-54, 56, Hague Regulations Article 57, GC IV.

<sup>465</sup> On the applicability of the investment instrument (and EWC) to occupied territories, see: F Mayorga, ‘Occupants, Beware of BITs: Applicability of Investment Treaties to Occupied Territories’ (2017) 19(1) *Palestine Yearbook of International Law* 136-76 and D Costelloe, ‘Treaty Succession in Annexed Territory’ (2016) 65 *ICLQ* 343-78. See also: *Everest Estate v Russia*, PCA Case No 2015-36, Decision on Jurisdiction, 5 April 2017. However, see an opposite view whereby such treaties (and the EWC) arguably cannot apply to occupied territory: Case C-266/16 *Western Sahara Campaign UK v the Commissioners for her Majesty’s Revenue and Customs and the Secretary of State for the Environment Food and Rural Affairs* [2018].

<sup>466</sup> Article 31(4), VCLT. See further: G Haraszti, *Some Fundamental Problems of the Law of Treaties* (Akadémiai Kiadó 1973) 86; Linderfalk – Interpretation (n 458) 64-6; Villiger (n 168) 434; Wälde (n 457) 771. In investment arbitration, Article 31(4) was referred to in barely 1% of investment cases (J Weeramantry, *Treaty Interpretation in Investment Arbitration* (OUP 2012) 95 and Appendix III).



term,<sup>467</sup> it is suggested that Article 31(4) is likely to assume relevance where the ‘special meaning’ can be derived from materials and circumstances that are extrinsic to the treaty subject-matter of interpretation.<sup>468</sup> The above review of the materials of the 1930 Hague Codification Conference and contemporary treaty language reveals the intention of States to give the term ‘requisition’, in the context of investment protection, a broad meaning that encompasses appropriation of property during armed conflict by the State forces for military needs against compensation.

Overall, it is proposed that the meaning of the phrases ‘requisition by armed forces’ and ‘destruction of property not required by the necessity of the situation’ has a recognized meaning under international law, which references customary law. If the technical, be it ordinary or be it special, meaning of ‘requisition by armed forces’ and ‘destruction of property not required by the necessity of the situation’ references the customary standard of treatment of foreign property, then under the VCLT, the meaning of the EWC is ascertained by way of examining the content of the customary rules on the treatment of alien property.

A different interpretive route to an arguably similar outcome may be found in VCLT Article 31(3)(c), whereby the IHL norms on the appropriation and destruction of property are brought into the interpretive exercise by way of ‘taking it into account’ as a ‘relevant rule of international law’.<sup>469</sup> Indeed, the ILC proposed that, custom is ‘of particular relevance to the interpretation of a treaty under article 31(3)(c)’ where the ‘terms used in the treaty have a

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<sup>467</sup> Article 31(4) is rather focused on the burden of proving the ‘special meaning’. See: 1966 Draft Articles on the Law of Treaties with Commentary (n 166) 222-23; Third Report of the Special Rapporteur, Sir Humphrey Waldock (Sixteenth Session of the ILC (1964)), Doc A/CN.4/167 and Add.1–3, YBILC 1964, II, 5, 57; *Legal Status of Eastern Greenland (Denmark v Norway)* 1933 PCIJ Ser A/B No 53; I Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP 2009) 350.

<sup>468</sup> Weeramantry (n 466) 96; Dörr (n 456) 569-70.

<sup>469</sup> Article 31(3)(c), VCLT.

recognized meaning in customary international law<sup>470</sup> and the EWC is arguably one such case.

For the purpose of the present analysis suffice it to say that, for a certain legal instrument to be ‘taken into account’ under Article 31(3)(c) it must meet several cumulative admissibility conditions. It must be a rule of international law; which is relevant; and applicable; between the parties and their relations.<sup>471</sup> Briefly put, the concept of ‘rules’ encompasses treaties, custom, and general principles.<sup>472</sup> The notion of ‘parties’ denotes an overlap between the parties to the treaty subject-matter of interpretation and the other ‘rules of international law’.<sup>473</sup>

Finally, there seems to be a spectrum of ‘relevant rules’. On one end of the scale is the view that, ‘in order to be ‘relevant’ for purposes of interpretation, rules of international law [...] must concern the same subject-matter as the treaty terms being interpreted’,<sup>474</sup> while on the opposite end is the notion that almost all rules of international law are ‘relevant’ if treated with a certain amount of abstraction.<sup>475</sup> If a rule passes these admissibility hurdles it will be taken into account ‘together with the context’. Taking a rule ‘into account’ does not mean that it supplants the treaty language under examination.<sup>476</sup> This rather entails something on the continuum between

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<sup>470</sup> ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion International Law, Report of the Study Group of the International Law Commission. UN Doc A/CN.4/L.682 (2006).

<sup>471</sup> Article 31(3)(c), VCLT.

<sup>472</sup> WTO, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Reports of the Panel (29 September 2006), Para 7.67.

<sup>473</sup> Pauwelyn (n 62), 261-63; Linderfalk – Interpretation (n 458) 343-364; Gardiner (n 456) 270-275.

<sup>474</sup> WTO, *Peru – Additional Duty Imports of Certain Agricultural Products*, WT/DS457/AB/R, Report of the Appellate Body (20 July 2015) para 5.101.

<sup>475</sup> B Simma and T Kill, ‘Harmonizing investment protection and international human rights: first Steps towards a Methodology’ in (n 457) 696. For scholarship that followed this approach: A Bjorklund and A Reinisch (eds) *International Investment Law and Soft Law* (Edward Elgar 2012) 185-87; N Kline, ‘Human Rights and International Investment Law: Investment Protection as Human Right?’ (2012) 4 *GoJIL* 199-215; G Hernandez, ‘The interaction between investment law and the law of armed conflict in the interpretation of full protection and security clauses’ in (n 192) 29-30.

<sup>476</sup> *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v France)* (Merits) ICJ Rep 1 [2008], para 114

‘drawing inspiration’,<sup>477</sup> ‘consideration’,<sup>478</sup> and direct ‘application’, of this relevant rule.<sup>479</sup>

Thus, compared to the above-suggested interpretation technique of the language ‘destruction not required by the necessity of war’ and ‘requisition by the armed forces’ (and like formulations) through Articles 31(1) or 31(4), the relative weight of the interpretive technique of Article 31(3)(c) is rather limited. This proposition however should *not* be taken as a statement of a personal preference, but rather as a reflection of the customary rules on treaty interpretation. Put a different way, the two ways of bringing customary law into the process of interpretation entail different assessments and different effects.

If the language ‘destruction not required by the necessity of war’ and ‘requisition by the armed forces’ (and like expressions) has an identifiable (ordinary or special) meaning in international law, and it is argued that it does, then this should be accounted for through the language itself, not its context.<sup>480</sup> As one commentator explained:

In the argument by Article 31(1) or Article 31(4) the benchmark is the content of (the reference in) the treaty rule and the interpretative weight directly affects ordinary or special meaning. In the argument by Article 31(3)(c), the benchmark of admissibility is the subject matter of the treaty rule and the interpretative weight is limited to that of context.<sup>481</sup>

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<sup>477</sup> Article 60, African Charter on Human Rights and Peoples’ Rights, 21 ILM 58 (1982).

<sup>478</sup> V Vadi, *Cultural Heritage in International Investment Law and Arbitration* (CUP 2008) 266.

<sup>479</sup> P Sands, Treaty, custom and cross-fertilization of international law’ (1998) 1(1) Yale Human Rights Development Law Journal 85, 102.

<sup>480</sup> M Paparinskis, ‘Investment treaty interpretation and customary investment law: Preliminary remarks’ in (n 2) 77-9; A-M Carstens, ‘Interpreting Transplanted Treaty Rules’ in A Bianchi et al. (eds) *Interpretation in International Law* (OUP 2015) 238-40; E Bjorge, ‘The Vienna Rules, Evolutionary Interpretation, and the Intentions of the Parties’ in *ibid*, 197-99.

<sup>481</sup> M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP 2013) 159. See an example for this distinction in *Chevron v Ecuador*, UNCITRAL Case, Partial Award on Merits, 30 March 2010, para 242 (the Tribunal addressed the impact of the customary law of denial of justice on the treaty obligation which required the State to ‘provide effective means of asserting claims and enforcing rights’. On the point of

Overall, it is proposed that a VCLT-consistent interpretation, which is further supported by supplementary means of interpretation such as the historical development of the EWC,<sup>482</sup> leads to an IHL-informed meaning of the EWC as proposed above. Of course, it may be argued that even if in the mid-20<sup>th</sup> century States introduced the EWC to investment treaties with the intention to award them a recognized meaning under customary war law, modern instruments have no such intention.

Yet, it is submitted that if the treaty language itself makes a reference to customary law, pursuant to VCLT Article 31, then to preclude this reference and to award phrases, such as ‘destruction not required by the necessity of the situation’, a meaning *other than* their technical recognized meaning in customary law, it should be ‘established that the parties so intended’.<sup>483</sup> Such is the case with the use of the term ‘requisition’, for instance, which entails ‘appropriation of private foreign property for military needs during armed conflict’ and not the accepted meaning of ‘requisition’ under the law of occupation.

This is not the case however for the phrase ‘destruction of property not required by the necessity of the situation’ (and like formulations). As explained, there is nothing in the express treaty language, negotiations history, or the use of this treaty language over time to evince a clear intention of the parties to break from the customary IHL meaning of this phrase. On the contrary, this seems to be precisely the meaning that States awarded to this phrase over time.

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the interaction of treaty and custom, the Tribunal first concluded that the treaty rule did not make a reference to custom and only then proceeded to assess context). By contrast, see *Saluka v Czech Republic*, Partial Award, 17 March 2006, paras 305-310, where the Tribunal did not distinguish between the methods of reliance on customary law. There, the Tribunal assumed that a treaty norm concerning ‘deprivation’ made a reference to customary rule on expropriation and incorporated the customary qualifications to the treaty rule through its context (VCLT Article 31(3)(c)), not the meaning (Articles 31(1),(4)). See also: Paparinskis –Treaty interpretation (n 480) 74-5, 90-3.

<sup>482</sup> Article 32, VCLT.

<sup>483</sup> Article 31(4), VCLT.

The proposition that the language of the EWC makes a reference to customary law, pursuant to VCLT Article 31, has several conceptual and practical implications. Conceptually, what follows from the suggested interpretation is that the EWC deals with the obligation of States to pay compensation for lawful conduct and for unlawful conduct in the same breath. While compensation is prescribed as part of the primary rule for *any* requisition of investments insofar as it is carried out by the host State's forces or authorities, the EWC also mandates compensation for destruction that *fails* to comply with certain conditions ('not caused in' and 'not required by'), i.e., compensation as part of the secondary obligation.

Although it may not appear elegant, it is only logical that the EWC includes elements of both primary and of secondary rules of international law. International law, in particular the law on the protection of foreign property, did not develop under the strict separation between rules that address the scope and content of international obligation on one hand, and the rules that deal with the legal consequences of the breach of any such obligation, on the other. Rather, the treatment of foreign property and the international responsibility thereof were construed in an 'integrated' manner.<sup>484</sup> Traditional attitudes, such as those reflected in the materials of the 1930 Hague Conference, considered the subject of State responsibility as a matter concerned with injuries caused to foreigners.<sup>485</sup> Illustratively, Basis 21 as cited above dealt with State responsibility for lawful requisition *and* for unlawful destruction under the umbrella of a single rule.<sup>486</sup> The EWC essentially reiterates this 1930 'integrated' norm structure.

In practical terms, the reference to IHL means that the customary qualifications on dispossession are incorporated into the unqualified investment treaty provision.<sup>487</sup> Therefore, irrespective of treaty language

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<sup>484</sup> M Paparinskis, 'Investment arbitration and the law of countermeasures' (2009) 37(1) British Ybk Intl L 264, 307.

<sup>485</sup> F Paddeu, 'A Genealogy of *Force Majeure* in International Law' (2012) 82(1) British Ybk Intl L 381, 433.

<sup>486</sup> Rosenne (n 445) Basis 21.

<sup>487</sup> See: *Saluka v Czech Republic*, paras 254, 265.

which does not mention proportionality or humanity, destruction of foreign investments is in principle subject to an IHL proportionality assessment, which prohibits excessive destruction. Likewise, notwithstanding the treaty language, which does not mention 'military necessity', a *lawful* dispossession of foreign investments in armed conflict is only one that is justified by military necessity and against compensation. This also means that, as with compensation for lawful expropriation, the stipulation on the obligation to compensate in the EWC ('adequate compensation') is part of the primary obligation.<sup>488</sup>

In turn, this potential resemblance between the EWC and expropriation raises the question of the interaction between both forms of property dispossession and the question whether the expropriation provision deems the EWC redundant. This concern over the possible redundancy of the EWC arises from the fact that while provisions that deal with the transfer of title and/or outright physical seizure of property are commonly known as 'expropriation clauses', they encompass other takings.<sup>489</sup> Different concepts, such as 'expropriation', 'taking', 'nationalization', 'deprivation', 'dispossession', or a combination thereof,<sup>490</sup> can be encountered in investment instruments. These terms are often used interchangeably with no clear elucidation as to their differences;<sup>491</sup> their use typically depends on legal tradition and translation. Potentially, the

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<sup>488</sup> This issue is addressed in chapter 7.

<sup>489</sup> Notably, foreign assets may be subjected to trade and establishment restrictions involving licensing or quotas, anti-trust limitations, consumer protection laws, environmental standards, and even land planning. Although these measures affect the ability to own or enjoy assets and are essential to the efficient functioning of the State, they are not necessarily expropriation (Sornarajah (ibid) 374; J Crawford, *Brownlie's Principles of Public International Law* (8<sup>th</sup> edn. OUP 2012) 621)

<sup>490</sup> Article 1110, NAFTA.

<sup>491</sup> UNCTAD proposed that, 'while "nationalizations" are undertaken for political purposes and may often affect entire sectors of the economy, "expropriations" are takings that are often limited to one specific firm and do not have a political background' (UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, 134 at n 69) (UNCTAD 2007) <[https://unctad.org/en/Docs/iteiia20065\\_en.pdf](https://unctad.org/en/Docs/iteiia20065_en.pdf)> (accessed 20 September 2017). A similar view is espoused by M Sornarajah, *The International Law of Foreign Investments* (2<sup>nd</sup> edn CUP 2010) 347-48.

dispossession of private property in armed conflict may be said to be covered by the wide concept of 'expropriation'.

However, the regulation of expropriation does not negate the need for rules on appropriation of investments in armed conflict. While 'requisition' is a form *sui generis* of expropriation for reasons of public utility that requires compensation, it substantively differs from expropriation. First, whereas expropriation may be grounded in various national priorities including health and safety, environmental consideration, and political agenda, the only national need that is capable of justifying appropriation of property (whether requisition, seizure, angary, etc.) in hostilities is military necessity.<sup>492</sup>

Second, expropriation must also comply with due process. Dispossession of property under IHL is not conditioned upon these qualifications. In the case of requisition, in contrast to expropriation, the investor is not entitled to, say, an independent right of review or prior notification. In practical terms this means that a taking for a legitimate purpose against compensation that is lacking in due process may constitute lawful requisition but unlawful expropriation. Hence, the expropriation provision and the EWC do not fully overlap.

An additional consequence that arises from the proposition that the EWC references customary law concerns the stringency of the treaty standard. Any legal norm may be made more or less stringent through the formulation of different burdens of proof, evidentiary standards, and thresholds of invocation.<sup>493</sup>

Placing the EWC in the broader normative framework of IHL assists to elucidate the burden of proof under the EWC. It clarifies how to construe the language 'destruction of property...that was not required by the necessity of the situation' with respect to the burden of proof. This language

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<sup>492</sup> Articles 46-47, 52-54, 56, Hague Regulations; Borchard – Private pecuniary claims (n 385) 122; Bin Cheng, *General principles of Law* (CUP 1987) 40-2.

<sup>493</sup> R Goodman, 'The Power to Kill or Capture Enemy Combatants' (2013) 24(3) EJIL 819, 828.

may be taken to establish a presumption of illegality, whereby the State must show that the destructing measure was necessary to accomplish a military purpose. Alternatively, this language may be construed as a presumption of legality under which the destructing measure is assumed to be lawful unless it is established that the measure was unnecessary to accomplish a military purpose. The former assumption disfavors the State, while the latter presumption favors the State. In this respect Eagleton proposed that, 'the wording of the Hague Convention', which is referenced by the treaty language of the EWC, 'makes it reasonable to say that the burden of proof is upon the belligerent to show that his seizure or destruction of private property was imperiously demanded by the necessities of war'.<sup>494</sup>

Further, placing the EWC in the broader normative framework of IHL assists to ascertain the threshold of the provision's invocation, as it brings further clarity to the meaning and role of the qualifiers of 'necessity', which may allow, in exceptional cases, to destroy property. In IHL instruments, the threshold of invocation of military necessity varies from 'necessity' (unqualified) through 'imperative necessity' under Article 23(g) of The Hague Regulations<sup>495</sup> to 'absolute necessity' and like formulations.<sup>496</sup> In contrast to IHL instruments, the EWC usually instructs that destruction that is 'necessary' (unqualified) will not invoke the responsibility of the State. Arguably, the use of qualifiers implies that IHL sets a different, potentially higher threshold of invocation relative to the unqualified EWC, thereby also raising the question of the interaction between the unqualified treaty rule and the customary standard.

On this point, it is suggested that both the unqualified 'necessity' under the EWC and the 'imperative' threshold under The Hague Law, represent the same standard, since under IHL the qualifier 'imperative' is

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<sup>494</sup> Eagleton and Dunn (n 392) 135.

<sup>495</sup> Article 23(g), HR ('destruction or seizure be imperatively demanded by the necessities of war').

<sup>496</sup> Article 42, GC IV.



conceived as a cosmetic, not a substantive adjective. In fact, the same question arose with respect to the Statute of the International Criminal Court (ICC), which instructs that, destruction of property is not punishable under Articles 8(2)(b)(xiii) and 8(2)(e)(xii) if it is 'imperatively demanded by the necessities of war'.<sup>497</sup> Schabas explained that the language 'imperatively demanded by the necessities of war' is 'an archaic expression borrowed from the 1907 Hague Convention'.<sup>498</sup> Dinstein went even further and asserted on this point that, 'the modern tendency is to regard all such adverbs [i.e., 'absolute' and 'imperative' necessity] as synonymous and self-evident, and, therefore, redundant'.<sup>499</sup> The same is true for the 'necessity' of the EWC and its reference to customary law on the treatment of aliens.

However, propositions as those expressed above have led some commentators to opine that EWCs 'are arguably superfluous in light of the protection afforded private property under the laws of war'.<sup>500</sup> But this is not accurate. First, the incorporation of custom into treaties removes any ambiguity over the acceptance of the customary rule, and its scope of application to investments.<sup>501</sup> Additionally, incorporation of custom ensures that the [customary] standard as applied to covered investment 'is

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<sup>497</sup> Articles 8(2)(b)(xii), 8(2)(e)(xiii), Rome Statute.

<sup>498</sup> Schabas (n 419) 294. See also *Prosecutor v Katanga*, para 894 and note 2116.

<sup>499</sup> Y Dinstein, 'Military Necessity', in (n 31) paras 12-3.

<sup>500</sup> S Gudgeon, 'United States Bilateral Investment Treaties: Comments on Their Origin, Purpose, and General Treatment Standards' (1986) 4 Int'l Tax & Bus L 105, 128. In footnote 83, the author refers specifically to the Hague instruments and their subsequent codification in API. See also: L Sohn and R Baxter (n 461) 551.

<sup>501</sup> *ELSI*, ICJ Pleadings Vol II (Italian rejoinder), pp 39-40, 390-92, 469; *ELSI*, Oral arguments, 27 November 1987, arguments for the US, pp 92-3, 111-13; *United States Diplomatic and Consular Staff in Tehran*, oral arguments on the request for the indication of provisional measures 10 December 1979, arguments for the US, pp 25-6; *United States Diplomatic and Consular Staff in Tehran*, oral arguments, 18, 20 March 1980, arguments for the US, pp 273, 284, 296; *Military and Paramilitary Activities*, ICJ Pleadings Vol IV, (Nicaraguan memo), paras 398-400; *Case concerning Oil Platforms (Iran v US)*, Public Sitting 19 February and 5 March 2003, CR 2003/17, paras 12, 25.60-25.63, respectively; Wälde (n 457) 742.

enforceable through the investor-state and state-state disputes provisions'.<sup>502</sup>

Further, that the EWC references customary law by way of using technical terms of art with a recognized meaning under The Hague Law does not mean that modern investment instruments should be interpreted in accordance with 1907 war law. Of course, States are free to agree that a treaty norm is to be interpreted in accordance with customary law as it stood at a certain point in time.<sup>503</sup> But the EWC does not explicitly reflect any such agreement. In fact, seeing as war law, and its exclusive focus on military necessity, has evolved considerably since The Hague Law into modern humanitarian law,<sup>504</sup> it is absurd to propose that 21<sup>st</sup> century EWCs intend to apply war law norms, which modern war law itself no longer recognizes.

It is suggested that the interpretation of the language of the EWC as a reference to customary law, pursuant to VCLT Articles 31(1) and 31(4), accommodates flexibility and allows for development. Thus, if the customary rules on requisition and destruction of property evolve, and indeed The Hague Law has evolved in the Geneva Law as discussed in the next chapter 4, then the treaty reference will reflect any such change.

## **7. Conclusion**

This chapter focused on dispossession and destruction of foreign investments under the paradigm of hostilities.

It was established that under IHL, States have a broad authority to interfere, subject to certain qualifications, with the right to use, own, or control a foreign investment. Under customary war law as codified in The Hague Law, appropriation is lawful if it is required by military necessity and against compensation. Destruction of property is, conversely, prohibited.

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<sup>502</sup> K Vandevelde, *Bilateral Investment Treaties: History, Policy, and Interpretation* (OUP 2010) 232-33.

<sup>503</sup> *Mondev International Limited v US*, ICSID Case No ARB(AF)/99/2, Award, 11 October 2002; *ADF Group Inc. v US*, ICSID Case No ARB(AF)/00/1, Award, 9 January 2003, para 179; *Waste Management v Mexico* ("Number 2"), ICSID Case No ARB(AF)/00/3, Award, 30 April 2004, paras 93-5.

<sup>504</sup> See the discussion in chapters 1(5) above and 4(2) below.

Exceptionally, property may be destroyed only when required by military necessity and subject to a proportionality assessment. Because destruction of property is prohibited as a rule, in contrast to requisition, when the destruction is lawful for military needs it does not denote compensation. It was then established that these IHL rules infiltrated the law on the protection of foreign property abroad during the 20<sup>th</sup> century and shaped the customary standard of treatment of foreign property during war. The practical implication of this historical development is that, today, IHL is effectively incorporated in the language of the EWC.

In broader terms it may be said that the one important practical take away from this discussion is that the assessment of the international responsibility of the State for lethal measures that result in the total or partial dispossession (including destruction) of foreign investments is in principle no different than the assessment of the State's responsibility for lethal measures that result in the loss of life. First, the applicable legal paradigm must be established (paradigm of hostilities or the paradigm of law enforcement). Then, the measure at issue ought to be properly characterized (confiscation, seizure, requisition, destruction, etc.) so as to identify the qualifications against which the lawfulness of the conduct is to be assessed. Only then, can it be determined whether the international responsibility is invoked for the conduct at issue.

And so, just as it cannot be said that every State measure that results in loss of life is a violation of international law on grounds that it is an arbitrary deprivation of life in breach of human rights law (any more than it can be presupposed that every loss of life is necessarily lawful incidental damage), *it cannot be said that every taking of property in armed conflict is either lawful or unlawful expropriation*. The law of armed conflict recognizes a range of various interferences with private property that differ by their qualifications from expropriation. Ignoring this fact risks holding a State responsible under international law where its responsibility simply does not arise.

On a higher level of abstraction, this analysis demonstrates one, complementary level of interaction between IHL and investment law. It was argued that the codification of war law in the Hague instruments facilitated a progressive development of the law on State responsibility for damage to foreign property, which eventually resulted in the formation of a customary standard of treatment. Today, investment treaties incorporate this customary standard in the EWC. Thus, the historical backdrop allows us to interpret IHL and investment law norms in a compatible manner and thus, to 'avoid' (in the sense of chapter 1) a potential conflict between IHL and investment law norms.

## Chapter 4

### The Treatment of Foreign Investment under the Contemporary Law of Targeting

#### 1. Introduction

Chapter 3 addressed the IHL rules on the protection of private property as reflected in The Hague Law and the interaction of those rules with customary and conventional standards of investment protection. That chapter concluded with the proposition that IHL is ever-developing and that any such development also affects the protection of investment in warfare. In continuance, this chapter addresses several such developments in the contemporary law and policy of targeting. *Targeting* describes the deliberate process followed by a military commander in deciding against which objectives she will apply force. Hence, the act of *targeting* is distinguished from the conduct of *attacking a target*, which is the actual application of force.<sup>505</sup>

In contrast to The Hague Law, subject of chapter 3, the Geneva Conventions and the Additional Protocols do not speak in terms of ‘property’ but in terms of ‘objects’. While the Hague Law regulates the treatment of private ‘enemy’ and ‘neutral’ property, the Geneva Law regulates the treatment of ‘civilian objects’, which are protected from direct attacks, and ‘military objectives’ that may be targeted under certain circumstances. As a preliminary step, therefore, section 2 addresses the relationship between the concepts of ‘property’ and ‘objects’ and the interaction between the Hague Laws and the Geneva Law as regards targeting.

Establishing in section 2 that the rules on the protection of objects from attacks under the Geneva Law operationalize the rules on the protection of private property under The Hague Law, section 3 proceeds to focus on API Article 52. Article 52(1) instructs that, ‘civilian objects shall not be the object of attack’ and that ‘civilian objects are all objects which are not

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<sup>505</sup> Henderson (n 40) 19-20; W Boothby, *The Law of Targeting* (OUP 2012) section 1.2.

military objectives'. If so, to ascertain whether a certain artefact is protected from an attack, it is necessary to determine if it is a military objective. Accordingly, section 3 focuses on API Article 52(2), which defines a 'military objective' using a two-pronged test. At the next step, the discussion focuses on the classification of investments as targets in today's reality of belligerency. The discussion examines two contentious classes of targets that emanate in practice from the ambiguity over the definition of 'military objective' under API Article 52: dual-use objects (section 4) and revenue-generating objects (section 5).

Overall, it is not the purpose of this chapter to cover the entire body of international law concerning target selection during international armed conflict, but rather to provide a contemporary and more detailed analysis of the law concerning targeting that applies to conflict-ridden host States specifically, and thereby to provide a broader analytical framework of the normative reality in which investments operate during hostilities. This analysis demonstrates that in modern warfare, foreign investments in certain economic sectors are particularly prone to classification as military objectives, which may be subject to lawful attacks. Such war practices appear to directly contradict concomitant standards of investment protection and undermine investment promotion and facilitation policies. Aware of this, this chapter cautiously suggests that foreign investment law and policy may be used to induce States to observe certain limits when engaging in armed violence, and thus investments serve as an informal restraining qualification on the conduct of hostilities.

## **2. The Interaction between The Hague Law and the Geneva Law on Targeting**

This section explains the interaction and normative link between the discussion in chapter 3 above and the analysis of targeting in this chapter 4. It elucidates that while The Hague Law (as addressed in chapter 3) circumscribes the destruction of property by 'imperative military necessity', modern IHL rules on targeting spell-out that 'military necessity', with respect

to attacks on targets, means that only property that makes an effective contribution to military action may be destroyed, and only if such destruction in the circumstances ruling at the time, offers a definite military advantage. Thus, to examine whether a destruction of property (including foreign investments) 'was required by the necessity of the situation' under the EWC, in some circumstances it is necessary to assess whether this property (including foreign investment) is a 'military objective' susceptible to targeting.

To so assert, this discussion of the law of targeting must start with some account of the sources of that law, and of how those sources relate to one another. Accordingly, before dealing with the content of the rules of API on targeting, this section addresses the relationship between these rules and the aforementioned Article 23(g) HR, which prohibits destruction of property unless required by imperative military necessity.

Relative to antiquity when the sovereign exercised unlimited powers over the property of the vanquished party, The Hague Law represents a move toward humanitarianism. Nonetheless, the Law of the Hague was drawn up at a time when attitudes on private property in times of armed conflict reflected prevailing notions of 'laissez-faire and a clear separation between the property of the sovereign and that of individuals', and the provisions of the Hague Regulations reflect these attitudes.<sup>506</sup> The Geneva Law developed some of these perceptions and attitudes. In contrast to The Hague Law, the 1949 and 1977 instruments do not speak in terms of 'property',<sup>507</sup> let alone 'enemy property', but rather in terms of 'objects' and 'objectives'. Under the principle of distinction – the cornerstone of the modern law of armed conflict – attacks are permitted only against 'military objectives', whereas 'civilian objects' shall not be the object of deliberate attacks. However, while the Geneva Conventions repeatedly refer to

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<sup>506</sup> D Kretzmer, 'The Advisory Opinion: The Light Treatment of International Humanitarian Law' (2005) 99 AJIL 88, 95-6.

<sup>507</sup> For sake of completeness, the composite term 'cultural property' is used in the Geneva instruments.

‘military objectives’,<sup>508</sup> they do not define the term. Such a definition is provided only in API Article 52. For this reason, the discussion of target selection under the Geneva Law is conducted within this ambit.

The ordinary meaning of the term ‘object’ denotes ‘something that is visible and tangible’,<sup>509</sup> distinguished from abstract notions such as the goals and aims of the conflicting parties.<sup>510</sup> In a similar vein, the concept of ‘objectives’ under IHL does not mean goals, desired achievements, or purposes, as under colloquial, everyday language, but rather concrete artefacts. On the point of this special meaning, the ICRC Commentaries to API elucidate that ‘both the English and French texts [of API] intended tangible and visible things by the word ‘objective’, and not the general objective (in the sense of aim or purpose) of a military operation’.<sup>511</sup>

Mindful of the discussion in chapter 3, it appears that the concepts of ‘object’ and ‘objective’ at the core of the Geneva Law partially overlap with the notion of ‘property’ which is the subject-matter of the Law of The Hague. This implies that two concomitant sets of rules regulate the treatment of a given article in armed conflict. Thus, the destruction of an artefact is potentially regulated by the Article 23(g), under which destruction of property is permitted only when it is required by imperative military necessity, *and* by API Article 52(2), which permits attacks that may result in total or partial destruction of an object, only if this object qualifies as a military objective. But how do HR Article 23(g) and API Article 52(2) interact?

There are several views on this point. Henderson, for one, opined that, while the rules on property protection under The Hague Law ‘are still in force and indeed considered to represent customary international law...

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<sup>508</sup> Eg: Article 19, GCI.

<sup>509</sup> Y Sandoz et al (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) paras 2008-2010 (‘API Commentary’).

<sup>510</sup> M Sassòli, ‘Military Objectives’, in (n 31) para 9.

<sup>511</sup> API Commentary (n 509) para 2010.



API has superseded' them.<sup>512</sup> As an example, he suggested that because 'Article 52 API provides the same protection for undefended towns' as that mandated by HR Article 25, which deals with the protection for undefended towns, villages etc., from attack or bombardment,<sup>513</sup> 'there is no need to consider separately article 25 when considering the lawfulness of an attack'.<sup>514</sup> In this example, an undefended town would not meet the definition of military objective in Article 52(2) API; 'and therefore would be a civilian object for the purposes of article 52(1) API; and therefore would be protected from attack in accordance with article 52(1) API'.<sup>515</sup>

The ILA study group on 'The conduct of hostilities under international humanitarian law'<sup>516</sup> suggested that 'Article 23(g) HR and Article 52(2) API, if considered singularly, are quite distinct'. However, the Report of the Study Group goes on to suggest that both provisions reflect 'identical' customary norms, and therefore, 'today in the conduct of hostilities any destruction due to attacks against property is exclusively regulated by the rule contained in Article 52(2) API'.<sup>517</sup> This proposition led the Study Group to conclude that, 'in situations of hostilities, imperative military necessity does not allow attacking an object that does not constitute a military objective under Article 52(2) API and the corresponding rule of customary law'.<sup>518</sup> Dederer, as another example, suggests that the rules on the destruction and appropriation of enemy property under The Hague Law are 'flanked' – but not supplanted or negated – 'by the more modern principle of distinction, which has become a norm of customary international law as well'.<sup>519</sup>

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<sup>512</sup> Henderson (n 505) 25.

<sup>513</sup> Article 25, HR.

<sup>514</sup> Henderson (n 505) 25.

<sup>515</sup> *ibid.*

<sup>516</sup> Gill T et al, 'The conduct of hostilities under international humanitarian law: Challenges of 21st century warfare (International Law Association Study Group on the Conduct of Hostilities in the 21st Century) (2017) 93 International Law Studies 322.

<sup>517</sup> *ibid.*, 348.

<sup>518</sup> *ibid.*, 349.

<sup>519</sup> H-G Dederer, 'Enemy Property' in (n 31) para 14.

These views are not mistaken, but they are not accurate either. It is suggested that API Article 52 does not ‘supersede’ the rules on the protection of property under the Hague Law *per se*. The concomitant existence of these rules is evidenced *inter alia* in the separate provisions of the Rome Statute. Article 8(2)(b)(ii) concerns the principle of distinction while Article 8(2)(b)(xiii) addresses destruction of enemy property.<sup>520</sup> API does not flank Article 23(g) either. Although there is some overlap in the scope of both norms, there are also practical<sup>521</sup> and conceptual<sup>522</sup> distinctions between the two.<sup>523</sup>

For the purposes of the present discussion it is suggested that API Article 52(2) operationalizes the notion of military necessity under Article 23(g) HR in the context of targeting. While HR Article 23(g) circumscribes the destruction of property by ‘imperative military necessity’, API Article 52(2) spells-out that ‘military necessity’ with respect to ‘attacks’ on targets means that only property that makes ‘an effective contribution to military action’ may be destroyed, and only if such destruction ‘in the circumstances ruling at the time, offers a definite military advantage’.<sup>524</sup> A similar rationale

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<sup>520</sup> Articles 8(2)(b)(ii) and 8(2)(b)(xiii), Rome Statute.

<sup>521</sup> Col. N Neuman, ‘Challenges in the Interpretation and Application of the Principle of Distinction During Ground Operations in Urban Areas’ (2018) 51(807) Vanderbilt Journal of Transnational Law 807, 824. He suggests that Article 23(g) ‘can certainly explain incidental and unintentional force, especially concerning acts such as moving tanks through narrow streets, or breaching tactics, when the act is imperatively demanded by the necessities of war’.

<sup>522</sup> Hayashi – Military necessity (n 411) 110–14. He argues that destroying property and attacking property are distinct conducts: ‘Property destruction is militarily necessary only if it is required for the attainment of a military purpose [...] In other words, military necessity justifies the property’s destruction, whereas the property’s status as a military objective justifies attacks being directed against it. The acts of destroying property and attacking property are conceptually distinct from each other because the notions of military necessity and military objectives are conceptually distinct from each other’.

<sup>523</sup> Arguably, the purpose behind the destructing conduct informs the applicable legal analysis. Where the purpose of the act of violence is to target an object (or property) then this attack shall be assessed under API Article 52(2) while the lawfulness of any incidental damage to civilian objects thereof shall be analyzed under the customary rules of precautions in attack and proportionality. In contrast, when the destruction of the property is an incidental damage due to, say, the movements of heavy armored vehicles in an urban area or the as a result of the breach of walls in the attempt to avoid possible booby-trapped doors, the damage to this property shall be governed by the prohibition to destroy property unless when required by imperative necessity under Article 23(g) (Neuman (n 521) 824).

<sup>524</sup> Article 52(2), API.

was followed in *Katanga*. The Trial Chamber explained that property which is ‘protected from the destruction or seizure under international law of armed conflict’ in the sense of Article 23(g) is a ‘civilian object’, i.e., property that does not meet the definition of a military objective under API Article 52(2).<sup>525</sup> Hence, whether private foreign property is protected from or subject to *targeting* turns on its classification as a ‘civilian object’ under Article 52.

### **3. Target Classification under API Article 52(2)**

It follows from the conclusion of the previous section that the treatment of investments under the modern law of targeting is mostly circumscribed by the rules on the treatment of objects and military objectives. Accordingly, this section analyzes the definition of ‘military objective’ as prescribed in API Article 52(2). The inferences from this discussion are then used in sections 4 and 5 to assess when, in the contemporary practice of targeting, belligerents may target foreign investments and when are investments classified as ‘civilian objects’ that cannot be targeted.

IHL does not define ‘civilian objects’. This concept is defined *a contrario*; a civilian object is one which is not a ‘military objective’.<sup>526</sup> This means that to learn what a protected object is, it is first necessary to identify what is a targetable objective. Article 52(2) API, which is widely recognized as customary law,<sup>527</sup> sets out the two-pronged definition of ‘military objectives’, whereby:

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<sup>525</sup> In *Katanga*, the Trial Chamber explained that, ‘to fall within the ambit of article 8(2)(e)(xii) of the Statute, partially or totally destroyed property must be protected by the international law of armed conflict, that is, it must not constitute “military objectives” (*Prosecutor v Katanga*, para 893). See also: Schabas (n 419) 293-94.

<sup>526</sup> Article 51(1), API.

<sup>527</sup> ICRC – Customary IHL Study (n 38) Practice on Rule 8. See also: Henderson (n 505) 51; S Oeter, ‘Methods and Means of Combat’ in D Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (3<sup>rd</sup> edn, OUP 2013) 170-71, s 443; S Sivakumaran *The Law of Non-International Armed Conflicts* (OUP 2012) 344; J Gaudreau, ‘The reservations to the Protocols additional to the Geneva Conventions for the protection of war victims’ (2003) 849 IRRC 143, 159-60; Y Dinstein, ‘Legitimate Military Objectives in the correct *jus in bello*’ (2002) 78 International Law Studies 140; H Robertson, ‘The Principle of the Military Objective in the Law of Armed Conflict’ (1997) 8 US Air Force Journal of Legal Studies 35, 36-8.

[M]ilitary objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action *and* whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>528</sup>

The language of Article 52(2) illuminates a significant aspect of the definition of ‘military objectives’ under IHL. While API prescribes a two-pronged test for assessing whether something is a military objective, in no case does Article 52 provide that an object is *ipso facto* a military objective. This means that target selection is always fact-based and context sensitive.

Under the first prong of Article 52(2) API, the targetability of an object is determined by the examination of its use and function with the armed forces.<sup>529</sup> In this sense, an object can offer an ‘effective contribution’ to the military in four possible ways – nature, location, purpose, or use.<sup>530</sup> The criterion of ‘location’ concerns the geographical features of the object.<sup>531</sup> Civilian buildings, for instance, may become military objectives if they obstruct the field of fire for an attack on another valid military objective.<sup>532</sup>

An object that is ‘owned or usually controlled’ by the armed forces,<sup>533</sup> and possesses ‘intrinsic military significance’,<sup>534</sup> would qualify as a military objective by its ‘nature’.<sup>535</sup> Such objects may include headquarters, military aircraft, and enemy warships.<sup>536</sup> ‘Use’ refers to the object’s actual usage by the forces, i.e. whether it is presently used militarily either by the military itself or in a manner which benefits the forces.<sup>537</sup> Finally, ‘military purpose’ is construed from an established intention of the belligerent as regards ‘future’ use. The purpose of an object refers to the adversary’s known

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<sup>528</sup> Article 52(2) API; emphasis added.

<sup>529</sup> Henderson (n 505) 55.

<sup>530</sup> M Schmitt, ‘Fault Lines in the Law of Attack’ in S Breau and A Jachec-Neale (eds), *Testing the Boundaries of International Humanitarian Law* (BIICL 2006) 277, 278-80.

<sup>531</sup> *ibid*, 280.

<sup>532</sup> Robertson (n 527) 49.

<sup>533</sup> API Commentary (n 511) para 2020.

<sup>534</sup> Schmitt – Fault Lines’ (n 530) 280.

<sup>535</sup> API Commentary (n 509) paras 2020-2021; Dinstein – Legitimate military objectives (n 527) 145-47; Henderson (n 505) 55-6.

<sup>536</sup> Unless these objects were specifically exempt, eg, if aircrafts are used for medical transport.

<sup>537</sup> Schmitt – Fault Lines’ (n 530) 280; Henderson (n 505) 59.

intentions, not to ‘those figured out hypothetically in contingency plans’.<sup>538</sup> In practice, it is often more than one feature that will inform the target’s assessment. For instance, a tank is an object that is regularly used militarily, but its remote location from the battlefield, for instance, will reduce its relative military contribution.<sup>539</sup>

Notably, the focus of the first prong is on the ‘effective contribution’ of the object, while it is ‘far less important to be able to pigeonhole’ how that contribution arises under one of the words nature, location, purpose or use.<sup>540</sup> For the purposes of this discussion it is enough to explain that, ‘effective’ does not denote a linear correlation or a direct causation between the object and its military contribution. It is mostly accepted that ‘effective contribution’ entails a ‘proximate nexus’ between the object and the war-fighting.<sup>541</sup> The original wording of the provision, as suggested by the ICRC, was concerned with objects that ‘contribute effectively and *directly* to the military effort’.<sup>542</sup> This qualifier however was deliberately omitted.<sup>543</sup> It follows that ‘effective contribution’ comprises not only direct, but indirect contributions to the military action.<sup>544</sup> However, how indirect may any such contribution be is contentious, as further addressed below.

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<sup>538</sup> API Commentary (n 509) para 2022; Schmitt – Fault Lines (n 530) 280; Dinstein – Legitimate military objectives (n 527) 148; Henderson (n 505) 59-60; Sivakumaran (n 527) 344.

<sup>539</sup> Another example is the Six Day War of 1967 when Israel destroyed the Egyptian Bombers within a few days. Against such backdrop, absent bombers to shoot them, even Egyptian air missiles, which just like tanks, are likely to offer an effective contribution by their nature and thereby be classified as military objectives, cannot be classified as targets, since they cannot be used militarily at present or in the concrete future.

<sup>540</sup> Henderson (n 505) 54

<sup>541</sup> Dinstein – The conduct of hostilities (n 415) 87; Schmitt – Fault Lines (n 530) 28; Sivakumaran (n 527) 344-5.

<sup>542</sup> ICRC, ‘Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts’ (Second Session, Geneva, 3 May-3 June 1972) Report on the Work of the Conference Vol I (Geneva 1972) 146-47 para 3.141.

<sup>543</sup> *ibid.*

<sup>544</sup> Human Rights Watch, ‘Needless Deaths in the Gulf War: Civilian Casualties during the Air Campaign and Violations of the Laws of War’, pt 1, ch 1 (1991) <<https://www.hrw.org/reports/1991/gulfwar/CHAP1.htm>> accessed 29 March 2017; Human Rights Watch, ‘Off Target: The Conduct of the War and Civilian Casualties in Iraq II’ (11 December 2003) <<https://www.hrw.org/report/2003/12/11/target/conduct-war-and-civilian-casualties-iraq>> accessed 30 July 2017.

Whereas the first prong is concerned with the permitted classes of targets, the second part offers ‘tailor-made’ criteria for the assessment of military necessity with regard to objects. Under the second-prong of Article 52(2), it is necessary to determine that given the circumstances ‘ruling at the time’, the ‘total or partial destruction, capture or neutralization’ of the objective ‘offers a definite military advantage’ to the military ‘action’. The language ‘circumstances ruling at the time’ is inherent to IHL and to the notion that a conduct in warfare is to be assessed in consideration to all factors and existing possibilities as they appeared to the commander at the time.<sup>545</sup>

Article 52(2) clarifies that a ‘definite advantage’ ought to be of a ‘military’ category, characteristic, or nature. This ‘military’ modifier is substantive. It excludes economic, civil, political, or national advantages from the scope of Article 52(2) API.<sup>546</sup> At the same time, it is widely accepted that a military advantage is not restricted to ‘tactical gains’; the spectrum is necessarily wide, and it extends to the security of the attacking force.<sup>547</sup> The qualifier ‘definite’ (‘military advantage’) is used as a term of limitation that requires a perceptible military advantage rather than a ‘hypothetical and speculative one’.<sup>548</sup> This means that there should be a reasonable connection between the destruction of property and the overcoming of the enemy forces.<sup>549</sup> Further, the drafting history of Article 52(2) API teaches

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<sup>545</sup> *US v List*, 234; E Jensen, ‘Article 58 and Precautions against the Effects of Attacks in Urban Areas’ (2016) 98 IRRC 147, 166.

<sup>546</sup> St. Petersburg Declaration (n 42) Preamble, prohibits any forms of economic activities; API Commentary (n 509) para 2018; Henderson (n 505) 61; Dinstein – The conduct of hostilities (n 415) 108; M Schmitt, ‘Targeting Narcinsurgents in Afghanistan: The Limits of International Humanitarian Law’ (2009) 12 Yearbook of International Humanitarian Law 30, 314.

<sup>547</sup> J Burger, ‘International humanitarian law and the Kosovo crisis: Lessons learned or to be learned’ (2000) 82 IRRC 129, 132; Dinstein – Legitimate military objectives (n 527) 144; DoD LOAC Manual (n 34) Section 5.7.7.3; ICRC – Customary IHL Study (n 38) practice relating to Rule 8.

<sup>548</sup> Henderson (n 505) 63; Dinstein – The conduct of hostilities (n 415) 106; Sivakumaran (n 527) 346; Melzer (n 411) 292-93; Bothe et al – New rules for victims of armed conflicts (n 42) 367.

<sup>549</sup> St. Petersburg Declaration (n 42) Preamble; Bothe et al (ibid) 367; Henderson (n 505) 62; Sivakumaran (ibid) 346-47.

that an ‘extensive discussion took place’ before agreement was reached on the word ‘definite’. Among the qualifiers that had been considered and rejected at the Diplomatic Conference were – ‘distinct’, ‘direct’, ‘clear’, ‘immediate’, ‘obvious’, ‘specific’, and ‘substantial’.<sup>550</sup> The intentional rejection of these adjectives indicates that Article 52(2) API aims at a lower standard; ‘something that is capable of articulation and evaluation, rather than something that is, in a sense, certain or bound to happen’.<sup>551</sup>

In sum, while the term ‘military objectives’ effectively informs the targetability of any private property, including investments, this definition of the concept leaves a lot to be desired. Each part of the multifaceted definition of Article 52(2) lends itself to ambiguity, which has resulted in practice in the formation of several controversial classes of targets, namely dual-use and revenue-generating targets.

#### **4. Targeting Investments under the Concept of Dual-Use Objects**

This section focuses on the classification of foreign investments under a controversial class of targets – ‘dual-use objects’. First, the section briefly outlines the meaning of ‘dual-use objects’ and the linguistic anchors of Article 52(2) that potentially allow for this class of targets. Then, several practices in Iraq and Israel are used to demonstrate that the law and policy of the conduct of hostilities potentially undermines the protection and promotion of foreign investment in certain economic sectors.

For the purpose of the present discussion, it suffices to explain that in warfare particularly, the military also uses civilian infrastructure, telecommunications, and logistics. Objects that have both a civilian and a military application are commonly known as ‘dual-use objects’. To illustrate,

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<sup>550</sup> ICRC, ‘The Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 1974-77’ (Geneva 1974 – 77) Vol XV, CDDH/215/Rev I 277, para 64.

<sup>551</sup> Boothby (n 505) section 6.13.

power-generating stations are used not only to grant civilians the access to clean water, but also to provide power to war industries.<sup>552</sup>

It is not plentifully clear from the wording of API Article 52(2) that dual-use objects are lawful targets. But there is also nothing to explicitly prohibit dual-use targeting. To recall, the provision focuses on the military contribution of the object, but it pays no attention to the object's contribution to civilian life. This arguably indicates that the civilian benefits of an object are of little to no significance to its classification as targets. Further, the term 'use' in the provision is not modified by any adjectives (e.g. 'primary'). Thus, any degree of military use, including secondary or marginal use, suffices to classify an object as a military objective.

State practice, doctrine, and jurisprudence, before and after the adoption of Article 52(2), indicate that dual-use objects are a permissible class of targets. Power generation stations, for instance, appear as a regular target as early as WWI.<sup>553</sup> In modern warfare, States often classify (and attack) bridges, factories, industrial plants, ports, mines, power grids, broadcasting stations, etc., as dual-use objects. Judicial and scholarly jurisprudence also accepts that dual-use object may be classified as lawful targets.<sup>554</sup>

But the ramifications of operations against dual-use objects are problematic. For instance, Iraq, like most modern States, uses an integrated electrical power grid. Thus, all power stations in Iraq contribute electricity to a grid which is used by all consumers, civil and military. During the 1990-1991 Gulf War, the Coalition air campaign treated the integrated Iraqi

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<sup>552</sup> L Green, 'The Environment and the Law of Conventional Warfare' (1991) 29 CYIL 222, 233; M Schmitt, 'Future War and the Principle of Discrimination' (1998) 28 IYHR 51, 68; Henderson (n 505) 129-42.

<sup>553</sup> The targeting of electricity was also carried out in the two World Wars, in North Korea and Vietnam (M Roscini, 'Targeting and contemporary aerial bombardment' (2005) 54 ICLQ, 411, 428.

<sup>554</sup> Dinstein – Legitimate military objectives (n 527) 154-58; M Sassòli, 'Legitimate Targets of Attacks under International Humanitarian Law' (2004) HPRC 1, 6-8 <<http://www.humanrightsvoices.org/assets/attachments/documents/Session1.pdf>> accessed 20 October 2016.



national grid infrastructure as lawful military targets, and removed approximately 80% of Iraq's electricity generating capacity in order to deny the military access to electrical power and so weaken their control and command ability.<sup>555</sup> However, these operations had serious side-effects on the civilian population since the shut-down of the electrical grid led to the shut-down of water purification and sewage treatment plant, which in turn resulted in 'epidemics of gastroenteritis, cholera, and typhoid' and thousands of civilian casualties.<sup>556</sup>

While the humanitarian cost of this campaign casts doubt as to its compliance with the principle of proportionality, the lawfulness of the classification of power plants as targets attracted little attention. It is mostly accepted that the use of the plants made an 'effective contribution' to Iraqi military action since they were the principal source of electric power for the Iraqi forces.<sup>557</sup> As Greenwood put it, 'there is no intermediate category of 'dual use' objects; either something is a military object, or it is not',<sup>558</sup> and there's the rub, as Shakespeare put it in Hamlet.

It should be borne in mind that in today's reality of trade and investment liberalization foreign investments are often made in economic sectors that are prone to dual-use classification.<sup>559</sup> Investment in the form

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<sup>555</sup> C Byron, 'International Humanitarian Law and Bombing Campaigns: Legitimate Military Objectives and Excessive Collateral Damage' (2010) 13 Yearbook of International Humanitarian Law 175, 183.

<sup>556</sup> K Rizer, 'Bombing dual-use targets: legal, ethical, and doctrinal perspectives' (2001) Air and Space Power Chronicles, cited in *ibid*.

<sup>557</sup> US Department of Defense, *Conduct of the Persian Gulf War: Final Report to Congress* (US DoD: Washington DC 1992); C Greenwood, 'Current Issues in the Law of Armed Conflict: Weapons, Targets and International Criminal Liability' (1997) 1 Singapore Journal of International and Comparative Law 441, 460-62; Dinstein – Legitimate military objectives (n 527) 155-56.

<sup>558</sup> C Greenwood, 'Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict' in P Rowe (ed) *The Gulf War 1990-91 in International and English Law* (Routledge 1993) 63, 73.

<sup>559</sup> To illustrate, as of February 2019, at least 173 disputes were focused on investments in electricity, gas, steam, and air conditioning supply; some 37 claims concerned investments in water supply, sewerage, waste management and remediation activities; 33 investment disputes concerned Agriculture, forestry and fishing; 129 cases concerned mining and quarrying; (UNCTAD, Investment Dispute Settlement Navigator, Economic sector and subsector <<http://investmentpolicyhub.unctad.org/ISDS/FilterByEconomicSector>> accessed 14 May 2017).

of, say, hydro plants,<sup>560</sup> airport security services,<sup>561</sup> telecommunications,<sup>562</sup> and certainly weapons production, may commonly be of primarily civilian nature, use, and purpose, but such investments also possess secondary military qualities, which may serve the armed forces in hostilities.

Illustratively, in recent years General Electric (GE), a Boston headquartered enterprise, signed several multiyear agreements with the Iraqi Ministry of Electricity. Under these agreements, GE adds over 2 gigawatts to Iraq's power-generation capacity and builds a 3-gigawatt gas-fired power plant in Basmaya, 40 kilometers east of Baghdad.<sup>563</sup> The investment is part of Iraq's effort to meet 'the surging demand for power from the Iraqi people' and 'support the country's focus on building its infrastructure and strengthening local industries'.<sup>564</sup> This investment is desired for the development of Iraq and even required for the attainment of certain public aims. However, this investment also serves the Iraqi army and other foreign and international forces. Given that integrated power grids in Iraq were treated as military objectives, GE's investment may arguably be attacked by Iraq's adversary in future hostilities. Such targeting would necessarily undermine postwar reconstruction efforts in Iraq as well as attempts to promote and facilitate investment into Iraq.

Notably, bombing campaigns in Iraq during the 21<sup>st</sup> century (eg: Operation Iraqi Freedom) were directed at power distribution facilities

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<sup>560</sup> Eg: *Amlyn v Croatia* (pending) ICSID case No ARB/16/28. The dispute concerns investments in the construction of a biomass power plant.

<sup>561</sup> Eg: *Abed El Jaouni v Lebanon* (pending) ICSID case No ARB/15/3. The dispute concerns ownership of a company that operates a fleet of private jets for charter and lease throughout Europe and the Middle East.

<sup>562</sup> Eg: *Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001 and *CME v Czech Republic* (Final Award and Separate Opinion) (2006) 9 ICSID Rep 264. These disputes concerned an investment in the field of information and communication, and programming and broadcasting activities.

<sup>563</sup> GE, 'GE in Iraq' <<https://www.ge.com/power/case-studies/iraq-ministry-electricity>> (accessed 6 June 2018).

<sup>564</sup> Ahmad Ismail, chairman of Mass Energy Group Holding, cited in: GE, 'GE Signs US\$520 Million Multiyear Deal in Iraq to Operate Mass Energy Group Holding's 3-Gigawatt Basmaya Power Plant' 8 September 2016, <<https://www.genewsroom.com/press-releases/ge-signs-us520-million-multiyear-deal-iraq-operate-mass-energy-group-holding%E2%80%99s-3>> (accessed 6 June 2018).

instead of generation facilities, and they were carried out with carbon fibre bombs. While electricity and water supplies were interrupted in some cities, the electricity network was largely left intact. 'Probably', as Roscini posited, 'in order to facilitate the post-war reconstruction'.<sup>565</sup> Such reconstruction is inherently linked to the promotion, facilitation, and protection of foreign investment.

Further, even *before* the outbreak of hostilities, the classification of an investment as a dual-use object imposes certain humanitarian obligations upon States under the control or territory of which the investment is located. These obligations, in turn, result in various interferences with the ability to own or enjoy investments. To illustrate, since the Second Lebanon War of 2006, Hezbollah leader, Hassan Nasrallah, repeatedly insisted that in any future armed conflict with Israel Hezbollah will target Haifa's ammonia storage tank, which mainly serves the agriculture sector. Such an attack is alleged to have an effect tantamount to an atom bomb.<sup>566</sup> True, a deliberate attack against a civilian industry plant is a violation of IHL, however aside from its civilian usage, ammonia is also used militarily as an alternate fuel, namely for combat jets. Arguably, the tank may be lawfully classified as a dual-use target by Hezbollah. Because 'something is either a military objective, or it is not', as Greenwood explained, the same is true if the ammonia tank is a foreign investment. In fact, this 12,000-ton storage container of ammonia is part of a longstanding US investment in Israel.<sup>567</sup>

If this American investment is a military objective, by virtue of dual-use classification, then Israel is obliged under IHL, 'already during peacetime',<sup>568</sup> to remove and avoid locating it within, or near, densely populated areas and to take all other practicable precautions so as to

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<sup>565</sup> Roscini (n 553) 429; Byron – Bombing campaigns (n 555) 183.

<sup>566</sup> See: N Shpigel, 'Tens of Thousands of Israelis Could Die if Key Security Weak Spot Exploited, Experts Warn' Haaretz (Israel, 30 January 2017).

<sup>567</sup> Haifa Chemicals is owned by the American holding company Trance-Resource Inc., founded in 1971, headquartered in NYC, NY. The company is controlled by the Trump Group (Jules Trump, no relation to POTUS).

<sup>568</sup> API Commentary (n 509) paras 2244, 2247, and 2251.

protect the civilian population under its control from the effects of attacks against this dual-use investment.<sup>569</sup> Considering that the ammonia tank is located in the Haifa metropolitan area, the third-largest city in Israel, and accounting for the probability of an attack against it as evidenced in repeated threats by Hezbollah, and the magnitude of anticipated civilian damage thereof, the closure and removal of the tank is required by IHL.<sup>570</sup> Indeed, on 28 May 2017 the Israeli Supreme Court instructed the Government to discontinue the permit for the operation of the tank and ordered its closure, citing *inter alia* security concerns.<sup>571</sup>

In sum, dual-use objects are recognized as a permissible class of targets under customary IHL, which subject to other conventional and customary restrictions, may be attacked. In today's reality, dual-use objects in war-torn host States are often foreign investments. If such investments are susceptible to targeting and are potentially less protected due to their significance and contribution to the host State and its economy, the attempts to promote those investments into such States are effectively frustrated.

### **5. Targeting Investments under the Doctrine of Revenue-Generating Targets**

This section focuses on another controversial class of targets that increasingly challenges the promotion and protection of investments in hostilities – 'revenue-generating targets' (RGT). Accordingly, the meaning of 'revenue-generating' objects, the use of RGT in practice, and the

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<sup>569</sup> Article 58, API. Chapter 5 offers a detailed analysis of this provision.

<sup>570</sup> Mindful of this reality, the Ministry of the Environment appointed a public committee to examine the preparations and defenses related to the hazardous materials in Haifa Bay. This committee suggested improving the protection of the tank and prohibiting the entry of the ammonia ship into Israel in wartime. In 2012, the Ministry of the Environment recommended closing the tank and transferring future operations to a desert in the southern part of the Country. Subsequently, in 2013, the Israeli Government unanimously resolved to transfer the tank, by 2017, to the desert. The Government explained that the resolution aims to remove hazardous materials from the heavily populated area and guarantee the safety of the citizens of Haifa (Copies of all the reports referenced herein are on record with me in their signed, Hebrew version).

<sup>571</sup> PCA 2841/17 *Haifa Chemicals v The City of Haifa et al* (2017).

linguistic anchors of Article 52(2) that potentially allow for this class of targets are briefly addressed in turn. Then, the section examines the practice of Iraq and Afghanistan so as to demonstrate that the law and policy of RGT potentially undermine the protection and promotion of foreign investment.

RGT are any economic infrastructure that generate revenue for an enemy's armed forces,<sup>572</sup> such as – production, transportation, storage, and distribution facilities of petroleum,<sup>573</sup> energy resources,<sup>574</sup> and generally any form of profit.<sup>575</sup> Notably, the justification for targeting, say, oil assets does not arise from the military usage of the infrastructure as in the case of dual-use objects; the argument is not that, say, petroleum is used to fuel military vehicles. Rather, the reasoning here lies with the potential revenues from the object, which may (or may not) be transferred to the armed forces, who may (or may not) use the money to sustain their war-fighting.

Although revenues are not mentioned in Article 52(2) API, the ambiguity over the requirement that the object offers an 'effective' – but not 'direct' – 'contribution to the military action', arguably allows for this practice. although (as discussed further below) this is a heavily contested issue.<sup>576</sup> According to the US, the main supporter of RGT, there are two main classes of targets that offer in practice an indirect but 'effective' contribution to the military in the sense of Article 52(2): Targets with *war-fighting* capabilities and targets with *war-sustaining* capabilities. While the expression 'war-

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<sup>572</sup> R Goodman 'The Obama Administration and Targeting 'War-Sustaining' Objects in Non international Armed Conflict' (2016) 110 AJIL 663, 664.

<sup>573</sup> DoD LOAC Manual (n 34) Section 5.7.8.5 – 'Examples of Military Objectives – Economic Objects Associated with Military Operations'.

<sup>574</sup> The White House, Office of the Press Secretary, 'Fact Sheet: Maintaining Momentum in The Fight against ISIL' (15 January 2016) <<https://obamawhitehouse.archives.gov/the-press-office/2016/01/15/fact-sheet-maintaining-momentum-fight-against-isil>> (accessed 12 May 2017).

<sup>575</sup> The speech of DoD General Counsel, J O'Connor at NYU Law School, published in Just Security, 'Applying the Law of Targeting to the Modern Battlefield' (*Just Security*, 28 November 2016) <<https://www.justsecurity.org/34977/applying-law-targeting-modern-battlefield%E2%80%8E-full-speech-dod-general-counsel-jennifer-oconnor/>> accessed 5 May 2017.

<sup>576</sup> Goodman – War-sustaining Objects (n 572) 663-70

fighting’ may be considered as equivalent of the language ‘military action’ that is used in Article 52(2), ‘war-sustaining’ is much broader,<sup>577</sup> for instance this category comprises petroleum that is used to generate revenue to sustain armed forces.<sup>578</sup>

The view that Article 52(2) allows for RGT is particularly problematic for investment law and policy. First, taken at face value, the doctrine of revenue-generation essentially means that an investment is deemed targetable under IHL for the same reasons that merit its protection under international investment law. To recall, a foreign investment, which benefits from the protection of international law against certain State interferences, is an economic activity that normally entails common characteristics. Putting to one side the debate over these features, their interrelationship, and binding status,<sup>579</sup> it may be said that, ordinarily an investment entails – profit and return, risk, duration, and a form of actual or anticipated contribution to the host State and its economy. In other words, revenue-generation and financial contribution to the State are inherent to foreign investments and their protection.

Furthermore, foreign investment is often a prerequisite for transitions from conflict to peace. Hostilities-stricken States frequently seek to promote investments so as to benefit their economy and facilitate its transition from foreign aid to sustainable economic policy.<sup>580</sup> Often, the economic sectors in which such host States pursue foreign capital inflows concern energy and natural resources.<sup>581</sup> By definition, economic activities in these sectors generate revenues for the State, which are also used militarily and in pursuit of national security aims. If IHL is read to recognize such economic activities

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<sup>577</sup> Roscini (n 553) 422.

<sup>578</sup> *ibid*; Sivakumaran (n 527) 345.

<sup>579</sup> (n 2)

<sup>580</sup> De Brabandere – *Jus Post Bellum* and Foreign Direct Investment (n 6) 590-92.

<sup>581</sup> OECD, ‘Promoting Investment in a Fragile Context: the OECD Iraq Project’, 14-8 <[https://www.oecd.org/mena/competitiveness/2016\\_06\\_Project\\_Insight\\_final.pdf](https://www.oecd.org/mena/competitiveness/2016_06_Project_Insight_final.pdf)> (accessed, 12 May 2017).

as a permitted class of targets, then investments are prone to classification as revenue-generating targets.

However, the practice on RGT is far from settled. In contrast to the debate over dual-use objects, there is no widespread or consistent State practice *prior* to the adoption of API (1977) to evidence that RGT were recognized as customary law prior to the adoption of API. The first clear use of the doctrine concerned the American defense in the *Hannah Case*, which concerned the destruction of British cotton by Union forces during the American Civil War.<sup>582</sup> There, the British agent argued that the deliberate destruction of British property breached the conventional and customary obligation to guarantee that ‘merchants and traders...shall enjoy the most complete protection and security for their Commerce’.<sup>583</sup> The main defense of the US was that, British ‘cotton in the insurrectionary States was peculiarly and eminently a legitimate subject for such destruction’ because the revenues from cotton sustained the war-fighting of the Confederacy.<sup>584</sup>

The *Hannah case* was mentioned in US manuals starting from the 1980s as evidence that, ‘as long ago as the 1870s... international courts recognized that the destruction of Confederate bales of cotton was justified during the American Civil War, since the sale of cotton provided funds for importing almost all Confederate arms and ammunition’.<sup>585</sup> However, this is

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<sup>582</sup> US Air Force, Commander’s Handbook on the Law of Armed Conflict AFP 110-34 (1980); US Department of the Navy - JAG, ‘Annotated Supplement to the Commanders Handbook on Naval Operations’, NWP 1-14M (1989), section 8.1.1; R Thomas and J Duncan (eds), *Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations* (1999) reprinted in: 73 ILS 403; M Bothe et al, *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (Martinus Nijhoff 1982) section 2.4.3.

<sup>583</sup> Article 14, Jay’s Treaty; Article 1, GB – US FCN treaty (3 July 1815). This provision is addressed in the next chapter 5.

<sup>584</sup> US Department of State, *Papers Relating to the Treaty of Washington: Report of the US Agent* Vol 6 (Washington 1874) 52–8.

<sup>585</sup> US Air Force, Commander’s Handbook (1980); US Air Force, ‘Commander’s Handbook on the Law of Armed Conflict’, AFP 110-34 (1985), section 2-3(a); US Navy, Annotated Supplement to the Commanders Handbook (1989); US Army, International and Operational Law Department: The Judge Advocate General’s Legal Center & School, *Operational Law Handbook* (2015), ch 2, section IX (A)(4)(b)(a); The Military Commissions Act of 2009 10 U.S.C., section 950p(a)(1). See also NZ’s Interim Law of Armed Conflict Manual, DM-112 (1992) (New Zealand): ‘Economic targets that indirectly but effectively

a misstatement of the law. Although the British claim was rejected, the American argument on RGT was not accepted; the case was dismissed on grounds of attribution, and ‘upon this ground’ alone.<sup>586</sup> Indeed, the DoD LOAC manual does not reiterate the reference to an ‘international precedent’ from the 19<sup>th</sup> century.<sup>587</sup> If so, there is no widespread or settled State practice before 1977 to evidence that API ‘preserved’ or incorporated customary law on RGT.<sup>588</sup>

Nor can it be said that there is widespread or consistent State practice on RGT *post-API* that indicates that a rule of customary law evolved on the basis of the wording of Article 52(2). The permissibility of RGT was dismissed in the final report of the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) concerning the NATO campaign in the former Yugoslavia in the 1990s.<sup>589</sup> The idea of RGT was considered and ‘firmly rejected’ in drafting the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea.<sup>590</sup> Likewise, the proposition that military objectives comprise RGT was

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support enemy operations may also be attacked to gain a definite military advantage. For example, an 1870 international arbitral tribunal recognized that the destruction of cotton was justified during the American Civil War since the sale of cotton provided funds for almost all Confederate arms and ammunition’.

<sup>586</sup> There, the US filed a demurrer whereby even if the destruction of revenue-generating objects is deemed unlawful, this wrongful act is not attributable to the US, for that particular destruction of cotton was performed by the Confederacy. The Tribunal accepted the demurrer (Reports of the US Agent (n 584) 58). There was one rare case when an international tribunal recognized that cotton constitutes RGT, explaining that, cotton was ‘the great staple from which were derived the principal means of that government for the carrying on of the war, which was the principal basis of its credit, the source of its military and naval supplies, and on which it relied to maintain its independent existence and to carry on the war against the United States’ (US Government, *Papers Relating to the Treaty of Washington* Vol VI (Washington 1874) 52-3). This reasoning is so specific and narrow that it can hardly encompass further objects (Sivakumaran (n 527) 345).

<sup>587</sup> DoD LOAC Manual (n 34) Section 5.7.8. However, leading commentators still mention the 19<sup>th</sup> century arbitral tribunals as an ‘international precedent’ (Bothe et al – New rules for victims of armed conflicts (n 42) section 2.4.3).

<sup>588</sup> Goodman – War-sustaining Objects (n 572) 625.

<sup>589</sup> Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 13 June 2000, paras 40-1.

<sup>590</sup> L Doswald-Beck (ed) *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (International Institute of Humanitarian Law, CUP 1995) para 67.27; Robertson (n 527) 50-1; Goodman – War-sustaining Objects (n 572) 665.



excluded in the deliberations of the 2009 Harvard Humanitarian Policy and Conflict Research Manual on International Law Applicable to Air and Missile Warfare,<sup>591</sup> and in drafting the 2013 Tallinn Manual on the International Law Applicable to Cyber Warfare.<sup>592</sup>

In fact, aside from the destruction of cotton in the 19<sup>th</sup> century, there are only two clear uses of RGT, and both are highly controversial: anti-narcotic operations in Afghanistan and operations against petroleum assets in Iraq. As regards the fight against narcotics, the normative framework applicable to the counter-narcotic operations is domestic and international human rights laws under a law enforcement paradigm. However, it has been asserted that narcotic facilities, fields, labs, and other objects can also be subject to military action since the profits of drug-trafficking supports the insurgency the sense of API Article 52.<sup>593</sup> These operations are mostly criticized as unlawful.<sup>594</sup>

The other more recent use of RGT concerns Daesh. In recent years, the US launched a 'wave of strikes against oil infrastructure, tanker trucks, wells and refineries' in Iraq so as to undermine Daesh's financial base.<sup>595</sup> The position of the Obama Administration was that targeting of petroleum

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<sup>591</sup> HPRC, 'Commentary on The HPRC Manual on International Law Applicable to Air and Missile Warfare' (2002) para 24(2).

<sup>592</sup> M Schmitt (ed), *Tallinn Manual on the International Law Applicable to Cyber Warfare* (CUP 2013) 131.

<sup>593</sup> C De Cock, 'Counter-Insurgency Operations in Afghanistan. What about the '*Jus ad Bellum*' and the '*Jus in Bello*': Is the Law Still Accurate?' (2010) 13 Yearbook of International Humanitarian Law 97, 111.

<sup>594</sup> J Dempsey and J Burns, 'NATO Agrees to Take Aim at Afghan Drug Trade' (*NY Times* 10 October 2008) <<http://www.nytimes.com/2008/10/11/world/asia/11nato.html>> accessed 12 July 2016; D Akande, 'US/NATO Targeting of Afghan Drug Traffickers: An Illegal and Dangerous Precedent?' (*EJIL: Talk!*, 13 September 2009) <<http://www.ejiltalk.org/usnato-targeting-of-afghan-drug-traffickers-an-illegal-and-dangerous-precedent/>> accessed 10 May 2016; Schmitt, 'Narcoinsurgents in Afghanistan' (n 546) 301-05; E Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict* (OUP 2015) 198-201; Goodman – War-sustaining Objects (n 572) 672.

<sup>595</sup> The White House, 'Remarks by President Obama on Progress Against ISIL' (25 February 2016) <<https://www.whitehouse.gov/the-press-office/2016/02/25/remarks-president-progress-against-isil>> (accessed 24 November 2017); The White House, 'Statement by the President on Progress in the Fight Against ISIL' (13 April 2016) <<https://obamawhitehouse.archives.gov/the-press-office/2016/04/13/statement-president-progress-fight-against-isil>> (accessed 7 May 2017).

infrastructure is permitted under API Article 52(2) because 'ISIL's oil production and revenues are significantly reduced' by such operations, and because 'every dollar we deny them means one less dollar to pay their fighters and to fund their terror'.<sup>596</sup> The current Administration follows suit.<sup>597</sup> As with cotton and narcotic-industries, these operations are not widely endorsed.

But the dearth of State practice alone does not dispose of the entire argument on RGT. Technological progress, by nature and essence, entails the emergence of concepts and categories that are initially 'untied' to any State practice or *opinio juris* regarding the interpretation of the concomitant legal issues. 'In the dynamic circumstances of armed conflict', as Bothe et al. remarked already in 1982, 'objects which may have been military objectives yesterday, may no longer be such today and vice versa'.<sup>598</sup> But it is not simply the lack of State practice but the proper treaty interpretation of Article 52 on a whole that demonstrates that IHL excludes bombing RGT. And this prohibition withstands technological developments.

First, there is nothing in the ordinary language of Article 52(2) to indicate that RGT are covered. On the contrary, the double repetition of the qualifier 'military' in Article 52(2)<sup>599</sup> excludes any and all economically-motivated advantages and contributions from the assessment of the permitted class of targets. Even assuming that there is doubt as to the classification of economic targets under Article 52(2), then Article 52(3) instructs that, 'in cases of doubt whether an object which is normally

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<sup>596</sup> The Progress in the Fight Against ISIL, 13 April 2016 (ibid).

<sup>597</sup> Eg: US DoD, 'US, Coalition Continue Strikes Against ISIL in Syria, Iraq: From a Combined Joint Task Force Operation Inherent Resolve News Release' (22 January 2017) <<https://www.defense.gov/News/Article/Article/1056079/us-coalition-continue-strikes-against-isil-in-syria-iraq/source/GovDelivery/>> (accessed 16 May 2017); US DoD, 'Department of Defense Press Briefing by Col. Dorrian via teleconference from Baghdad, Iraq', 3 May 2017 <<https://www.defense.gov/News/Transcripts/Transcript-View/Article/1172185/departement-of-defense-press-briefing-by-col-dorrian-via-teleconference-from-bag/>> (accessed 15 May 2017).

<sup>598</sup> Bothe et al – New rules for victims of armed conflicts (n 42) 365.

<sup>599</sup> Article 52(2), API.

dedicated to civilian purposes...is being used to make an effective contribution to military action, it shall be presumed not.’<sup>600</sup>

Even assuming *arguendo* that the wording of Article 52 allows bombing RGT, humanitarian considerations that pervade IHL and its object and purpose weigh against it, since it is inherently difficult to identify the limiting principles that guard against unintentional slippery slopes in the application of RGT.<sup>601</sup> On this point, Goodman, a leading proponent of RGT, argues that the ‘three clearest and primary historic examples’ in support of targeting war-sustaining revenue – cotton (Confederacy), narcotics (Taliban), and petroleum (Daesh) – demonstrate that a ‘limiting principle might be’ that RGT are only those that constitute a ‘regular, indispensable, and principal source for directly maintaining military action’.<sup>602</sup>

This proposition is not convincing. Over time, as evinced by Goodman’s examples, RGT were expanded from cotton artefacts, to poppy fields and opium production objects, through any economic activities that may be taxed by insurgents, to oil production assets, natural resources, and finally – cash storages. The thought that RGT will next be broadened to cover banks, for instance, is not science fiction. A US Air Force Judge Advocate General proclaimed as early as 2001 that, ‘bank accounts, financial institutions, shops, entertainment sites, and government buildings’ are susceptible to targeting as RGT.<sup>603</sup>

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<sup>600</sup> Article 52(3), API.

<sup>601</sup> Sivakumaran (n 527) 345; K Watkin, ‘Sustaining the War Effort: Targeting Islamic State Oil Facilities’ (*Just Security*, 3 October 2014) <<https://www.justsecurity.org/15890/sustaining-war-effort-targeting-islamic-state-oil-facilities/>> (accessed 2 June 2016); L Padeanu ‘Accepting that War-Sustaining Objects are ‘Legitimate Targets’ under IHL is a Terrible Idea’ (*YJIL*, 2 March 2017) <<http://www.yjil.yale.edu/accepting-that-war-sustaining-objects-are-legitimate-targets-under-ihl-is-a-terrible-idea/>> (accessed 15 April 2017).

<sup>602</sup> Goodman – War-sustaining Objects (n 572) 678-80; Dunlap – Understanding War-Sustaining Targeting: A Rejoinder to Iulia Padeanu’ (*YJIL*, 6 April 2017) <<http://www.yjil.yale.edu/understanding-war-sustaining-targeting-a-rejoinder-to-iulia-padeanu/>> (accessed 15 April 2017).

<sup>603</sup> J Meyer, ‘Tearing down the façade: a critical look at the current law on targeting the will of the enemy and air force doctrine’ (2001) 51 *Air Force Law Review* 143, 180-81.

In fact, the campaign against Daesh itself does not meet Goodman's 'limiting principle'. According to the International Centre for the Study of Radicalisation, six major categories of income support Daesh – taxation and other fees, kidnaping, foreign donations, looting, antiquities, and the exploitation of natural resources, including oil. Of these six, *taxes* account for most of Daesh's income during 2014 – 2016. At its highest, oil revenues accounted for the second-most significant source of income. Most of this oil was used for domestic consumption. Only some of it seems to have been sold and/or smuggled into neighboring territories in return for profit that was used militarily.<sup>604</sup> This oil is therefore not a 'regular, indispensable, and principal source for directly maintaining military action'.<sup>605</sup> The attempt to protect the limited nature of RGT only proves the flexible and ever-evolutive nature of this class of targets. This is particularly problematic from the perspective of investment promotion and protection.

Take the Iraqi practice on the promotion and facilitation of American investments on one hand, and the American practice of RGT in Iraq, on the other. The prolonged hostilities with Daesh have resulted in humanitarian, social, and economic crises across Iraq.<sup>606</sup> To resolve these and so as to respond to its national challenges Iraq requires capital. To attract such capital, the State offered in recent years convenient concession contracts, bids, and licenses over its oil reserves.<sup>607</sup> With the encouragement of the

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<sup>604</sup> Daesh's income is analysed as follows. 2014: Looting (52%), taxes (25%), oil (21%), kidnapping (2%). 2015: taxes (44%), oil (36%), and looting (20%). 2016: taxes (43%), oil (32%), looting (22%), and kidnapping (3%), see: S Heibner et al., 'Caliphate in Decline: An Estimate of Islamic State's Financial Fortunes', The International Centre for the Study of Radicalisation and Political Violence March 2017 <<https://pdfs.semanticscholar.org/ea21/0ac919dcd374d432001fcf781bb57edf1468.pdf>> (accessed 10 May 2017) 11.

<sup>605</sup> Goodman – War-sustaining Objects (n 572) 678-80; Dunlap – Understanding War-Sustaining Targeting (n 602)

<sup>606</sup> State Department, '2017 Investment Climate Statement – Iraq' <<https://www.state.gov/e/eb/rls/othr/ics/2017investmentclimatestatements/index.htm#wrap>> (accessed 12 May 2017)

<sup>607</sup> State Department, '2010 Investment Climate Statement – Iraq' <<https://www.state.gov/e/eb/rls/othr/ics/2010/138084.htm>> (accessed 13 May 2017); State Department '2011 Investment Climate Statement – Iraq' <<https://www.state.gov/e/eb/rls/othr/ics/2011/>> (accessed 13 May 2017); State Department, '2013 Investment Climate Statement – Iraq'

international community, it also passed an amended national investment law that improves investment terms for foreign investors, allows them to purchase land in Iraq for certain projects, and speeds up the investment license process, and it joined ICSID.<sup>608</sup> Because Iraq has the fifth largest proven oil reserves in the world, approximately 90% of the Iraq's revenues originate from investments in oil, most of which are foreign investments, in particular US-owned or controlled.

The US, on its end, takes various proactive measures to promote and facilitate the operation of US companies in Iraq. First, the US – Iraq Strategic Framework Agreement provides intergovernmental forums to address impediments to investment and trade, the Trade and Investment Framework Agreement between Iraq and the US provides a framework for dialogue to increase trade and investment cooperation between the two countries, the American Chamber of Commerce in Iraq also provides a platform for commercial advocacy for the US business community operating in Iraq, and there are continued efforts to start an American Chamber of Commerce in the Iraqi Kurdistan Region.<sup>609</sup> Additionally, the US State Department encourages American companies to invest in Iraq.<sup>610</sup> However, while the US encourages its nationals to take advantage of the profitable opportunities in Iraq on one hand, and Iraq to facilitate and protect such American investment so as to generate revenues and develop the Iraqi economy, on the other, the US also calls to target investments in oil in Iraq because they generate revenues and economically sustain other aims.

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<<https://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm>> (accessed 12 May 2017); International Trade Centre, 'Iraq – Country Brief' <<http://www.intracen.org/country/iraq/>> (accessed 12 May 2017)

<sup>608</sup> Article 68(2), ICSID Convention. The ICSID Convention entered into force in Iraq on 17 December 2015.

<sup>609</sup> For further information see: US Embassy and Consulate in Iraq, 'Joint Statement by the United States of America and the Republic of Iraq Higher Coordinating Committee' (28 January 2018) <<https://iq.usembassy.gov/joint-statement-united-states-america-republic-iraq-higher-coordinating-committee/>> (accessed 12 June 2018).

<sup>610</sup> For a review of such encouraging statements, see US State Department, 'Investment Climate Statements – Iraq' for the years 2010 – 2018 <<https://www.state.gov/e/eb/rls/othr/ics/>>.

If objects such as 'production, transportation, storage, and distribution facilities' of petroleum,<sup>611</sup> energy resources,<sup>612</sup> and generally any form of profit,<sup>613</sup> constitute lawful military objectives under Article 52(2), as the US consistently maintains, then US foreign investments may be too legitimately targeted in armed conflicts. For instance, the assets of ExxonMobil in the West-Qurna I generate revenues for the Iraqi government, which are then used to sustain the operations against Daesh. As such, this asset is (on the logic set out above) an RGT that may be lawfully attacked by Daesh under certain circumstances. It is doubtful that this is a desired outcome for ExxonMobil, Iraq, or the US.

The case of Afghanistan is also indicative. A focus on the exploitation of natural resources has long been an established part of the playbook of various belligerents and insurgents in Afghanistan. For instance, while the Taliban lost almost all of its territory after the US-led invasion in 2001 it is still estimated to control 41 of Afghanistan's 407 districts and to contest control over additional 118 districts, including parts of the Nangarhar province and the Logar province (as of July 2018). The Taliban's grip on the talc trade in these districts generates millions for the organization. In fact, almost all Afghan talc generates revenue for the Taliban.<sup>614</sup> Similarly, an Afghan affiliate of Daesh known as Islamic State – Khorasan Province (ISKP) controls a limited amount of territory in Afghanistan. But this territory, namely the Achin district of Nangarhar, is rich in minerals, especially talc, chromite, and marble. Reportedly, the revenues from the mines in Nangarhar sustain the ISKP and its fighting against Afghan and international forces.<sup>615</sup>

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<sup>611</sup> DoD LOAC Manual (n 34) Section 5.6.8.5.

<sup>612</sup> The White House –Maintaining momentum against ISIL (n 574).

<sup>613</sup> O'Connor (n 575).

<sup>614</sup> Global Witness, 'At any price we will take the mines: the Islamic State, the Taliban, and Afghanistan's white talc mountains' <<https://www.globalwitness.org/en-gb/campaigns/afghanistan/talc-everyday-mineral-funding-afghan-insurgents/>> (accessed 3 June 2018) 6.

<sup>615</sup> *ibid.*

As a result, Afghan and American forces often initiate attacks against mines controlled by the Taliban and ISKP in an attempt to hurt the organizations' financial basis. In April 2017, for instance, the US used, for the very first time, the American military's largest nonnuclear bomb, the GBU-43/B Massive Ordnance Air-Blast, popularly called the 'Mother of All Bombs' near the Achin mine, Nangarhar.<sup>616</sup> While the US provided several (different) explanations for the classification of the location as a target,<sup>617</sup> satellite imagery shows marks of extensive mining for minerals a few hundred meters from the impact area, which indicate that the mine was bombed for its classification as a RGT.<sup>618</sup>

At the same time, at the advice of the World Bank and 'to help fuel growth' and so as to as transition into self-sustaining economy, Afghanistan 'is constantly seeking investment from the private and foreign investors to develop the huge and very diverse mineral resource potential in the Achin Magnesite Deposit, in the Nangarhar province'.<sup>619</sup> But if the mines that are controlled by the Taliban and ISKP in Nangarhar are lawful targets for their revenue-generating nature, then foreign investment in Nangarhar, which undeniably generate revenues that are used to sustain war-fighting against the Taliban and ISKP, are too a lawful target for the same reason. This is problematic.

Afghanistan also encourages investments in other areas, such as the world's second largest copper deposit in Mes Aynak in the Logar

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<sup>616</sup> B Starr and R Browne, 'First on CNN: US drops largest non-nuclear bomb in Afghanistan' (CNN 14 April 2017) <<https://edition.cnn.com/2017/04/13/politics/afghanistan-isis-moab-bomb/index.html>> (accessed 20 May 2018).

<sup>617</sup> *ibid*; C Wang, 'Trump calls Afghanistan bombing a 'very successful mission' (CNBC 13 April 2017) <<https://www.cnbc.com/2017/04/13/trump-calls-afghanistan-operation-a-very-successful-mission.html>> accessed 20 May 2018.

<sup>618</sup> Global Witness – At any price (n 614)

<sup>619</sup> The Government of Afghanistan, Ministry of Mines and Petroleum, 'Mineral is Afghanistan: Achin Magnesite Deposit, Nangarhar Province' <[http://mom.gov.af/Content/files/MoMP\\_MAGNESITE\\_Achin\\_Midas\\_Jan\\_2014.pdf](http://mom.gov.af/Content/files/MoMP_MAGNESITE_Achin_Midas_Jan_2014.pdf)> (accessed 2 June 2018)

province.<sup>620</sup> It is estimated to be enough to produce 200,000 tons of refined copper – some USD 450 million worth – annually.<sup>621</sup> In 2007, Afghanistan awarded a 30-year lease to extract copper<sup>622</sup> at a worth of some USD 3 billion, to a State-owned Chinese corporation, Metallurgical Corporation of China (MCC).<sup>623</sup> Under the investment agreement, MCC was to build roads and railways, and provide infrastructure and power plants to the underdeveloped area.<sup>624</sup> The investment was estimated to create 12,000 direct jobs and add USD 250 million in annual revenue to the State's budget.<sup>625</sup>

From 2008, when it assumed control over the site, until 2014, when it withdrew its personnel from the project, MCC's investment was subjected to repeated deadly attacks by the Taliban that resulted in loss of life and damage to property.<sup>626</sup> Nonetheless, the Taliban found a new – but familiar – way to generate revenues from the mine. In November 2016, the Taliban publicly pledged to 'back all national projects' and to 'direct its Mujahideen

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<sup>620</sup> A Baker, 'Deciding Between Heritage and Hard Cash in Afghanistan' (*Times* 17 November 2011) <<http://content.time.com/time/world/article/0,8599,2099676,00.html?>> accessed 9 December 2016; J Parello-Plesner and M Duchâtel 'China's new global risk map' in J Parello-Plesner and M Duchâtel (eds) *China's Strong Arm: Protecting Citizens and Assets Abroad* – 54(451) Adelphi Series (IISS, 2014) 67-90.

<sup>621</sup> The World Bank, 'Q&A: Aynak and Mining in Afghanistan' (2 April 2013) <<http://www.worldbank.org/en/news/feature/2013/04/02/qa-aynak-mining-afghanistan>> (accessed 9 December 2016) and The Government of Afghanistan, Ministry of Mines and Petroleum, 'Brochures provided by Investment Promotion & Marketing Directorate' <<http://mom.gov.af/en/page/11375/msdd>> (accessed 2 June 2018).

<sup>622</sup> The Government of Afghanistan, 'Ministry of Mines & Petroleum, Aynak Tender Process History' <<http://mom.gov.af/en/page/1401>> accessed 9 December 2016. A copy of the Aynak Mining Contract (dated 8 April 2008) is on record with me ('MCC – Afghanistan Investment Agreement').

<sup>623</sup> MCC was absorbed in the Chinese state-owned conglomerate China MinMetals Corporation (CMC) in December 2015 as part of a broader consolidation of Chinese state-owned enterprises.

<sup>624</sup> Parts II, IV, MCC – Afghanistan Investment Agreement; K Katzman 'Afghanistan: Post-Taliban Governance, Security, and US Policy' (2014) 5(2) *Current Politics and Economics of the Middle East* 307, 394.

<sup>625</sup> Santander – Trade Portal, 'Afghanistan: Foreign Investments' (last updated, October 2016) <<https://en.portal.santandertrade.com/establish-overseas/afghanistan/investing-3>> accessed 4 December 2016.

<sup>626</sup> Global Witness, *Copper Bottomed? Bolstering the Aynak contract: Afghanistan's first major mining deal* (20 November 2012) <<https://www.globalwitness.org/en/campaigns/afghanistan/copper-bottomed/?>> accessed (13 December 2016).



to help in the security of projects that are in the higher interest of [Afghanistan]', including Mes Aynak.<sup>627</sup> To be sure, the Taliban does not volunteer its protection, but levies taxes on infrastructure that it 'guards' so as to sustain itself.

This illustrates the slippery slope that is inherent to RGT. To sustain its operation and war-fighting, the Taliban traditionally relied on the taxation of the production and sale of opium. The relative success of the counter-narcotics operations in poppy-growing areas of Afghanistan during the 2000s forced the Taliban to look elsewhere for revenues. Today, foreign investments fill in the gap. But investors, like MCC, who will pay the Taliban in order to avoid attacks will find themselves between a rock and a hard place.<sup>628</sup> By paying protection-taxes so as to enable the operation of their investment in relative peace investors effectively support the insurgent's financial base, thereby risking the classification of their investment as an RGT. The justifications for counter-narcotic operations apply verbatim to the new source of income that supplanted narcotics.

In sum, the implication of conditioning the legality of attacks on revenue-generation is that revenue-generating foreign investments may too be targeted by the adversary. This renders international and national efforts to foster such foreign investments into conflict-ridden States futile and calls into question the purported role of investments in post-conflict reconstruction.

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<sup>627</sup> Islamic Emirate of Afghanistan, 'Statement of Islamic Emirate regarding backing national projects in the country' (29 November 2016) <<https://alemarah-english.com/?p=7766>> (accessed 13 December 2016).

'Statement of Islamic Emirate regarding backing national projects in the country' (*Islamic Emirate of Afghanistan*, 29 November 2016) <<https://alemarah-english.com/?p=7766>> accessed 13 December 2016.

<sup>628</sup> Aside from targeting this may raise legal issues relating to the financing of terrorism on the national and international levels. A Corr, 'Sanction China for Its Support of Taliban Terrorists' (*Forbes* 21 February 2017) <<https://www.forbes.com/sites/anderscorr/2017/02/21/sanction-china-for-its-support-of-taliban-terrorists/2/#1e6ae1b14b31>> accessed 10 October 2017.

## 6. Conclusion

This chapter assessed the classification of investments as non-human targets under the contemporary law of targeting by examining targeting practices and policies in conflict-ridden States.

In the aggregate, this analysis demonstrates the difficulty of holding expansive targeting practices in one hand and calling for investment liberalization in conflict-ridden States, at the same time. This difficulty emanates from the well-established principle that the law applies equally to the parties to an armed conflict. Under IHL, what is sauce for the goose is sauce for the gander: There are no separate sets of IHL rules for home and host States, and there are no special targeting rules for foreign investments and so, the policies and practices that States put forth as the law with respect to dual-use objects and RGT when they initiate attacks, are as true for the targeting of dual-use objects and RGT that are owned or controlled by foreign nationals as explained below.

From a higher degree of abstraction, this discussion fleshes out another level of interaction between IHL and investment law. Chapter 3 demonstrated that, historically, IHL fostered and shaped the development of customary and conventional investment standards of treatment. This historical backdrop allows us to interpret IHL and investment law norms in a compatible manner and thus, to ‘avoid’ (in the sense of chapter 1) a potential conflict between IHL and investment law norms.

By contrast, potential incompatibilities between contemporary targeting *practices*, which emanate from a broad interpretation and application of IHL norms, on the one hand, and investment promotion and protection rules and *policies*, on the other, cannot be interpreted away through, say, an investment law-informed reading of the definition of ‘military objectives’, for this would exceed the rules and the roles of treaty interpretation. Moreover, because the potential divergence between investment law and IHL in these issues concerns *not* norms in the strict sense but rather broader national and international policies and strategies,

it is not clear that norm conflict 'resolution' tools, such as the *lex specialis* rule, offer a proper solution, as explained below.

This chapter illustrated several potential instances of divergence between investment law and IHL. One such divergence arises when the host State loses control over the territory where a foreign investment is located, *and* that investment becomes susceptible to targeting because the adversary uses it to sustain its war-fighting against the host State. As in the examples involving mines in Afghanistan, in such cases, an incompatibility may exist between the State's *obligation* to protect the investment as a host State (the investment is arguably within the geographical scope of the relevant treaty) and the potential *authorization* under IHL, as a belligerent, to target that same investment. Professedly, this situation is, per the broad definition outlined in chapter 1, a conflict.

Potentially, a conflict may also arise between the State's *obligation* to guarantee the investment certain treatment as a host State (eg: regulatory stability or protection of reasonably-based expectations) and its *obligation* (rather than a permission) under IHL to protect the civilian population. Such is the case, as with the example of the American investment in Israel, when an investment is classified as a dual-use object that is susceptible, at a high level of probability, to targeting by the adversary *and* this investment is located in densely populated civilian areas, thereby risking inflicting significant damage to the civilian population in case of an attack. In this case, IHL arguably requires (obliges) that the investment be relocated, removed, or terminated so as to protect the civilian population from the adverse effects from its targeting, but such measures are arguably a simultaneous breach of investment standards of treatment. This too seems to be a case of a conflict, under the broad definition set out in chapter 1 above.

Further, the State's policies and practices on investment promotion and targeting may collide. Thus, by way of reciprocity, when the State adopts expansive approaches to target classification as a party to a conflict,

namely concerning RGT, it risks 'inviting' the targeting of its foreign investments by its adversary. As with the example of Iraq and the US, if the American stance is that, under IHL, a party to a conflict is *authorized* to target any economic object or commercial activity that generates revenues for the adversary (eg: mining), then, under IHL, this is as true for the targeting of American investments in conflict-ridden States. But it is doubtful that the US, as a home State, maintains the same views that it holds as a belligerent that attacks economic targets abroad (often the property and operations of US corporations). On the contrary, as a home State, the US seeks to promote and protect the investments of its nationals into conflict-ridden States (eg: in mining) and it takes measures to secure them.

In the above examples, the potential incompatibility cannot be avoided through, say, harmonious interpretation of the concept of 'military objective' and the relevant investment standard of treatment or by way of 'interpreting away' the divergence between the obligation to remove military objectives from civilian areas and the limitations to such measures under investment standards of treatment. In such cases, chapter 1 suggested that a possible conflict may be resolved, particularly using the *lex specialis* maxim. But it may also be that in these cases, the conflict is 'unresolvable',<sup>629</sup> as explained below.

First, it should be clarified that the proposition that a conflict is 'unresolvable' does not mean that the dispute in the framework of which this conflict arises is unresolvable. What is meant rather is that the rules on conflict resolution as outlined above and further explored in chapter 5 below, do not adequately remove the potential incompatibility and a legislative or

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<sup>629</sup> Milanović – Whither human rights? (n 62) 61-68, 74-75; Milanović – Norm Conflicts (n 58) 108-10 (to illustrate, he explains: 'Just as I can conclude two equally valid contracts whereby I commit to sell the same thing to two different people, and then have to face a choice as to which obligation to fulfil and which to breach and hence suffer the consequences, so a state can enter into two mutually contradictory, yet equally valid commitments from which the only escape is a political one'). However, see C Droege, 'Elective Affinities? Human Rights and Humanitarian Law', (2008) 90(871) IRRC 501, 504 (arguing, regarding the interaction of IHL and human rights law, in particular, that all conflicts must be resolved and one norm must always prevail over the other).

strategic stance is to be taken by the State so as to reconcile (or resolve) the normative tension. Situations of unresolvable conflict occur namely because 'there is no single legislative will behind international law. Treaties and custom come about as a result of conflicting motives and objectives... and often result from spontaneous reactions to events in the environment.'<sup>630</sup>

States, as Milanović explains, 'are perfectly capable of making contradictory commitments, and to presume coherence in the intent of states in all circumstances would fly in the face of reality'.<sup>631</sup> He illustrates this point by referencing, among others, the matter of *Soering v UK*,<sup>632</sup> where the European Court held that, under Article 3 of the European Convention on Human Rights (ECHR) a State cannot extradite a person to another country, where there is substantial risk that that person will be subjected to cruel or inhuman treatment or punishment. On this point, Milanović observes that:

In reality what we had in *Soering* was an unresolvable norm conflict. The political solution to this conflict was that the US did not press the issue, and that it reached an accommodation with European states generally whereby it would provide assurances that a person whose extradition was being sought would not be tried for a capital offence.<sup>633</sup>

Similarly, the resolution of the potential incompatibilities between the norms, practices, and policies set out above arguably exceeds the scope of conventional interpretation and priority rules. Arguably in these cases, the State should make a 'policy call' – a strategic decision – that gives due respect to its national and international policies on the promotion and

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<sup>630</sup> ILC Study Group on Fragmentation (n 470) para 34; Milanović – Whither human rights? (ibid) 75-6.

<sup>631</sup> Milanović – Whither human rights? (ibid).

<sup>632</sup> *Soering v UK*, 161 ECtHR (Ser A) (1989) (there, the Court held that, under ECHR Article 3 a State cannot extradite a person to another country, where there is substantial risk that that person will be subjected to cruel or inhuman treatment or punishment).

<sup>633</sup> Milanović – Norm Conflicts (ibid) 108-09.

protection of investments and its targeting policies. Thus, in the example of the US, the DoD could consult with, and account for the agenda of, the State Department, which seeks to promote, facilitate, and protect US investments in petroleum and mining in conflict-ridden States such as Iraq or Afghanistan, when it forms its policies on the lawfulness of targeting of objects for the reason that they are economic activities in petroleum or mining in conflict-ridden countries such as Iraq and Afghanistan.

Indeed, this seems to be the way in which such tensions have been resolved in the examples set out above. For instance, in the case of foreign investments in areas in Afghanistan over which the Government's control is questionable, Afghanistan (the host State), the home State of the investor (China), the investor (MCC), and the adversary (the Taliban) engage in direct dialog that facilitates a solution of the potential tension of the complex situation.<sup>634</sup>

In the above case of Israel and the American investment, the potential conflict was resolved through an extra-legal solution that allowed Israel to regulate in the public interest and to pursue its national security goals while mitigating the investor's potential losses and allowing the investment to be carried out in a different location in Israel.<sup>635</sup> Potential clashes between expansive targeting practices and policies on the promotion and protection of investments are too resolved in practice by way of making strategic choices when to target and with what means. For instance, it recently became known that Israel refrained from following a potential *authorization*, under IHL, to attack lawful targets in Gaza out of the desire to promote and protect foreign investments there, which in turn promote broader geopolitical aims.<sup>636</sup>

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<sup>634</sup> Reuters, 'Taliban delegation holds talks in China as part of peace push' (*Reuters*, 20 June 2019) <<https://www.reuters.com/article/us-china-afghanistan/taliban-delegation-holds-talks-in-china-as-part-of-peace-push-idUSKCN1TL0V9>> accessed 22 June 2019.

<sup>635</sup> S Gorodeisky, 'Haifa Chemicals, Edeltech to build Negev ammonia plant' (*Globes*, 5 December 2018) <<https://en.globes.co.il/en/article-haifa-chemicals-to-build-negev-ammonia-plant-1001263592>> accessed 16 January 2019.

<sup>636</sup> J Volinsky, 'Mellanox CEO Told Former Defense Minister Not to Bomb Company's Building in Gaza' (*Haaretz*, 3 April 2019) <<https://www.haaretz.com/israel-news/.premium->

The reality, whereby investment law and policy potentially affects targeting practices, may be taken to suggest that the law and policy of foreign investment augment humanitarian considerations by offering additional counterweight against controversial warfare practices. Notable in this respect is the recent study of the ICRC on the 'Roots of Restraint in War' (June 2018).<sup>637</sup> The ICRC sought to identify the factors that 'induce weapon bearers across the spectrum to observe certain limits when engaging in armed violence and to preserve a minimum of humanity even in the heat of battle'. One of the main conclusions of the study was that, to effectively induce compliance with IHL, there is need to look beyond the 'formal norms prescribed by IHL'.<sup>638</sup> And while cross-border trade and investment are mentioned obliquely only once among the various factors the study identified,<sup>639</sup> this chapter demonstrates that investments arguably play a more central role in the policy and conduct of hostilities.<sup>640</sup>

Finally, this analysis merits two more remarks. First, the discussion on the targetability of investments fits squarely with the argument in chapter 3 on the interpretation of the EWC. As explained, the modern rules on targeting in API Article 52(2) operationalize the customary rules on protection of property in HR 23(g). Thus, in the context of targeting, to examine whether the destruction of the investment 'was required by the necessity of the situation' under the EWC, it is necessary to address the classification of the investment under API Article 52(2) as a military objective.

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[mellanox-ceo-told-former-defense-minister-not-to-bomb-company-s-building-in-gaza-1.7086215](https://www.mellanox.com/press-releases/mellanox-ceo-told-former-defense-minister-not-to-bomb-company-s-building-in-gaza-1.7086215)> accessed 15 June 2019.

<sup>637</sup> ICRC, The Roots of Restraint in War (June 2018) <<https://www.icrc.org/en/publication/4352-roots-restraint-war>> (accessed 20 June 2018).

<sup>638</sup> *ibid*, 8.

<sup>639</sup> *ibid*, 49.

<sup>640</sup> This proposition is arguably further supported by the economic part of the US plan to promote peace in the Middle East through foreign investments. See: The White House, 'Peace to Prosperity' (June 2019) <<https://www.whitehouse.gov/peacetoprosperity/>> (accessed 24 June 2019) (Putting to one side critical views over the content and scope of this plan).

Second, if an investment is not classified as a military objective under Article 52(2) API, or whenever there is any doubt as to its classification,<sup>641</sup> the investment is presumed to be a civilian object. As such, the investment cannot be the subject of direct and deliberate attacks.<sup>642</sup> Nevertheless, IHL accepts that in the harsh reality of hostilities civilian objects, foreign investments inclusive, may be incidentally hurt during attacks against legitimate military targets. This is recognized under the customary principle of proportionality, which prohibits launching an attack against a lawful target which is 'expected' to cause incidental civilian damage that would be excessive in relation to the military advantage 'anticipated'.<sup>643</sup>

The next chapter 5 picks up on this point and deals with the obligation of conflict-ridden host States to take precautions so as to protect investments which are not lawful targets against the effects of hostilities. To a degree, the next chapter 5 continues the analysis under this chapter 4. The next chapter 5 completes and complements the discussion of RGT in this chapter 4 by addressing the obligation of host States to protect foreign investments when they are attacked by the adversary on its territory.

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<sup>641</sup> Article 52 (3) API.

<sup>642</sup> Articles 48, 51, and 52 API.

<sup>643</sup> Article 51 and 57 API; ICRC – customary IHL Study (n 38) practice on Rule 14.



## Chapter 5

### The Obligation to Protect Foreign Investments from the Effects of Hostilities

#### 1. Introduction

This chapter is concerned with the obligation of conflict-ridden host States to protect the investments under their control from the effects of hostilities. This discussion encompasses situations when the host State attacks its adversary, and in the framework of this attack the investor's property is damaged, and instances when the host State is attacked by its adversary and this attack by a third party damages foreign investments that are located under the control of the host State.

As with the previous chapter 4, the starting point for this discussion is the fundamental principle of distinction, whereby attacks are allowed 'only against military objectives', while 'civilian objects shall not be the object of attack'.<sup>644</sup> Since responsibility for applying the principle of distinction rests on both the defender, who best controls the population and objects in his territory, and on the attacker, who alone decides on the identity of the targets and the means and methods for their attack, API Articles 57 and 58 require States, whether they attack or are attacked by their adversary, to take 'feasible' precautionary measures in favor of the civilian objects under their control, including foreign investments.<sup>645</sup> The benchmark of 'feasibility' under IHL is widely understood as a due diligence standard that requires States to do only what is 'practical and practicable in the prevailing circumstances'.<sup>646</sup> What is 'practicable in the prevailing circumstances', in turn, is determined, also, in consideration of the State's resources.<sup>647</sup>

At the same time, chapter 2 established that investment treaty standards remain applicable in wartime and thus, in addition to their IHL

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<sup>644</sup> Articles 48, 51(2), and 52, API

<sup>645</sup> Articles 57-8, API; JF Quéguiner, 'Precautions under the Law Governing the Conduct of Hostilities' (2006) 88(864) IRR 793, 820-21; Oeter (n 527) para 448.

<sup>646</sup> Articles 57-8, API.

<sup>647</sup> K Trapp, *State Responsibility for International Terrorism* (OUP 2011) 70-72.

obligations, war-torn host States are obliged to comply with their conventional and customary obligations to protect investments. One such obligation is the protection and security standard, which has been said to be 'designed to protect investors and investments against violent actions'.<sup>648</sup> While some instruments prescribe an obligation of 'full protection and security',<sup>649</sup> and others refer to a benchmark of 'most constant protection and security',<sup>650</sup> it is mostly accepted that these variations in treaty language do not carry any substantive significance.<sup>651</sup> Therefore, for sake of convenience the discussion deals with the treaty obligation to guarantee 'full protection and security' (FPS).

Notwithstanding the prevalence of the FPS clause, its scope of protection is controversial.<sup>652</sup> FPS has been discussed in a relatively small number of arbitral decisions, which are mostly inconsistent in their interpretation and application of the standard<sup>653</sup> but for the consensus that FPS is an obligation of conduct<sup>654</sup> that requires States to take reasonable

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<sup>648</sup> Schreuer – Investments in armed conflicts (n 192) 6.

<sup>649</sup> Eg: Article 1105, NAFTA; Article 1, 2012 US Model BIT; Article 9.6(1), CPTPP; Article 8.10, CETA; Article 7(1) Morocco – Nigeria BIT; Article 4 Japan – Israel BIT; Article 4(1), China – Hong Kong CEPA Investment Agreement.

<sup>650</sup> Eg: Article 10(1), ECT ('most constant').

<sup>651</sup> Eg: C-M Giuditta, 'Full Protection and Security' in A Reinisch (ed) *Standards of Investment Protection* (OUP 2008) 131, 138-40; C Schreuer, 'Full Protection and Security' (2010) 1(2) *Journal of International Dispute Settlement* 1-17. However, see: *Azurix v Argentina*, ICSID Case No ARB/01/12, Annulment, 1 September 2009, para 408.

<sup>652</sup> On the scope of FPS and whether it covers legal, and not only physical, protection, see: *CME v The Czech Republic*; *CSOB v Slovak Republic*, ICSID Case No ARB/97/4, Award, 29 December 2004; *Siemens v Argentina* (Award); *Rumeli Telekom v Kazakhstan*, paras 662-68; *Tatneft v Ukraine*, UNCITRAL, Award, 29 July 2014, 15-27; *Saluka v Czech Republic*, para 483; *PSEG v Turkey*, ICSID Case No ARB/02/5, Award, 19 January 2007, para 258; *Oxus Gold v Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, paras 830-832; *Houben v Burundi*, ICSID Case No ARB/13/7, Award, 12 January 2016, paras 157-158; *Mesa Mining Corporation v Ecuador*, PCA No 2012-2, Award, 15 March 2016, paras 6.80-6.82; *Rusoro Mining v Venezuela*, para 122; *Allard v Barbados*, PCA Case No 2012-06, Award, 27 June 2016, paras 231-52. On the relationship of FPS with other standards, see: Giuditta (n 651) 146-49; Schreuer – Full Protection and Security (n 651); R Lorz, Protection and Security and Customary International law in M Bungenberg et al (eds) *International Investment Law: A Handbook* (CH Beck, Hart, Nomos 2015) 781-86.

<sup>653</sup> For a detailed discussion of arbitral practice, see Giuditta (ibid) 146-149; Lorz (ibid) 781-786.

<sup>654</sup> *AAPL v Sri Lanka*, para 75; *AMT v Zaire*, ICSID Case No ARB/93/1, Award, 21 February 1997, para 85; *Tecmed v The Mexico*, para 177; *Nobel Ventures v Romania* ICSID Case No ARB/01/11, Award, 12 October 2005, para 177; *Saluka v Czech Republic*, para 484;

precautions so as to protect foreign investments from violence, whether authored by the State or third parties, in particular during hostilities.<sup>655</sup>

A persistent point of controversy concerns the level of protection that the FPS standard denotes and the assessment of compliance with it. On this point, arbitral and scholarly jurisprudence identifies a 'sliding scale of liability'.<sup>656</sup> On one end of the spectrum is the *AAPL v Sri Lanka* case, which concerned the destruction of a shrimp farm by Sri Lankan commando forces during an alleged counter-insurgency operation. The Tribunal unanimously rejected the contention that FPS represented a strict liability obligation, and framed the standard using the benchmark of what a 'well-administrated government' could do in like circumstances.<sup>657</sup> On this view, FPS prescribes a uniform level of vigilance rather than one that is relative to the circumstances of the host State.

On the opposite end of the scale is the approach according to which FPS should 'not be strictly objective and applied worldwide, but rather that its content differs according to the situation of the country at issue'<sup>658</sup> in a manner that pays 'due respect' to the State's level of 'development and stability'.<sup>659</sup> In arbitral jurisprudence, this approach has been manifested most predominantly by the sole arbitrator Paulsson in *Pantechniki v Albania*, where the investor's claim that Albania was obliged to protect the investment from looting and riots by private parties was rejected.<sup>660</sup>

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*Frontier Petroleum v Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para 273; *AES v Hungary*, ICSID Case No ARB/07/22, Award, 23 September 2010, paras 13.3.1-13.3.3; *El Paso v Argentina*, ICSID Case No ARB/03/15, Award 31 October 2011, para 523; *von Pezold v Zimbabwe* (Award), para 596; *Allard v Barbados*, para 244; *Isolux v Spain*, SCC Case V2013/153, Award, 17 July 2016, paras 818-825.

<sup>655</sup> *Saluka v Czech Republic*, para 483; *PSEG v Turkey*, para 258; *Oxus Gold v Uzbekistan*, paras 830-32; *Houben v Burundi*, paras 157-58; Giuditta (n 651), 138 (noting that it is 'undisputed' that FPS applies to the hostilities paradigm); Schreuer – Full protection and security (n 651) 2 (stating that 'it is beyond doubt' that this is the purpose of FPS); Schreuer – investments in armed conflict (n 192) 6.

<sup>656</sup> *AAPL v Sri Lanka*, para 26.

<sup>657</sup> *ibid*, para 77, citing: A Freeman, 'Responsibility of states for unlawful acts of their armed forces' (1955) 88 *Recueil des cours de l'Académie de Droit International* 263, 278-80.

<sup>658</sup> H Zeitler, 'Full Protection and Security' in S Schill (ed) *International Investment Law and Comparative Public Law* (OUP 2010) 182, 201.

<sup>659</sup> Lorz (n 653) 780.

<sup>660</sup> *Pantechniki v Albania*, ICSID Case No ARB/07/21, Award, 30 July 2007, paras 71-74.

Paulsson explained that with regards to ‘an unpredictable instance of civic disorder’, a different level of protection is expected from a ‘powerful State’ than that from a ‘poor and fragile’ State with ‘limited capacities’.<sup>661</sup>

More recently, the Tribunal in *Houben v Burundi* (2016) elucidated that ‘paying respect’ to the State’s personal circumstances will not necessarily lead to the dismissal of a FPS claim.<sup>662</sup> The Tribunal cited *Pantechniki v Albania*, and stressed that the width of the FPS standard ought to be commensurate to the State’s individual circumstances.<sup>663</sup> Nevertheless, the Tribunal found that Burundi had breached FPS by failing to diligently use the resources that were available to it so as to remove squatters from the land that Houben acquired for a real-estate venture.<sup>664</sup>

An additional point of ambiguity regarding the operation of FPS in hostilities concerns the interrelationship between FPS and relevant IHL norms. Not a single investment tribunal that has adjudicated a dispute that arose out of or in relation to an armed conflict has considered the laws of armed conflict (as far as such decisions are publicly available); not even when it was determined by the forum that ‘there is no doubt that the destruction of the [investment] took place during the hostilities’, as was the case with *AAPL v Sri Lanka*.<sup>665</sup> Also notable in this regard is the recent case of *Ampal v Egypt* (2017), where the Tribunal found that Egypt breached FPS by failing to protect Ampal’s investment from terror attacks.<sup>666</sup> While the Tribunal ‘acknowledge[d] that the circumstances in the North Sinai Egypt were difficult’, including political instability, operation of armed militant groups, ‘security deterioration and general lawlessness’,<sup>667</sup> it did not explain the normative implications of this proposition in terms of applicable law and State responsibility.

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<sup>661</sup> *ibid*, paras 76-7

<sup>662</sup> *Houben v Burundi*, paras 160-64

<sup>663</sup> *ibid*, paras 160-64

<sup>664</sup> *ibid*, paras 164, 170-79

<sup>665</sup> *AAPL v Sri Lanka*, para. 59

<sup>666</sup> *Ampal-American Israel Corporation v Egypt*, ICSID Case No ARB/12/11, Decision on Liability, 21 February 2017.

<sup>667</sup> *ibid*, para 284.

Mindful of these uncertainties, this chapter deals with the obligation of States to take precautionary measures in favor of foreign investment in armed conflict. Section 2 establishes that under customary law States are required to take precautions to protect investments from violence. This is a due diligence obligation that is relative to the particular circumstances of the host State. Section 3 then argues that under the VCLT, the language ‘full protection and security’ (and like formulations) should be understood as a reference to customary international law on the treatment of aliens. Section 4 then deals with the IHL obligation to take precautionary measures as reflected in API Articles 57-8. It is established that IHL requires States to take feasible precautions, relative to their abilities and capacity, to protect investments from the effects of attacks, whether they author an attack or defend against one.

Finally, having addressed the meaning and content of the applicable investment law and IHL norms, the analysis turns to the interaction between these standards. To that end, the discussion focuses on the application of both norms to a particular factual-matrix. Because in practice FPS claims that arise out of or in relation to hostilities mostly concern the State’s obligation to take measures to protect foreign investments *against* attacks, the analysis uses the example of MCC’s investment in Afghanistan from chapter 4 and focuses more closely on the interaction between FPS and API Articles 58. Overall, this chapter argues that host States are required to take precautionary measures to protect foreign investment from the effects of hostilities whether they author the violence that affects the investment or not. Assessment of compliance with this obligation ought to consider the prevailing circumstances, including (but not limited to) humanitarian considerations, military necessities, and the resources and abilities of the State.

## 2. The Standard of 'Reasonable Care' under Customary Law on the Treatment of Aliens

It is an established standard of customary law that the host State is required to exercise due diligence or take 'reasonable care' to prevent injury to foreign nationals and their property. Yet, it is far from clear whether this due diligence obligation and the benchmark of 'reasonableness' prescribe a uniform rule or a relative standard that accounts for the circumstances and capacities of the host State. This section argues that a relative customary norm on the protection of aliens coalesced in the 20<sup>th</sup> century whereby what is 'reasonable' is assessed with regard to the particular resources and conditions of the host State.

The obligation to protect the physical integrity of 'merchants' and 'their effects' dates back to the Roman Empire.<sup>668</sup> This obligation appeared in treaties of amity as early as the 15<sup>th</sup> century and required the main powers to act 'in all haste and diligence' so as to allow 'all merchants' to 'remain in the countries securely'.<sup>669</sup> As early as the 17<sup>th</sup> century British treaties of amity prescribed 'complete', 'perfect', or 'constant' 'protection and security' to foreign subjects and inhabitants.<sup>670</sup> Across the Atlantic, American instruments included analogous obligations. From the 1776 draft Plan Treaty<sup>671</sup> through the 1795 Treaty of San Lorenzo with Spain, which was the last to use this language, American treaties of amity required the parties

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<sup>668</sup> I Finley, *The Ancient Economy*, Vol II (University of California Press, 1985) 160-62; G Young, *Rome's Eastern Trade: International Commerce and Imperial Policy from 31 BC to AD 305* (Routledge, 2001) 63-4; T Weiler, *The Interpretation of International Investment Law* (Brill 2013) 67-9.

<sup>669</sup> Eg: Treaty of Amity and Friendship, and of a Free Intercourse of Trade and Mechandizes between Henry VII King of England, and Philip Archduke of Austria, Duke of Burgundy (22 February 1495); Article V, Treaty of Peace and Commerce between Francis I King of France, and Henry VIII King of England (5 April 1515); Article XVI, Treaty of Confederacy and Alliance between Charles the IX, King of France and Queen of England, at Blois (29 April 1572); Treaty of Truce and Commerce between Portugal and the Netherlands (12 June 1641); Article VII, Treaty between GB and Tunis (5 October 1662); Article I, Treaty of Peace between France and Great Britain (13 November 1655).

<sup>670</sup> Eg: Article V, The Treaty of Peace between Henry II King of France, and Elizabeth Queen of England (2 April 1559); Articles I, II, IX Marine Treaty between the Crowns of Great Britain and France (24 February 1676-7).

<sup>671</sup> US Continental Congress, *Journals of Congress Containing the proceedings from January 1, 1776, to January 1, 1777*, Vol II (US Government, Pennsylvania 1778) 208.

‘to endeavor by all means in their power’ to ‘protect and defend’ foreigners and their property.<sup>672</sup>

In the late 18<sup>th</sup> century, as part of the negotiations of the Jay Treaty, the US adopted the British formula of ‘[adj.] + ‘protection and security’ in lieu to its strand of drafting that expressed the same obligation in terms of ‘protect and defend’. Accordingly, Article 14 of Jay’s Treaty instructed that, ‘merchants and traders on each side shall enjoy the most complete protection and security for their commerce’.<sup>673</sup> This language persisted through the 19<sup>th</sup> century with some variations in drafting, referencing ‘most perfect’, ‘entire’, or ‘complete’ protection and security.<sup>674</sup> Contemporaneous practice demonstrates that, first, notwithstanding these variations in formulation, these provisions were widely conceived as reflective of the same ‘common rule of intercourse between all civilized nations [that] has the further and solemn sanction of an express stipulation by [t]reaty’.<sup>675</sup> Second, while the treaty language ‘all haste and diligence’, ‘constant protection’, ‘most complete protection’, and like formulations would seem to imply that the standard that such expressions qualify is one of strict liability, the standard reflected in this language was intended to require due diligence; it ‘entitle[d] the property of strangers... to the protection of its sovereign by all efforts *in his power*’.<sup>676</sup>

At the same time, this obligation of vigilance was created by, and applied between, ‘civilized nations’, who considered themselves equal.<sup>677</sup>

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<sup>672</sup> 1795 Spain – US FCN Treaty (see further discussion of this instrument in chapter 2).

<sup>673</sup> Article 14, Jay Treaty.

<sup>674</sup> Eg: Article I, US – GB FCN treaty (3 July 1815) (‘most complete protection and security’); Article 11, US – Colombia FCN treaty (3 October 1824) (‘most perfect and entire security’); Article III, GB – Mexico FCN treaty (26 December 1826) (‘most complete protection and security’); Article XIII, US – Brazil FCN treaty (12 December 1828) (‘most perfect and entire security’). See also: Article III, US – Mexico FCN treaty (5 April 1832); Article 1, GB – Free City of Frankfurt FCN treaty (13 May 1832); Article III, US – Brunei FCN treaty (23 June 1850); Article 1, GB – Japan FCN treaty (16 July 1894).

<sup>675</sup> US Congress, *American State Papers: Documents, Legislation, and Executive* Vol IV (US Congress, Washington 1832) 433, 460, 464, 467.

<sup>676</sup> *ibid*, 433, 460-467; emphasis added.

<sup>677</sup> F Dunn, *The Diplomatic Protection of Americans in Mexico* (Columbia University Press 1933) 3-10; B Bowden, *The Empire of Civilization: The Evolution of an Imperial Idea*

'All efforts in his power' thus meant a uniform standard rather than a relative obligation that depends on the level of protection offered to the nationals of the host State and the host State's circumstances. The problem was (and remains) that not all States are equal. And so, while the law applied equally to all States its application was not equitable since it ignored material differences in size, population, capabilities, and resources. As a result, States with more limited capacities were held in practice to standards which they could not meet in terms of their resources. This effectively guaranteed a breach of the obligation to take reasonable care to protect aliens no matter how diligently these States acted.

The 1874 *Montijo* case is illustrative. The case concerned the seizure of 'Montijo', a vessel that belonged to US nationals, by revolutionaries and the failure of the State to recover it. Although it was undisputed by the parties that Panama did not have the means to recover the Montijo, its failure to do so nevertheless constituted a breach of customary law. The umpire held that, if a State 'promises protection to those whom it consents to admit into its territory, it must find the means of making it effective. If it does not do so, even if by no fault of its own, it must make the only amends in its power, viz, compensate the sufferer'.<sup>678</sup>

The idea that all States are equal and should be held to uniform standards irrespective of material differences lost its appeal during the 20<sup>th</sup> century.<sup>679</sup> Contemporaneous literature,<sup>680</sup> following the footsteps of

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(University of Chicago Press, Chicago and London 1967) 177-78; G Schwarzenberger, *Foreign Investment and International Law* (Stevens & Sons, London 1969) 163.

<sup>678</sup> *Case of the Montijo (USA v Colombia)* (1874) reported in: J Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (US Government Printing Office, Washington 1898) 1421, 1444.

<sup>679</sup> Pointedly for international economic law, this change is partially attributed to Calvo's impact on the legal traditions of Latin American States (S KB Asante, 'International Law and Foreign Investment: A Reappraisal' (1998) 37(3) ICLQ 588, 589-93). This reform was bolstered by the increased engagement of developing States with international law and the establishment of the UN and other instruments, such as the GATT (L Rajamari, *Differential Treatment in International Law* (OUP 2006) ch 2; E Alexander, 'Taking Account of Reality: Adopting Contextual Standards for Developing Countries in International Investment Law' (2008) 48(4) Virginia Journal of International Law 815, 817-20.

<sup>680</sup> Eg: Borchard – Diplomatic protection (n 385) 27-30; Dunn (n 677) 3–4.



dispute resolution bodies that were established to adjudicate claims that arose out of injuries to, or wrongful seizures of, property by revolutionaries during civil unrest began to reject the absolute nature of the customary obligation to take reasonable care to protect foreigners from violence; they rather assessed the 'reasonableness' of the measures that the State took against the circumstances ruling at the time in *that* State.<sup>681</sup>

Notably, the absolute standard that was espoused by the *Montijo* umpire was explicitly rejected in the 1903 *Sambiaggio Case*,<sup>682</sup> where it was held that assessment of diligence is a function of the capacities and the circumstances of the host State.<sup>683</sup> In 1910, Root explained that, 'the rights of the foreigner vary as the rights of the citizen vary between ordinary and peaceful times and times of disturbance and tumult; between settled and ordinary communities and frontier regions and mining camps'.<sup>684</sup> The IDI proposed in its 1927 meeting the rule (Article 7) that, a State is not responsible for damage caused to foreigners and their property owing to hostilities, if it has used normal due diligence, which was assessed relative to the treatment the State has given to its nationals.<sup>685</sup>

The same perceptions of relative due diligence were expressed by States in the framework of the aforementioned 1930 Hague Codification Conference.<sup>686</sup> And by 1961, Article 7(1) of the draft codification of the principles of State responsibility instructed that the responsibility of the State

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<sup>681</sup> Eg: *Kummerow, Otto Redler & Co., Fuda, Fischbach, and Friedericy Cases*, 10 RIAA 369, 387 (1903); *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (US) v GB*, 6 RIAA 42-4 (1920); *George Adams Kennedy (US) v Mexico*, 4 RIAA 194, 195, 198-201 (1927); *Solis (US) v Mexico*, 4 RIAA 358-64 (1928); *Mexico City Bombardment Claims (GB) v Mexico*, 5 RIAA 80-1, 90 (1930);

<sup>682</sup> *The Sambaggio Case* (Italy – Venezuela) 10 RIAA (1903) 499, 509, 517.

<sup>683</sup> *ibid*, 518, 524

<sup>684</sup> E Root, 'The Basis of Protection to Citizens Residing Abroad' (1910) 4(3) AJIL 517, 523. However, see J Sharpe, 'The Minimum Standard of Treatment, Glamis Gold, and Neer's Enduring Influence' in M Kinnear et al (eds) *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015) 269, 269-71.

<sup>685</sup> Article 7, 1927 IDI Articles (n 444); Eaglton and Dunn (n 392) 137.

<sup>686</sup> Rosenne (n 445) 104-19: See the German response ('the State is not responsible for the conduct of insurgent' and the damage that it causes foreign property, but it is responsible for such conduct if it has 'not afforded sufficient protection to foreigners or [has] not taken all steps that the circumstances allow'). A similar position was expressed by Italy, Sweden, Finland, Australia, Czechoslovakia, and South Africa)

‘for the injuries caused to an alien by illegal acts of individuals’ is assessed ‘in view of the circumstances, are taken to prevent the commission of such acts’. Paragraph 2 augmented that these circumstances ‘shall include, in particular... the physical possibility of preventing its commission with resources available to the State’.<sup>687</sup>

To recap, by the 20<sup>th</sup> century, the language, practice, and jurisprudence relating to FCN provisions on the protection and security of aliens recognized a customary standard that required host States to exercise due diligence in order to protect foreign persons and property from damage caused by the State’s own actions and from damage caused by third parties. Although this norm first coalesced as a uniform standard, it developed into a relative obligation that accounts for the available resources of the State in assessing its compliance with the obligation to take ‘reasonable’ care.

### **3. The Treaty Language ‘Full Protection and Security’ is A Reference to Customary Law**

This section argues that the treaty language ‘full protection and security’ (and similar formulations) is, under VCLT Article 31, a reference to the above established customary obligation of ‘reasonable care’.

As the FPS obligation is a treaty rule of international law, its content is determined by way of applying the customary rules of treaty interpretation as reflected in VCLT Article 31-2, which instruct that the first port of call in this discussion is the ‘regular, normal, or customary’ use of the term ‘full protection and security’.<sup>688</sup> True to this textual approach, some investment tribunals have attempted to elucidate the meaning of FPS and the level of protection it requires by looking to dictionaries.<sup>689</sup> Under this technique, the

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<sup>687</sup> Article 7, ILC, ‘Sixth report of the Special Rapporteur, Mr. FV García Amador’, UN Doc A/CN.4/134, and Add.1 (1961).

<sup>688</sup> Article 31, VCLT; Schwarzenberger – Myths and Realities of Treaty Interpretation (n 456) 212-19; Dörr (n 456) 543; Gardiner (n 456) 162-70.

<sup>689</sup> Eg: *AAPL v Sri Lanka*, paras 40-8; *National Grid v Argentina*, UNCITRAL, Award, 3 November 2008, paras 187-89; G Foster, ‘Recovering “Protection and Security”: The Treaty Standard’s Obscure Origins, Forgotten Meaning, and Key Current Significance’ (2012) 45 Vanderbilt Journal of Transnational Law 1095, 1106-108.

phrase ‘full protection and security’, or rather the conjunction of the dictionary meanings of each word, prescribes a protection at an ‘absolute level that cannot be improved upon’.<sup>690</sup> Along a similar line, the *Azurix v Argentina* Tribunal explained that, ‘when the terms ‘protection and security’ are qualified by ‘full’ [...] they extend, in their ordinary meaning, the content of this standard beyond physical security’.<sup>691</sup>

‘But dictionaries, alone, are not necessarily capable of resolving complex questions of interpretations’,<sup>692</sup> and FPS is one such case. ‘Ordinary meaning’, as explained in chapter 3, does not denote dictionary meaning alone. Rather, words are interpreted in the technical and professional meaning they have in the particularly relevant community of word-users (i.e., ‘the parlance of lawyers’).<sup>693</sup> Disassembling the language ‘full protection and security’ into detached words so as to ascertain the meaning of the entire expression, misplaces the syntax of the phrase and thus alters its meaning.<sup>694</sup>

Early treaty practice and more recent State practice demonstrate that, prior to the arbitral jurisprudence of the 1990s, the language ‘full protection and security’ (and like expressions) was used as a term of art that referenced the customary standard on the treatment of aliens, especially concerning protection from hostilities. As noted, at least from the 17<sup>th</sup> century British treaties of amity used a drafting formula that coupled

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<sup>690</sup> The qualifiers ‘full’, ‘complete’, ‘constant’, and ‘perfect’ plainly refer to something ‘absolute’ that ‘cannot be improved upon’. ‘Protection’ ordinarily denotes ‘shelter, defence, or preservation from harm, danger, damage, etc.’ And, ‘security’ is ‘the state or condition of being or feeling secure’ (see ‘full’, ‘complete’, ‘constant’, ‘perfect’, ‘security’ n’ (OED Online, OUP June 2013) <[www.oed.com](http://www.oed.com)> accessed 15 January 2018).

<sup>691</sup> *Azurix v Argentina*, ICSID Case No ARB/01/12, Award, 14 July 2006, para 408.

<sup>692</sup> *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Appellate Body Report, WT/DS285/AB/R, 7 April 2005, para 164; Weiler – Interpretation of International Investment Law (n 668) 191; Wälde (n 457) 747-48.

<sup>693</sup> Wälde (ibid) 771; 1966 Draft Articles on the Law of Treaties with Commentary (n 166) 542.

<sup>694</sup> *Aegean Sea Continental Shelf (Greece v Turkey)* (Merits)[1978] ICJ Rep 3, para 53; *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)* (Nicaragua intervening) [1992] ICJ Rep 351, paras 373-74; Dörr (n 456) 543-44. See also: *Lucchetti v Peru*, ICSID Case No ARB/03/4, Decision on annulment, 5 September 2007, dissenting opinion of Berman, para 8.

conjunctive nouns, such as ‘protection and security’, with qualifying adjectives, such as ‘complete’, ‘perfect’, and ‘constant’, so as to express an obligation of conduct to protect foreigners. In 1758, Vattel explained that this widely recognized obligation to guarantee ‘perfect security’ of aliens meant that, ‘the sovereign must afford perfect security, as far as depends on him’.<sup>695</sup>

In 1795, as another example, Alexander Hamilton defended Jay’s Treaty, which used the formula ‘most complete protection and security’ in Article 14,<sup>696</sup> and argued that, ‘the right of holding or having property in a country always implies a duty on the part of its government to *protect* that property, and *to secure to the owner the full enjoyment* of it’;<sup>697</sup> and that, ‘*full protection and security* to the persons and property of the subjects of one which are then in the territories of the other’ is an obligation of conduct.<sup>698</sup> While during the 19<sup>th</sup> century ‘most perfect protection and security’ and similar language was also used to describe obligations of conduct in other contexts,<sup>699</sup> these expressions mostly addressed the customary due diligence obligation to protect foreigners.

The formula, ‘complete protection and security’, persisted throughout the first half of the 20th century,<sup>700</sup> with some changes. First, interwar FCN treaties broadened the clause to cover not only ‘nationals’ or ‘citizens’, but also expressly extended rights to corporations and other juridical

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<sup>695</sup> de Vattel (n 160) Section 104

<sup>696</sup> Article 14, Jay’s Treaty

<sup>697</sup> H Lodge, *The Works of Alexander Hamilton* (G.P. Putnam’s Sons, New York 1904) Defence XIX; emphasis added.

<sup>698</sup> H Syrett and J Cooke, *The Papers of Alexander Hamilton* (Wiley 1957) Defence XXII; emphasis added.

<sup>699</sup> Eg: In 1841, Alexander Macomb, the Commanding General of the US army, ordered the forces in Florida to ‘adopt all efficient and proper measures necessary...so as to afford the *most perfect protection and security* to the frontiers’ (General Order No 29, 20 May 1841, cited in H Samuel, *Hazard’s United States commercial and statistical register, containing documents, facts, and other useful information* (Geddes, Philadelphia 1841) 351.

<sup>700</sup> Eg: Article 2, Mexico – Honduras FCN Treaty (24 March 1908); Article X, Japan – Colombia FCN Treaty (25 May 1908); Article 1, US – Japan FCN Treaty (21 February 1911); Article 1(6), UK – Japan FCN Treaty (3 April 1911); Article 1, US – Germany FCN Treaty (8 December 1923).

persons.<sup>701</sup> Second, interwar FPS clauses prescribed a ‘degree of protection that is required by international law’.<sup>702</sup> Notably, this reference to international law did not affect the content of the obligation itself.<sup>703</sup> Postwar FCN treaties retained the long-standing treaty practice that required each party to provide the ‘most constant protection and security’ and the twofold refinement of the inter-bellum period,<sup>704</sup> while extending the protection to the provision to property of companies.<sup>705</sup>

States continued to refer to the accepted formula, ‘most constant protection and security’ (and like formulations) as reflective of customary international law,<sup>706</sup> irrespective of additional treaty stipulations as regards what was ‘required by international law’. Illustratively, during the 1948-49 revision of the standard US FCN treaty, the State Department omitted the reference to treatment in accordance with ‘international law’ from the FPS clause and explained that US nationals and companies would be entitled to the protection of customary law ‘even without a reference to international law’.<sup>707</sup> As another example, in 1951, during the treaty negotiations between the US and Ethiopia, the US stated that ‘most constant protection and security’ was ‘time-honored treaty language’<sup>708</sup> that is, itself, declaratory of the customary obligation to act in due diligence to protect aliens.<sup>709</sup> In 1956, Wilson repeated the proposition that inclusion or omission of the reference

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<sup>701</sup> *ibid.*

<sup>702</sup> *ibid.* See also: Honduran – US FCN Treaty (7 December 1927).

<sup>703</sup> K Vandevelde, *The First Bilateral Investment Treaties: US Postwar Friendship, Commerce, and Navigation Treaties* (OUP 2017) 413-15; K Vandevelde, *United States Investment Treaties: Policy and Practice* (Kluwer 1992) 22; R Wilson, ‘Property-Protection Provisions’ (1951) 45 AJIL 83, 98.

<sup>704</sup> Eg: Article VI(1), US – China FCN Treaty (4 November 1946); Article V, US – Italy FCN Treaty (2 February 1948); Article II(1), US – Ireland FCN Treaty (21 January 1950); Article VI(1), US – Haiti FCN Treaty (3 March 1955). For a discussion of these treaties: Vandevelde – The first BIT (n 703) ch 8.

<sup>705</sup> *ibid.*; Wilson - Property-Protection Provisions (n 703) 83.

<sup>706</sup> Eg: *Asakura v City of Seattle*, 265 U.S. 332 (1924).

<sup>707</sup> Memorandum of Conversation dated 10 March 1947, cited in: Vandevelde – The first BIT (n 703) 415.

<sup>708</sup> Telegram dated 28 August 1951, from the Department of State to the US embassy in Addis Ababa, cited in *ibid.*, 414

<sup>709</sup> *ibid.*

to ‘international law’ did not make international law any more or ‘any less applicable to protection of both persons and property’.<sup>710</sup>

It is against this regular use of the phrase ‘protection and security’ as a reference to custom that the first Germany – Pakistan BIT was concluded. Article 3(1) instructed that, ‘investments by nationals or companies of either Party shall enjoy protection and security.’<sup>711</sup> This language was taken from the US FCN treaty draft, which served as a basis for the negotiations of the US – Germany FCN treaty (1953 – 55).<sup>712</sup> Subsequently, this formulation appeared at least in 7 out of 10 German BITs during 1960 – 62, and in more than a dozen BITs that were signed by various European States during 1963 – 66.<sup>713</sup>

Likewise, the 1960 Abs-Shawcross Convention and the 1967 OECD Draft Convention on the Protection of Foreign Property, which both influenced subsequent bilateral practice, used the language ‘most constant protection and security’ to express the due diligence obligation to protect the property of foreign nationals.<sup>714</sup> These provisions, as the Drafts themselves explain, were predicated on 1940s and 1950s US FCN treaty practice and used the referenced wording with the intention to attribute to it a certain pre-existing customary meaning.<sup>715</sup> Legal pleadings before international bodies that adjudicated postwar disputes in the 1980s also demonstrate that States perceived the phrase ‘most constant protection and security’ as a term of art that reflected custom, with or without additional language that referenced treatment ‘in accordance with customary law’.<sup>716</sup>

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<sup>710</sup> R Wilson, ‘A Decade of New Commercial Treaties’ (1956) 50 AJIL 927, 927-31.

<sup>711</sup> Article 3(1), Germany –Pakistan BIT.

<sup>712</sup> On the effect and influence of the US model and the negotiations with Germany, see: Vandevelde – The first BIT (n 703) 298-305.

<sup>713</sup> For a detailed analysis of the BIT concluded at the time, see: L Bastin, ‘State responsibility for omissions: Establishing a breach of ‘full protection and security’ obligation by omission (DPhil, Oxford 2017) 95-7.

<sup>714</sup> Article 1, Abs and Shawcross Draft Convention (n 460); Article 2, OECD Draft Convention on the Protection of Foreign Property (1967) 7 ILM 117

<sup>715</sup> Comment to Article 1, Abs-Shawcross Convention (ibid); Notes and comments to Article 2, OECD Draft Convention.

<sup>716</sup> *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* ICJ Pleadings Vol I, US memo, 100-02, the US maintained that under FPS clause ‘States must use due diligence to prevent wrongful

What follows from the foregoing is that the generally accepted ordinary meaning of ‘full protection and security’ for the purposes of VCLT Article 31(1) is a reference to customary law on the treatment of aliens, in particular regarding physical protection.<sup>717</sup>

In the alternative, this historical review of authorities may be construed as evidence of the intention to award the treaty expression ‘full protection and security’ a special, as opposed to ordinary, meaning that references customary law pursuant to VCLT Article 31(4).<sup>718</sup> Either way, the meaning of ‘full protection and security’ is a reference to custom and thus the meaning of the relevant FPS treaty obligation is ascertained by way of examining the content of the customary rule.

For the sake of completeness, and as suggested with respect to the EWC above, a different interpretive route to an arguably similar outcome may be found in VCLT Article 31(3)(c).<sup>719</sup> Thus, customary law on the treatment of aliens may be brought into the interpretive exercise by way of ‘taking it into account’ as a ‘relevant rule of international law’.<sup>720</sup> For the purpose of the present analysis, and relying on the discussion in chapter 3, suffice it to say that, while the customary standard of treatment is likely a relevant rule of international law (in the sense of VCLT Article 31(3)(c)) that should be contextualized in the interpretation of FPS, if the term ‘full protection and security’ has an identifiable (ordinary or special) meaning in international law, and it is argued that it does, then this meaning should be

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injuries’ and that this ‘does not require that [the State] prevents any injury whatsoever’, but rather to take ‘reasonable actions’; *United States Diplomatic and Consular Staff in Tehran (US v Iran)* ICJ Pleadings, US memo, pp 179-81 (‘the precise content ascribed to the phrase ‘the most constant protection and security’ may well depend on the circumstances of any particular case’)

<sup>717</sup> Gottlieb (n 458) 131; Linderfalk – Interpretation (n 458) 65-7; Gardiner (n 456) 291; *Aguas del Tunari v Bolivia*, para 230

<sup>718</sup> Article 31(4), VCLT; 1966 Draft Articles on the Law of Treaties with Commentary (n 166) 222-23; PCIJ, *Legal Status of Eastern Greenland*, 49; Dörr (n 456) 568; Gardiner (n 456) 291-93; Weeramantry (n 466) 95-6 and Appendix III

<sup>719</sup> ILC Study Group on Fragmentation (n 470).

<sup>720</sup> Article 31(3)(c), VCLT.

first accounted for through the language itself (VCLT Article 31(1), (4)), not its context.<sup>721</sup>

In sum, since the 18<sup>th</sup> century the formula '[adj.] + 'protection and security'' served, almost universally, as a treaty stipulation of a customary due diligence obligation that imposed a relative standard that accounts for the host State's conditions and resources. The treaty language 'full protection and security' is (pursuant to VCLT Article 31) a reference to this relative customary norm, and the meaning of the treaty rule is therefore directly informed by the content of the customary norm. In practical terms this means that assessment of compliance with the FPS rule turns, to a degree, on the technical, financial, and human resources of the particular host State.

#### **4. The Obligations to Take Precautionary Measures under IHL**

This section focuses on the content of API Articles 57-8 and the assessment of compliance with these provisions.

As explained, because the *Raison d'être* of IHL is respect for civilian persons and objects and their protection against the effects of hostilities, even when a lawful attack (against a military objective) is launched, IHL places further restraints in the form of the requirement to take precautionary measures, upon both the attacking party and the party being attacked, in order to avoid (or at least to minimize) the collateral effects of hostilities on civilian persons, the civilian population, and civilian objects. These precautionary obligations form part of customary IHL and are codified mainly in API Articles 57 and 58.<sup>722</sup> Insofar and for so long as foreign investments are not used militarily, they are civilian objects which cannot be

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<sup>721</sup> Paparinskis –Treaty interpretation (n 480) 77-9; Carstens (n 480) 238-40; Bjorge (n 480) 197-199.

<sup>722</sup> Articles 57-8, API. See also Articles 41 and 56, API. On the status of these obligations see: ICRC – Customary IHL Study (n 38) Rules 15, 22; ICTY, *Prosecutor v Kupreškić*, IT-95-16, Judgment, 14 January 2000, para 524; W Hays Parks, 'Air War and the Law of War' (1990) 32(1) Air Force Law Review 1, 158; Quéguiner (n 645) 817; Jensen (n 545) 157. For a view that maintains that Article 58 has not attained customary status see M Sassòli and A Quintin, 'Active and Passive Precautions in Air and Missile Warfare' (2014) 44 Israel Yearbook on Human Rights 69, 107-111.



the subject of direct attack, and the host State is required to take precautions to protect the investments from the effects of hostilities whether it launches an attack or are attacked by the adversary.

The obligation to take precautions *in* attack, as API Article 57(1) itself explains, is predicated on the general principle that the attacker alone decides on the objects to be targeted and the means and methods of attack to be employed. Therefore, it is incumbent upon the attacking party to take ‘constant care’ in the conduct of its military operations to ‘spare the civilian population, individual civilians, and civilian objects’.<sup>723</sup> Article 57 then materializes this principle by enumerating a non-exhaustive list of measures that must be taken when planning an attack, including the obligations to verify the lawfulness of the target, to choose means and methods so as to avoid or minimize civilian losses, and to refrain from attacks that are expected to cause disproportionate civilian loss.<sup>724</sup> The provision also includes a list of precautions that concern the execution of attacks, such as the obligations to suspend or cancel an attack ‘if it becomes apparent’ that it is prohibited,<sup>725</sup> to give ‘effective advance warning’, unless circumstances do not permit,<sup>726</sup> and when a choice is possible to select the military objective causing the least danger to the civilian population.<sup>727</sup>

Article 58 is titled ‘precautions against the effects of attacks’. It is concerned with the precautions an attacked party is to take in favor of the civilian population under its control.<sup>728</sup> This obligation rests on idea that the most effective way to ensure the safety of the civilian population is for the defender, who has better knowledge and control of the location of its civilian population and civilian objects, to shoulder a significant burden of the

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<sup>723</sup> Article 57(1), API; Quéguiner (n 645) 817; Jensen (ibid) 155-56; Sassòli and Quintin (ibid) 75-80.

<sup>724</sup> Article 57(2)(a), API.

<sup>725</sup> Article 57(2)(b), API.

<sup>726</sup> Article 57(c), API.

<sup>727</sup> Article 57(3), API.

<sup>728</sup> Article 58, API; API Commentary (n 509) para 2239.

responsibility.<sup>729</sup> Thus, Article 58(a) requires States to remove civilians and civilian objects from the vicinity of military objectives.<sup>730</sup> Notably, under this rule, States are not required to evacuate civilians or civilian objects from built-up areas as such, but only to remove them from the vicinity of military objectives.<sup>731</sup> Since under certain circumstances civilian objects may be classified as military objectives susceptible of direct attacks,<sup>732</sup> Article 58(a) requires the defending party to regularly re-assess the situation so as to identify known or anticipated military objectives and act accordingly.

Under Article 58(b) the defending party is required to avoid locating military objectives within, or near, densely populated areas.<sup>733</sup> In addition, Article 58(c) serves as a 'catch-all' clause that encompasses the measures prescribed under, and anything that is not covered by, the other subparagraphs,<sup>734</sup> requiring the parties to 'take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations'.<sup>735</sup>

The scope of Article 57 and 58 is circumscribed by the term 'control'. Article 57 lays down rules for the conduct to be observed in attacks on the territory under the enemy's control, and Article 58 covers the protection of civilian objects that are found 'under the control' of the defending State. While this language may be conceived of as a territorial limitation, the

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<sup>729</sup> API Commentary (n 509) para 692; F Kalshoven, *Reflections on the Law of War: Collected Essays* (Brill Martinus Nijhoff 2007) 223; Jensen (n 545) 155-56

<sup>730</sup> Article 58(a), API.

<sup>731</sup> The State may decide to go beyond the requirement of Article 58(a) and evacuate civilians in accordance with Article 17, GCIV, but it is not obliged to do so. As for what amounts to 'vicinity' in the sense of Article 58, the object and purpose of the provision implies that the appropriate distance is that 'where the defending party would no longer expect civilians to suffer harm as a result of friendly or hostile fire directed against that particular military objective' (U Sari, 'Urban Warfare: The Obligations of Defenders' (*Lawfare*, 24 January 2019) <<https://www.lawfareblog.com/urban-warfare-obligations-defenders>> (accessed 25 January 2019)).

<sup>732</sup> On this point, see the analysis in chapter 4.

<sup>733</sup> Article 58(b), API.

<sup>734</sup> Quéguiner (n 645) 818; Schmitt – Tallinn Manual (n 592) sections 4-5; Jensen (n 545) 161.

<sup>735</sup> Article 58(c), API.

drafting history of API elucidates that the term ‘control’ was preferred over ‘authority’ in order to ‘impose obligations on the parties which would not necessarily be implied by the use of the word ‘authority’.’<sup>736</sup> Pointedly, the language ‘under the control’ is used to highlight the *de facto* as opposed to the *de jure* scope of the obligation to take precautionary measures.<sup>737</sup> The obligations to take precautionary measures therefore cover not only the host State’s own population, but also any other civilians and civilian objects that may be temporarily under its control, including refugees, aliens, and foreign investments.<sup>738</sup>

Before turning to the assessment of compliance with the precautionary obligations, the interaction between the obligations to take precautions in and against attack merits consideration. On this point, American practice stands for the proposition that it is the *defender* who carries most of the burden to take precautions in favor of the civilian population, since it better controls its civilian population.<sup>739</sup> This is a convenient position to hold since the US is traditionally not engaged in warfare on US territory, thereby shifting most of the responsibility to its adversary. Correspondingly, Israel, who normally engages in warfare in territory over which it may be said to exercise control, represents the view it is the *attacking* party, and not the defender that controls the war zone, who carries the burden to take precautions.<sup>740</sup> Both views are inaccurate.

Articles 57 and 58 are two necessarily interconnected sides of the same principle whereby civilians must be spared to the extent possible from the effects of armed conflict. Hence, the object and purpose of IHL mandates that *all* parties to the conflict will carry the burden of the precautionary obligation irrespective of their classification into ‘attacker’ and

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<sup>736</sup> ICRC – The Official Records of the Diplomatic Conference 1974-77 (n 550) Vol 14, 198-200 esp. the Canadian proposal in paras 9 and 14.

<sup>737</sup> *ibid.*

<sup>738</sup> Rogers (n 416) 75-6; Jensen (n 545) 162; Quéguiner (n 645) 818-19

<sup>739</sup> For a summary of this view and its rationale, see Hays Parks – Air war (n 722) 153-54, 158.

<sup>740</sup> See the language in Israel, Rules of warfare in the battlefield, Military AG Corps Command, IDF (2<sup>nd</sup> edn 2006) 13.

‘defender’.<sup>741</sup> In fact such a distinction has no place in the practice and law and policy of the conduct of hostilities. The practicalities of warfare render the distinction between defenders and attackers artificial, since in reality, a belligerent party takes measures that are both pro-active and offensive and protective and defensive. No belligerent engages in purely offensive or strictly defensive tactics. This notion is clearly reflected in the customary definition of ‘attack’, under API Article 49, as ‘acts of violence against the adversary, *whether* in offence or in defence’.<sup>742</sup> Moreover, an attempt to identify who is the attacking party so as to allocate precautionary obligations risks collapsing into a guilt-based analysis of the conduct of hostilities and conflating ‘attack’ with ‘aggression’ and ‘defense’ with ‘self-defense’, thereby confusing *jus in bello* with *jus ad bellum*.

The fact that the obligation to take precautions applies equally to all the parties to the conflict does not mean that the obligation is not equitable in application. The requirement to take precautionary measures imposes an obligation of conduct that is assessed in terms of ‘effort made rather than results obtained’.<sup>743</sup> The phrase ‘everything feasible’ qualifies all the obligations of Article 57, while the language ‘to the maximum extent feasible’ modifies the precautionary obligations under Article 58.<sup>744</sup> This ‘feasibility’ yardstick represents the desire of the international community to increase the protection of civilians (objects and persons) without placing unrealistic constraints on the ability of the State to defend itself.<sup>745</sup> As regards the meaning of this benchmark, States, doctrine, and jurisprudence

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<sup>741</sup> Jensen (n 545) 156.

<sup>742</sup> Article 49, API; emphasis added.

<sup>743</sup> K Trapp, ‘Great Resources Mean Great Responsibility: A Framework of Analysis for Assessing Compliance with API Obligations in the Information Age’ In D Saxon (ed) *International Humanitarian Law and the Changing Technology of War* (Brill Nijhoff 2013) 156.

<sup>744</sup> Article 58 chapeau, API

<sup>745</sup> The Rapporteur of the Working Group at the Diplomatic Conference leading to the adoption of the API explained that, ‘agreement was reached fairly quickly’ on the inclusion of the obligations to take precautionary measures once the benchmark of ‘feasibility’ was changed to ‘modify all paragraphs’. See: API Commentary (n 509) para 2245; Bothe et al – New rules for victims of armed conflicts (n 42) 414

spell out that ‘feasible’ precautions are those which are ‘practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations’.<sup>746</sup>

The implication of conditioning the obligation to protect objects from the effects of hostilities by what is ‘practicable’ in the ‘prevailing circumstances’ is that, assessment of compliance is limited to ‘the factors and existing possibilities’ as they appeared to the State at the time; it is not subject to subsequently informed analysis.<sup>747</sup> Further, ‘practicability’ requires that the measurement of compliance with the obligation to take precautionary measures will turn, *inter alia*, on the means available to the State.<sup>748</sup> Of course, any such assessment of means ought to be realistic and context sensitive, and account for budget constraints, even of the wealthiest of States and most advanced of western armies.

Indeed, the drafting history of API, the declarations of States upon signature and upon ratification of API,<sup>749</sup> military manuals,<sup>750</sup> and scholarship, all indicate that developed and developing countries, neutral and war-ravaged States alike construe ‘practicability’ as a benchmark that is relative to their particular topography, weather, and economic

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<sup>746</sup> For State practice, see ICRC – Customary IHL Study (n 38) practice on Rules 15 and 22. For State declarations, see J Gaudreau, ‘The reservations to the Protocols additional to the Geneva Conventions for the protection of war victims’ (2003) 849 IRRC 143, 154-55 (Namely, Algeria, Belgium, France, Germany, Ireland, Italy, and the Netherlands). For other sub-sets of IHL that adopt the same meaning, see Article 4, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (10 October 1980), 1342 UNTS 171; Article 1(5), Protocol III to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (Amended, 21 December 2001), 10 October 1980, 1342 UNTS 137. For jurisprudence see *Prosecutor v Galić* (Judgement) IT-98-29-T (5 December 2003) para 58, fn 105. For doctrine see Sassòli and Quintin (n 722) 69-123; Quéguiner (n 645) 802-3, 808-10; Trapp - Great resources mean great responsibility (n 743) 155-7.

<sup>747</sup> *US v List (Hostages)* and Trapp - Great resources mean great responsibility (n 743) 155-7.

<sup>748</sup> This assessment also comprises topographical and geopolitical considerations, human resources, etc. M Schmitt, ‘War, Technology, and International Humanitarian Law’ (2005) Harvard Program on Humanitarian Policy and Conflict Research, Occasional Paper 4, 30-33; Trapp - Great resources mean great responsibility (n 743) 163-64.

<sup>749</sup> ICRC – Customary IHL Study (n 38) practice on Rule 22.

<sup>750</sup> *ibid*, practice on Rule 15 – Sections C-D and practice on Rule 22 – Sections B-C.

conditions.<sup>751</sup> In practice, in the assessment of what is 'feasible' most military manuals enumerate military and humanitarian considerations, such as the effect of taking the precaution on mission accomplishment and the likelihood and degree of humanitarian benefit from taking the precaution, *and* 'the cost of taking the precaution, in terms of time, resources and, or money'.<sup>752</sup>

It thus arises that IHL requires States to act in due diligence so as to protect foreign investments under their control from the effects of hostilities. The international responsibility for the obligation to take precautionary measures is, *inter alia*, circumscribed by the resources and the financial and technical capacity of the war-torn host State.<sup>753</sup> This is only right. IHL does not presume to suggest a priority for the allocation of funds. Insofar as States give due respect for the paramount obligation to protect the civilian population (persons and objects) from the dangers of hostilities, international law respects their discretion to allocate their resources in accordance with domestic law and policy.

## **5. The Relationship between FPS and the IHL Obligation to Take Precautions**

This section deals with the application of the international norms that govern the State's obligation to take precautions in favor of foreign investments in times of armed conflict.

Importantly, the issue here is not about the relationship of the two regimes, IHL and investment law, as such, but the relationship of particular norms belonging to these two regimes that control the specific factual situation of investments that sustain damage owing to military operations

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<sup>751</sup> API Commentary (n 509) para 2256; ICRC – The Official Records of the Diplomatic Conference 1974-77 (n 550) Vol XV, 258, para 102; Hays Parks – Air war (n 722) 159; Jensen (n 545) 165.

<sup>752</sup> Eg: DoD LOAC Manual (n 34) Section 5.3.3.2. See also Section 0550, The Military Manual (2005) of the Netherlands, cited in ICRC- Customary IHL Study (n 38) practice relating to rule 22; Quéguiner (n 645) 819-20; Jensen (n 545) 164-65.

<sup>753</sup> Trapp – State Responsibility for International Terrorism (n 647) 70 and Trapp – Great resources mean great responsibility (n 743) 158, explaining in both authorities that 'as a general rule, capacity (or rather incapacity) is the limit of responsibility'

during armed conflicts.<sup>754</sup> Because, as noted, FPS claims that arise out of or in relation to armed conflict mostly concern the question whether the State took appropriate measures to protect the investment from the conduct of third parties, this discussion focuses on the interaction of the FPS obligation and API Article 58. In principle, a similar methodology applies to the interaction between API Article 57 and FPS. In the latter case, the question is whether the host State took appropriate precautions to protect the investment in its attack against the adversary.

The story of MCC's investment in Afghanistan from chapter 4 facilitates this analysis. To recall, in 2007 Afghanistan awarded MCC a 30-year lease to extract copper in Mes Aynak, but between 2008 and 2014 the copper mine was subjected to repeated deadly attacks by the Taliban.<sup>755</sup> Afghanistan took various costly measures and went to great lengths to protect the MCC's investment over the years. It deployed armed forces to guard the investment, provided the workers with armed vehicles, built bunkers and shelters on site, and spread checkpoints around the area; all at a reported cost of over USD 210 million.<sup>756</sup> The President even called on the Taliban to 'stop pursuing objectives of outsiders'.<sup>757</sup> Nonetheless, the attacks of the Taliban resulted in substantial loss of life and damage to property.<sup>758</sup>

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<sup>754</sup> See further: Milanović – Norm conflict (n58) 98-101 and Milanović – Origins of lex specialis (n 60) 82-5, 103-06.

<sup>755</sup> Global Witness – Copper Bottomed? (n 626)

<sup>756</sup> The Government of Afghanistan, Mes Aynak Archeological Project, Project Management Unit PMU [http://mom.gov.af/Content/files/Mes-Aynak-Complete\\_January\\_2014.pdf](http://mom.gov.af/Content/files/Mes-Aynak-Complete_January_2014.pdf) (accessed 13 December 2016)

<sup>757</sup> Afghanistan, Office of the President, Press Release, 26 October 2012 <<http://www.bakhtarnews.com.af/eng/politics/item/4659-president-karzai-calls-on-taliban-to-stop-pursuing-objectives-of-outsiders-but-rather-begin-a-life-of-dignity-and-honor-under-afghanistan-constitution.html>> accessed 25 July 2017.

<sup>758</sup> In 2014 MCC withdrew its employees from the site. It is estimated that by then the Taliban attacks caused damage worth more than USD 2 billion. See: DW, The Taliban and China's quest for Afghan copper (DW 2 December 2016) <<http://www.dw.com/en/the-taliban-and-chinas-quest-for-afghan-copper/a-36607748>> accessed 12 December 2016.

Assume that MCC initiates proceedings against Afghanistan in ICSID,<sup>759</sup> where it argues that the State failed to comply with the FPS standard and therefore, it must compensate MCC for the losses it suffered as a result of the Taliban's attacks. Let us also assume that Afghanistan argues that it did not breach FPS by failing to take reasonable measures to protect the investor's property from damage, since what is 'reasonable' in armed conflict is determined by IHL concepts of 'feasible precautions' (here, API Article 58), with which the State had fully complied. Since both norms, API Article 58 and FPS, cover the facts of which the situation consists and both have binding force over the legal subjects regulated, then barring issues of jurisdiction and applicable law,<sup>760</sup> the questions before the hypothetical *MCC v Afghanistan* tribunal may be broken-down as follows:

(a) Do the described measures comply with the obligation to take reasonable precautions under investment law? (b) Assuming that IHL applies, do the described measures comply with the obligation to take feasible precautions under IHL? (c) Is there a difference between the results that follow from the application of both standards to the facts of the case? (d) If so, what is the relationship between these standards and what does that mean in terms of State responsibility? These questions are addressed below.

Under API Article 58, Afghanistan is required, to the extent 'feasible', to take precautionary measures to protect the civilian objects under its control (including foreign investments) from the attacks of the Taliban. As explained, the assessment of the measures that Afghanistan took in favor of MCC's investment (as set out above) must have regard for the fact that Afghanistan is one of the poorest countries in the world; it is a landlocked developing country, whose economy and national armed forces

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<sup>759</sup> Pt XIV, Article 56(a) of the Aynak Mining Contract instructs that: 'if during the mining contract or thereafter there shall be any question or dispute with respect to the structure, meaning, or effect of this Mining Contract, or arising out of or in connection to this Mining Contract, either party shall have the right, subject to conditions precedent, to refer the dispute to ICSID to settlement by conciliation and/or arbitration...'

<sup>760</sup> See the discussion in chapter 1.



substantively rely on foreign aid.<sup>761</sup> Let us assume that in these circumstances Afghanistan's costly and diverse measures (as set out above) met the standard of what is practicable and practical in the prevailing circumstances, and that in these circumstances, notwithstanding the occurrence of damage, IHL does not impose an obligation to take more or other measures to protect the investment, such as the deployment of additional forces, the use of other, more advanced weapons, or the construction of better bunkers.

As regards FPS, it was above suggested that, like Article 58, this norm imposes a relative due diligence obligation that is sensitive to the capacity of the host State. Professedly, this means that Afghanistan's socio-economic conditions should be taken into consideration in the assessment of what was reasonable in the prevailing circumstances. Yet, doctrine and arbitral practice give no such guarantees since the question whether FPS imposes an absolute or relative standard of due diligence remains contested. Let us therefore assume that the hypothetical *MCC v Afghanistan* tribunal, along the lines of the *Ampal v Egypt* Tribunal, finds that whereas the first few attacks by the Taliban against MCC's assets could not have been prevented, the other deadly attacks could and should have been prevented by way of adopting better security measures and/or implementing such measures faster.<sup>762</sup>

It thus follows that the application of both investment law and IHL norms leads to two opposite results, whereby the same precautions comply with international law under one norm and breach international law under the other. Ostensibly, this is a norm conflict.<sup>763</sup> On this point, and as

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<sup>761</sup> World Bank, 'Afghanistan' <<http://data.worldbank.org/country/afghanistan>> (accessed 30 July 2017); US, Central Intelligence Agency, 'World Factbook' <<https://www.cia.gov/library/publications/the-world-factbook/geos/af.html>> (accessed 30 July 2017).

<sup>762</sup> *Ampal v Egypt*, paras 283-91.

<sup>763</sup> As explained in chapter 1 above, this study adopts a broad definition of conflict, whereby there is a conflict between norms, one of which may be permissive, if in obeying or applying one norm, the other norm is necessarily or potentially violated (Vranes (n 64) 418). See

stressed in the chapters above, a distinction should be drawn between an apparent conflict, which may be avoided by interpretive means, in particular through VCLT Article 31(3)(c), and a genuine conflict, which cannot be avoided but can be resolved through legal techniques, namely the *lex specialis* maxim.<sup>764</sup>

Accordingly, the first step in this inquiry is the examination whether the potentially conflicting results may be interpreted so as to make the norms compatible. A notable example of such a technique is arguably found in the *Nuclear Weapons Advisory Opinion*,<sup>765</sup> where the ICJ held that, in times of armed conflict, what is an 'arbitrary deprivation of life' under ICCPR Article 6 'can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself'.<sup>766</sup> Along a same line, it may be suggested that what is 'reasonable' in terms of precautions (or: what is 'full protection and security') in the context of armed conflict is determined by reference to IHL and its standards of feasibility.<sup>767</sup>

Whether IHL is a 'proper reference point'<sup>768</sup> from which to draw meaning for international investment agreements depends on whether API Article 58 passes the admissibility hurdles of VCLT Article 31(3)(c), which were previously addressed. It is suggested that it does. Article 58 is a rule

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further in: Pauwelyn (n 62) 176; ILC Study Group on Fragmentation (n 470); Milanović – Norm conflict (n 58) 101-2.

<sup>764</sup> The terminology of 'apparent' and 'genuine' conflicts follows the footsteps of Milanović (ibid) 102. The ILC referred to these situations as 'relationship of interpretation' and 'relationship of conflict' (ILC – Fragmentation report (ibid) 1). See further the discussion in chapter 1, section 6 above.

<sup>765</sup> *Legality of the Use by a State of Nuclear Weapons*, para 25.

<sup>766</sup> *ibid*, para 25. See further in Milanović – Origins of *lex specialis* (n 60) 103-114.

<sup>767</sup> While the ICJ referred to this technique as an application of the principle of *lex specialis*, it is more accurate to say that the Court was concerned with harmonization of norms through interpretation, rather than the strict sense of priority rules. This is also how this line of jurisprudence by the Court is treated in scholarship. See: Milanović (ibid); C Droege, 'The interplay between International Humanitarian Law and International Human Rights Law in situations of armed conflict' (2007) 40(2) *Israel Law Review* 310-55; Lubell (n 77) 648-60.

<sup>768</sup> B Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 63(1) *ICLQ* 573, 584. The language 'reference point' was used by Simma to describe the function of human right norms that pass the qualifications of VCLT Article 31(3)(c) and thus form part of the broader normative context that informs the meaning of investment treaty standards.

of customary international law that applies to all types of armed conflicts and binds all States. It is also relevant. In the *Oil Platforms* case the Court stated that customary *jus ad bellum* principles were ‘relevant’ to the interpretation of FCN treaties.<sup>769</sup> It is almost certain that the same would apply to the relevance of *jus in bello* customary norms to the interpretation of modern investment treaties.<sup>770</sup>

At the same time, the function of Article 31(3)(c) should not be overstated. The provision is not a ‘peg on which to hang the whole corpus of international law on the use of force’.<sup>771</sup> If API Article 58 is admissible through VCLT Article 31(3)(c) and is taken into account as part of the context in the interpretation of the FPS provision, this is as far as interpretation can go ‘without committing violence against the treaty’s text’, to use Milanović’s words.<sup>772</sup> Put a different way, interpretation is the process of establishing the legal character and effects of a consensus achieved by the parties. In contrast, application is the process of ‘determining the consequences’ of such an interpretation in a concrete case.<sup>773</sup> Hence, while IHL is taken into account, it is not dispositive for the interpretation of what precautions are ‘reasonable’ under FPS.

Notably, in this respect, the treatment of the interaction between the investment law and IHL norms in this chapter 5 differs from that under chapter 3, which dealt with the EWC and the IHL rules on the dispossession and destruction of property. Chapter 3 proposed that the language of the EWC effectively references the customary IHL rule through its ordinary (or special) meaning. In practical terms, this proposition means that the

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<sup>769</sup> *Case concerning Oil Platforms (Iran v USA)* (Merits)[2003] ICJ Rep 161, para 41.

<sup>770</sup> Simma and Kill (n **Error! Bookmark not defined.**) 698-691; Simma – A place for human rights (n 768) 585.

<sup>771</sup> A Aust, *Modern Treaty Law and Practice* (3<sup>rd</sup> edn CUP 2013) 216; LG Garcia ‘The Role of Human Rights in International Investment Law’ in J Calamita et al (eds) *Current issues in investment treaty law*, Vol IV (BIICL 2013) 29, 37-9.

<sup>772</sup> Milanović – Origins of *lex specialis* (n 60) 108. See also *Case concerning Oil Platforms*, Separate opinion of Judge Higgins, para 49.

<sup>773</sup> Schwarzenberger - Myths and Realities of Treaty Interpretation (n 456), 212-219; Pauwelyn (n 62) 263-74.

meaning of the investment treaty standard is ascertained by way of examining the content of the IHL norm. The same, however, cannot be said of the language of the FPS standard and the IHL obligation to take precautions. While it can be demonstrated that the phrase ‘full protection and security’ (and similar language) was regularly used, among the relevant community of word users, as a reference to the customary standard of treatment, it cannot be shown that the language ‘full protection and security’ is understood as a reference to API Articles 57 and 58, as such.

Nonetheless, the discussed similarities between both norms – the ‘protective’ function of the norms, the scope which covers foreign investments, and that both prescribe an obligation of conduct that is crafted using ‘feasibility’ and ‘reasonableness’ yardsticks implies that, even assuming that the conflict at hand is not ‘apparent’ but ‘genuine’ in that it cannot be interpreted away, it can arguably be resolved. Accordingly, the next step in the inquiry is to examine whether the conflict between FPS and Article 58 may be resolved by assigning priority to one norm over the other,<sup>774</sup> namely through the *lex specialis* rule.<sup>775</sup>

A norm may be *lex specialis* due to the following two grounds.<sup>776</sup> First, a norm may be ‘more special’ because it addresses the particular subject-matter that the general norm also addresses but in a more direct or precise manner.<sup>777</sup> Second, a norm can be more special if it deals with the subject-matter referred to in a general rule, but in greater detail.<sup>778</sup> In terms of State responsibility, under a conflict in the applicable law, only the special rule that must be applied can be breached and, in turn, result in responsibility.<sup>779</sup>

It is suggested that, in this case, API Article 58 is the special norm. While investment treaties are special in that substantive standards of

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<sup>774</sup> Milanović – Norm Conflict (n 62) 101-02.

<sup>775</sup> Pauwelyn (n 62) 327-418; ILC - Study on Lex Specialis (n 88) para 21.

<sup>776</sup> Pauwelyn (ibid) 327-418; ILC – Lex specialis study (ibid) para 21; Article 55, ARSIWA.

<sup>777</sup> Pauwelyn (ibid) 389.

<sup>778</sup> ibid, 390-91.

<sup>779</sup> ibid, 327.

protection prescribed under investment instruments (eg, FPS) are tailored for the particular investment relations between the parties,<sup>780</sup> these standards are general vis-à-vis the circumstances on the background of which the investment is made. FPS does not prescribe a detailed or particular arrangement for instances of hostilities.<sup>781</sup> The FPS standard does not, for instance, comprise particular sub-parts that deal with different situations in hostilities. In fact, many treaties intertwine FPS with fair and equitable treatment, a standard that mostly concerns regulatory measures under the law enforcement paradigm.

Conversely, IHL is triggered only against a factual determination that a given dispute has passed the threshold of hostilities. Article 58 is specifically tailored to address the obligations of the State to defend civilian objects, including investments, against attacks of third parties. Article 58 is therefore better able to take account of the particular circumstances of the complex situation in Afghanistan. It also deals with the requirement to take precautionary measures against the attacks of the Taliban in greater detail, and it is the rule which 'approaches most nearly to the subject in hand'.<sup>782</sup>

It is important that this determination does not suspend or abrogate the FPS standard. Investment rules, including FPS, continue to regulate the protection of investments, including during hostilities. In times of armed conflict, the State is under additional other obligations of police protection that do not relate to the dangers of military operations (eg protection from looting).<sup>783</sup> As regards this particular instance however, if FPS, the breached norm, has to give way to the norm complied with, API Article 58,

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<sup>780</sup> *Amoco v Iran*, Award, 15 IUSCTR 289, 14 July 1987, para 112.

<sup>781</sup> See in this regard Pauwelyn (n 62) 389. ('an obligation to do something in the events A to Z is less specific than an obligation not to do this something in the events A and B. Or a WTO obligation not to restrict trade, irrespective of the product involved, must be seen as less specific than an obligation (or permission) to restrict trade in the specific products A and B'). Similarly, the obligation to take precautionary measure A through Z under all circumstances (whether peace or war) is less specific than an obligation (or permission) to take measures A and B alone in situations of armed conflict specifically.

<sup>782</sup> ILC – Study Group on Fragmentation (n 719) para 60.

<sup>783</sup> See the discussion of the governing legal paradigms in chapter 3.

then Afghanistan incurs no international responsibility for the damage caused to the foreign investment in the framework of a military operation and it is therefore under no obligation (as a matter of law) to pay reparations MCC. Nonetheless, as explained in chapter 7, it may be that for various extra-judicial considerations Afghanistan will decide to compensate MCC.

To recap, this section suggested that, in practice, the FPS standard and the IHL norms that require States to take precautions in favor of civilian objects including foreign investment may, at least apparently, conflict. Where the conflict may be avoided by interpretive means, the FPS obligation is informed (but not supplanted) by IHL notions of ‘feasibility’. Where, however, the conflict cannot be avoided through interpretive tools, the *lex specialis* technique will apply to ‘resolve’ the conflict.

Under certain circumstance, as with the above example of Mes Aynak, the application of *lex specialis* may lead to the partial displacement of the investment norm or to the qualification of the conflicting investment norm to the extent required to resolve the conflict. Hence, the conduct at issue that would in principle breach the FPS standard (for instance, because more or better protective measures were not adopted), but was compliant with IHL norms (here, API Article 58) ‘would now also become compliant’ with investment law by virtue of *lex specialis*.<sup>784</sup>

## **6. Conclusion**

This chapter set out to elucidate the scope and content of the obligation of host States to protect investments from the effects of hostilities.

To that end, the discussion had to resolve several ambiguities over one of the most common, yet contentious, investment treaty standards – the obligation to protect and secure investments. First, the chapter dealt with certain aspects of the customary standard of treatment of foreign property in war. It was suggested that under customary law, States are obliged to act in due diligence so as to protect the property of aliens from

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<sup>784</sup> Milanović – Origins of *lex specialis* (n 60) 106-7. See also Droege – Elective Affinities? (n 630) 524.

the effects of hostilities. It was also argued that this customary norm imposes a relative obligation that depends on the particular capacity of the State.

Then, the discussion dealt with the debated meaning of the FPS treaty standard. It was argued that, under VCLT Article 31, the language ‘full protection and security’ is a reference to the customary standard of treatment. It was therefore argued that like the customary standards that informs its meaning, the FPS provision imposes an obligation that is relative, also, to the resources of the host State.

Next, the chapter dealt with the application of FPS in the context of hostilities, focusing on the interaction between the FPS standard and the precautionary obligation under IHL. In this framework, the chapter offered an analysis of the meaning, scope, and function of the obligation to take precautionary measures in and against attacks under IHL. It was suggested that, as a matter of existing and desired law, there is a consensus that the obligation to take ‘feasible’ precautions under IHL requires States to do what is practicable and practical in the prevailing circumstances, including but not limited to – military and humanitarian considerations and socioeconomic capabilities.

Finally, using the example of the Chinese investment in Afghanistan from chapter 4, the discussion looked into the interaction between the FPS standard under investment law and the IHL obligation to take precautions against the effects of attack. As proposed in chapter 1, and building on the broad definition of ‘conflict’ set therein, this analysis first attempted to ascertain whether a potential incompatibility between the FPS and the precautionary obligation under IHL may be avoided by interpreting the norms harmoniously, namely through VCLT Article 31(3)(c). It was suggested that, in this case, while the IHL norm should indeed be contextualized in the interpretation of the FPS, such a technique does not remove the potential divergence between the norms when applied to concrete circumstances.

This 'genuine conflict', while unavoidable, can be resolved. In contradistinction to the analysis in chapter 4 above (namely, section 6) where it was argued that some conflicts concerning targeting policies and investment promotion and protection are 'unresolvable', it is proposed that potential conflicts between FPS and API Articles 57 and 58 are resolvable. Thus, conflict resolution tools, namely the *lex specialis* rule, can resolve a conflict whereby a State adopts precautionary measures that comply with IHL, in that IHL does not require the State to do more or to take other means (or: IHL permits the State not to adopt other measures), but simultaneously these same measure breach FPS, because investment law requires the State to go to greater lengths and adopt more measures in these circumstances. In the example of Mes Aynak which involved the application of FPS and API Article 58, it was proposed that the IHL norm is the more special norm that prevails.

In the aggregate, this analysis allows us to identify a framework for assessing compliance with the obligation to protect foreign investments against the effect of armed conflicts – a question of growing relevance in practice – in a manner that accounts for both IHL and investment law. Assessment of compliance, it is suggested, ought to account for the prevailing military aims and humanitarian considerations as well as the socio-economic conditions of the host State. As a matter of desired law, any other assessment of compliance risks holding States with limited resources to the standards of developed countries and would *de facto* guarantee that no matter how vigilantly certain States use their limited resources to protect investments from the adverse effects of armed conflict, they will breach international law.



## **Chapter 6**

### **Hostilities-Based Defenses against Violations of Investment Obligations in Armed Conflict**

#### **1. Introduction**

The previous chapters demonstrated that the applicability of IHL as a field of international law that regulates the conduct of hostilities has important implications for the assessment of the host State's international responsibility. Where the breached investment treaty standard (eg, FPS) has to give way to the complied with IHL norm (eg, Article 58 API), then the State's international responsibility is not engaged. Thus, barring issues of jurisdiction and applicable law, it may be said that IHL-arguments<sup>785</sup> can serve as a defense against an investment claim.

In continuance, this chapter examines if and how States can invoke the reality of armed conflicts, and not IHL norms as such, as a defense against an investment claim that arises out of, or in relation to, hostilities, and the way in which such defenses could and should be dealt with by investment tribunals. In this chapter, the term 'defense' represents an array of legal arguments capable of rebutting the State's responsibility for violations of international law or the consequences for such violations. 'Defense' comprises treaty instruments, such as exceptions and carve-outs, and the customary rules on circumstances precluding wrongfulness (CPW).<sup>786</sup>

Accordingly, section 2 deals with the scope of security exceptions and the extent to which the State's decision to invoke security exceptions in relation to an armed conflict is binding upon judicial instances. It is suggested that in the context of armed conflict, security exceptions leave States ample room for appraisal with respect to emergency measures, however this discretion is subject to limited judicial review. Section 3 deals

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<sup>785</sup> See discussion in chapter 1.

<sup>786</sup> As noted, for the purpose of the present discussion, the analysis does not differentiate between justifications and excuses although conceptual and practical distinctions exist. On the distinction between these concepts, see (n 155).

with CPW. The treatment of the issue here is limited to the examination whether the reality of hostilities may be used to excuse or justify violations of investment standards that protect the investment during conflict.<sup>787</sup> It is suggested that few, if any, customary defenses can justify or excuse violations of investment standards of protection in the context of armed conflict.

Section 4 deals with treaty carve-outs in the form of Denial of Benefits clauses (DoB). It is suggested that the DoB may be invoked to introduce security-related concerns when such concerns are reflected in the absence of diplomatic relations with the third country that controls the investment. However, since in practice situations of hostilities are more abundant than the official absence of diplomatic relations, DoBs are far from a guaranteed defense against investment claims in the context of hostilities.

Overall, this chapter identifies a sliding scale of potential defenses to investment claims based on considerations relating to hostilities. At the same time, this chapter demonstrates that the existence of an armed conflict is not a silver bullet as far as defense against investment arbitration goes. Such defenses are subject to judicial review, they are qualified in scope, and are limited in application.

This conclusion, as further explained below, is predicated on the development of international law. Because armed conflicts, by their very nature and essence, entail extreme and dynamic conditions, over time States have developed primary rules that are tailored for this reality. Such international norms include not only rules of IHL but also other investment treaty mechanisms, such as security exceptions, war clauses, and

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<sup>787</sup> For an analysis of the origins, development, and qualifications of each CPW, see: Paddeu – Excuses and justifications (n 155). For the purposes of this analysis, the study assumes that the customary defences analysed below are relevant for investor-State relations. For an analysis of the applicability these customary defences, which constitute an expression of the law of inter-State responsibility, to relations between States and investors, see: Caron (n 171) 870-872; J Crawford, 'ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect', (2002) 96 AJIL 874, 886-888; M Paparinskis, 'Investment Treaty Arbitration and the (New) Law of State Responsibility' (2013) 24(2) EJIL 617-647.

precautionary obligations (including FPS). Each of these rules reflects an account (or a balance) of the State's military and security priorities in hostilities and other, potentially conflicting, humanitarian considerations. The creation of such primary norms to deal with extreme conditions and threats to national security, in turn, resulted in a limitation on the application of certain defenses, whereby States cannot use the extreme conditions of hostilities to excuse, justify, or circumvent the special primary norms that were created specifically for the regulation of the extreme conditions of hostilities.

The relative length of each section in this chapter 6 is designated to reflect this state of play and to correlate to what seems to be the relative weight and primacy of these defenses in modern practice. Accordingly, the discussion of security exceptions takes up more room than the analysis of customary defenses, while the discussion of denial of benefits is the most concise in the chapter.

## **2. 'Security interests' that Exempt from Treaty Standards of Protection in Armed Conflict**

This section examines whether IHL-consideration (i.e., the occurrence of hostilities, military aims, humanitarian objectives, and related circumstances) can be introduced in investment arbitration using treaty exceptions, assuming such exist. This analysis focuses on the origins, scope, and meaning of security exceptions and their application in the context of armed conflict.

A typical security exception in treaties of recent vintage instructs that, 'nothing in this [instrument] shall be construed to... prevent a Party from taking any actions which it considers necessary for the protection of its essential security interests...' <sup>788</sup> Generally speaking, such security exceptions permit a State to lawfully take action directed at a particular

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<sup>788</sup> Article 8, ASEAN - Hong Kong, China SAR Investment Agreement (signed 12 November 2017). For a review of recent practice: K Sauvants et al. 'The rise of self-judging essential security interest clauses in international investment agreements' (CCSI 2016)

regulatory objective that would otherwise be inconsistent with its substantive treaty obligations. In practical (or rather theoretical) terms, security exceptions limit the scope of investment protections in the treaty.<sup>789</sup> Put differently, when the host State relies on the security exception in the face of an allegation that it had breached an investment standard, the State does *not* deny that its measures do not conform to treaty standards of protection, it rather submits that the consequences of its failure to comply with the treaty are inapplicable since the measure was required to protect legitimate security aims.

Security exception in investment treaties are a postwar American product. The modern language of security exceptions is properly traced to Article 99 of the Charter of the International Trade Organization (ITO),<sup>790</sup> which served as the basis for many instruments.<sup>791</sup> Article 99 reserved the right of a party to the Charter to take 'any action which it considers necessary for the protection of its essential security interests, where such action...is taken in time of war or other emergency in international relations'.<sup>792</sup>

This language reflects the American experience during WWII, when the US armed forces learned the breadth of the American dependence on critical raw materials from abroad, and the concern of the US War and Navy Departments that American free trade commitments under the ITO Charter

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<sup>789</sup> C Henckels, 'Investment Treaty Security Exceptions, Necessity and Self-Defence in the Context of Armed Conflict' *European Yearbook of International Economic Law* (Springer forthcoming); *Continental Casualty Company v Argentina*, ICSID Case No ARB/03/9, Award, 5 September 2008, paras 164-65, 192; *CMS v Argentina*, ICSID Case No ARB/01/8, Decision on Application for Annulment, 1 September 2006, para 129. For the view that security exceptions are not a scope limitation but rather an affirmative defense, see: C Henckels, 'Scope Limitation or Affirmative Defence? The Purpose and Role of Investment Treaty Exception Clauses' in F Paddeu and L Bartels (eds), *Exceptions in International Law* (forthcoming OUP, 2019) and the authorities therein.

<sup>790</sup> Havana Charter for an International Trade Organization (Havana Charter, ITO Charter 1948) UN Doc E/CONF.2/78. This historical backdrop was recently stressed in WTO, Report of the Panel *Russia - Measures Concerning Traffic in Transit* (5 April 2019) WT/DS512/R, paras 7.83-7.87.

<sup>791</sup> Most notably, Article XXI, General Agreement on Tariffs and Trade 1994, Marrakesh Agreement Establishing the World Trade Organization, 1867 UNTS 187 (1994) (GATT).

<sup>792</sup> Article 99, ITO Charter.

would hamper military aims and needs. The armed forces sought to guarantee that American free trade and investment agenda will not interfere with measures that may be required so as to ensure the availability of natural resources necessary for defense purposes or with American efforts to halt the shipment of fissionable materials and military technology to the Soviet Union.<sup>793</sup>

FCN treaties that were concluded by the US after 1945 retained the formulation of Article 99 of the ITO Charter, with some improvements that were required by the postwar order.<sup>794</sup> Namely, in line with the prohibition on the use of force that was encapsulated in the UN Charter, the reference to essential interests ‘in time of war’ was omitted from postwar FCNs.<sup>795</sup> Illustratively, Article XXI(1)(d) of the 1955 Standard US FCN instructed that, ‘the present Treaty shall not preclude the application of measures... necessary to protect [the State’s] essential security interests’.<sup>796</sup> The US State Department explained that postwar security exceptions were predicated on the maxim that every legal system permits the State to ‘suspend assurances of [the] rights of [the] individual’ in the ‘face of imminent peril’. The purpose and effect of these exceptions was ‘to subordinate treaty principles’ to the ‘paramount responsibility of the state to defend itself and protect public safety’.<sup>797</sup>

While it is uncontested that security exceptions were introduced into investment instruments with the purpose and effect of giving States broad discretion to react to threats that relate to a war between two States or more, some questions remain concerning the operation of investment security

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<sup>793</sup> R Pollard, ‘Economic Security and the Origins of the Cold War: Bretton Woods, the Marshall Plan, and American Rearmament, 1944–50’ (1985) 9(3) *Diplomatic History* 271, 275-77; T Zeiler, *Free Trade, Free World: The Advent of GATT* (The University of North Carolina Press 1999) 64-5; Vandevelde – The first BIT (n 703) 145.

<sup>794</sup> Eg: Article XXV(1)(c), 1945 US standard draft treaty; Article XXVI(1)(d), China FCN treaty,; Italy FCN treaty, Article XXIV(1)(e).

<sup>795</sup> Vandevelde – The first BIT (n 703) 508 nn 729.

<sup>796</sup> Article XXI(1)(d), 1945 US standard draft treaty.

<sup>797</sup> Telegram from the Department of State to the US embassy in Karachi (14 June 1955) cited in Vandevelde – The first BIT (n 703) 507.

exception in the context of contemporaneous armed conflict. First, do security exceptions cover modern forms of hostilities that involve non-State actors? Second, how severe should such hostilities be to fulfil the requirements of the security exception? And third, to what extent is the State's decision to take emergency measures in armed conflict open for judicial review? The analysis below takes these questions in turn.

Ideally, the security exception will contain a stipulation on the State's right to take measures in pursuance of security aims during armed conflict. Some bilateral and multilateral investment instruments in fact contain such an explicit recognition. For instance, ECT Article 24(3) reserves the State's right to take 'any measure which it considers necessary... for the protection of its essential security interests including those... taken in time of war, armed conflict or other emergency in international relations'.<sup>798</sup> This language leaves no doubt that an international armed conflict, i.e., an armed conflict between two or more States,<sup>799</sup> is covered by the provision. Yet, this drafting leaves open the question whether such security exceptions comprise or exclude other forms of hostilities, namely NIACs.

Schreuer proposes in this respect that the juxtaposition of the phrase 'in international relations' with the concept 'armed conflict' may be construed as a limiting language that excludes NIACs from the ambit of Article 24(3).<sup>800</sup> There is some, albeit limited, logic to this proposition. At the time of the ECT's conclusion and around the time some other 2,000 investment treaties were concluded,<sup>801</sup> 1994, the law on NIAC was far from settled. Arguably, due to the ambiguity over this concept, the drafters of investment treaties intended to exclude NIACs from the scope of the

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<sup>798</sup> Article 24(3), ECT.

<sup>799</sup> CA 2, GC. Article 1(4), API extends the scope of application of 'international armed conflicts' to hostilities in which groups are fighting against colonial domination, alien occupation, or racist regimes in the exercise of their right of self-determination.

<sup>800</sup> Schreuer – Investments in armed conflict (n 192) 18.

<sup>801</sup> According to UNCTAD, some 2000 treaties were concluded before the year 1999. Thus, most investment treaties were concluded when the law on NIAC was unsettled.

security exception, so as not to muddy the waters of investment standards with further ambiguity from IHL, as it were.

Also of note in support of Schreuer's proposition is that when States, 'especially affected States' in particular,<sup>802</sup> wish to include NIACs in the security exception, they use explicit stipulations to that effect, thereby illuminating their understanding that absent such language NIACs are excluded from security exceptions.<sup>803</sup> For instance, Article 83(c) of the EU – Egypt Association Agreement (2000) reserves the right of the State to take any measure 'which it considers essential to its own security in the event of *serious internal disturbances* affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war.'<sup>804</sup> Article 15(3) of the Israel – Japan BIT (2017), as another example, reserves the right of the State to take measures 'which it considers necessary for the protection of its essential security interests taken in time of international *or non-international* armed conflict'.<sup>805</sup>

Nevertheless, a VCLT-consistent interpretation leads to the conclusion that whenever the security exception references 'war' and 'armed conflict' it also comprises NIAC, unless explicitly provided otherwise. Under evolutionary interpretation of treaties, with some terms, the intention of the parties is derived *not* from the meaning the term possessed, or which have been attributed to them at the time of the treaty's conclusion (say, 1994),<sup>806</sup> but rather from the meaning of such terms today.<sup>807</sup> The term

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<sup>802</sup> *North Sea Continental Shelf Cases*, 43.

<sup>803</sup> The circumstances of the inclusion of this language may also teach that reference to NIACs is added only for 'greater certainty'.

<sup>804</sup> Article 83(c), EC – Egypt Association Agreement; emphasis added.

<sup>805</sup> Article 15(3), Israel – Japan BIT; emphasis added. See also Article 8, (2017) ASEAN - Hong Kong, China SAR Investment Agreement ('...taken in time of war or other emergency in domestic or international relations...').

<sup>806</sup> G Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points' (1957) 33 *British Ybk Intl L* 203, 212; *Rights of Nationals of the United States of America in Morocco (France v US)* (Merits)[1952] ICJ Rep 176.

<sup>807</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (Advisory Opinion) [1970] ICJ Rep 1971 16, 31; *Gabčíkovo-Nagymaros Project*, 79–9; *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* (Merits)[2009] ICJ

‘armed conflict’ in treaty exceptions is one such generic term that finds its validity and meaning in the perpetual, dynamic, regime of investment law.

First, investment instruments and security exceptions, by their nature and essence, aim at evolution; they are designed to accommodate development.<sup>808</sup> Second, the duration and lifespan of investment treaties aims at perpetuity or at significant periods. Both contentions support the notion that certain investment treaty terms are intended to be defined by the relevant institutional practices existing at whatever time the treaty is interpreted, rather than at the time of its conclusion.<sup>809</sup> Third, other terms in investment instruments use evolving concepts. For instance, some investment standards of protection qualify the treatment of the investment with ‘domestic laws’; logically, such references intend the domestic law in force at the time the treaty is interpreted, not at the time of conclusion. Therefore, the concepts ‘war’ and ‘armed conflict’, like the term ‘comercio’ in the 1858 Treaty between Costa Rica and Nicaragua, are to be understood based on language conventions that apply at the time of interpretation.<sup>810</sup>

Moreover, a contemporaneous rather than evolutionary interpretation of ‘armed conflict’ is absurd. The term ‘armed conflict’ is a technical term of art with a recognized meaning in IHL that has evolved considerably starting from the late 1990s. In 1994, when the ECT was

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Rep 213, 242 and *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Merits)[2010] ICJ Rep 14, 82–3. In these cases, the Court applied an evolutionary interpretation of the instrument as a way to elucidate the intention of the parties. See further: M Waibel, ‘International Investment Law and Treaty Interpretation’ in R Hofmann and C Tams (eds) *International Investment Law and General International Law – From Clinical Isolation to Systemic Integration?* (Nomos 2011) 29-52.

<sup>808</sup> This is often the argument with respect to the open-ended definition of ‘investment’. See eg: International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States para 3 (18 March 1965) para 27 (explaining that ‘no attempt was made to define the term ‘investment’...’) and further in B Legum and W Kirtley, ‘The Status of the Report of the Executive Directors on the ICSID Convention’ (2012) 17(1) ICSID Review 159-71.

<sup>809</sup> Canada – France Arbitration Tribunal, *La Bretagne Arbitration*, Award 17 July 1986, ILR 82 (1986).

<sup>810</sup> *Costa Rica v Nicaragua*, paras 63-71.



concluded, the idea of NIAC was controversial and its scope and regulation were ambiguous.<sup>811</sup> Today, it is a truism to assert that NIACs represent the vast majority of armed conflicts, and that the humanitarian consequences they impinge, such as regional destabilization, refugee flows, and the potential for escalation to inter-State conflict, can be significant.<sup>812</sup> The typology of NIACs has also become increasingly rich and imbued with more nuanced terminology that goes far beyond traditional perceptions of ‘war’.<sup>813</sup> Finally, it stands to reason that if States intended to specifically exclude the most prevalent form of hostilities from the scope of their power to invoke security exceptions, which is against their best interests, they would have done so with an explicit carve-out (eg: ‘other than in cases of NIAC...’).<sup>814</sup> For the foregoing, it is suggested that when treaty exceptions reference ‘war’ or ‘armed conflict’ they also encompass NIACs, with or without additional language.

Irrespective of explicit treaty language on the invocation of the exception in armed conflicts, not all measures the State takes in armed conflict come within the purview of the exception but *only* those which are taken for the protection of certain objectives from certain threats.<sup>815</sup> Most investment instruments<sup>816</sup> express the protected objects at the core of the

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<sup>811</sup> More clarity followed the jurisprudence of the ICTY and ICTR (in particular following the aforementioned, *Tadic case*, para 70), see: Greenwood – IHL and the Tadic Case (n 180)265-83; T Meron, ‘Classification of Armed Conflict in the Former Yugoslavia: *Nicaragua’s* Fallout’ (1998) 92(2) AJIL 236-42; S Murphy, ‘Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia’ (1999) 93(1) AJIL 57-97. For the treatment of this case and its influence on IHL today, see: D Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’ in E Wilmshurst (ed) *International Law and the Classification of Conflicts* (OUP 2012) 32-63; M Schmitt, ‘Classification in future conflict’ in (ibid) 465-70; Sivakumaran (n 527) 57-60, 223-32.

<sup>812</sup> V Bernard, ‘Editorial: Delineating the boundaries of violence’ (2014) 96(893) IRRC 5-11.

<sup>813</sup> Today, conflict are also described as ‘spillover’, ‘multinational’, ‘cross-border’, ‘transnational’, etc. and warfare is also dealt with in terms of effect-based operations, that deviate from conventional war practices (see further: Henderson (n 505) 126-29).

<sup>814</sup> See eg: Article 24(1), ECT.

<sup>815</sup> *Deutsche Telekom v India*, PCA Case No 2014-10, Interim Award, 13 December 2017, paras 183 and onwards.

<sup>816</sup> Some treaties refer to ‘public security’ (see eg: Article 3(a) Protocol to the Germany – Bosnia and Herzegovina BIT).

security exception and the potential risks and threats to them through the terms 'national security',<sup>817</sup> 'national security interests',<sup>818</sup> or 'essential security interests'.<sup>819</sup>

Whether UNCTAD was correct to propose in 2009 that by choosing one of these alternatives States 'do not actually intend to introduce a distinction' between the terms and the scopes they represent,<sup>820</sup> or not,<sup>821</sup> what is certain is that these terms were chosen specifically for their flexible and open-ended nature and because they have 'no precise delineation or interpretation', as the US State Department explained.<sup>822</sup> There is also a wide agreement that irrespective of other ambiguities over 'national security' and like formulations, at the very least, these concepts ordinarily entail the 'safety of a nation and its people, institutions, esp. from military threat or from espionage, terrorism.'<sup>823</sup>

Supplementary means of interpretation offer additional indications as to what type of emergency measures may be taken in the context of armed conflict,<sup>824</sup> since occasionally, during treaty negotiations, one party inquired of the other party whether a particular measure would be justified by the security exception. For instance, during the negotiations of the US –

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<sup>817</sup> Eg: Article 2, Hungary – Russia BIT.

<sup>818</sup> Eg: Article 18, Sweden – Mexico BIT.

<sup>819</sup> Eg: Article 15(2), Israel – Japan BIT; Article 6.12, India – Singapore Comprehensive Economic Cooperation Agreement.

<sup>820</sup> UNCTAD Series on International Investment Policies for Development, 'The protection of national security in IIAs' (UNCTAD, 31 Jul 2009) <UNCTAD/DIAE/IA/2008/5> (ACCESSED 10 September 2018), 73.

<sup>821</sup> The negotiation history of FCN treaties may lead to an opposite conclusion. For instance, the negotiation materials of the US – Israel FCN (1951) teach that, 'security' 'involve[d] considerations of national defense' while 'safety' was construed as a narrower concept that somewhat overlapped with 'considerations of public order' (Memorandum of Conversation 'Negotiation of Treaty of Friendship, Commerce and Navigation with Israel' 20 November 1950, cited in Vandeveldt – The first BIT (n 703) 497. The negotiations of US – Philippines FCN (1948) elucidate that 'national emergencies' was understood as such that 'might not have regard to international situations; that a threat of uprising or an earthquake might be a national emergency' and, that, this concept 'had a physical connotation, such as volcanic eruption or war' (Telegram dated 20 July 1948, from the US embassy in Manila to the Department of State, cited in: *ibid* 497-510).

<sup>822</sup> Despatch from the US High Commissioner in Bonn to the Department of State, 17 February 1954, cited in *ibid*, 513-14.

<sup>823</sup> OED, n' national security <<http://www.oed.com/>> (accessed 20 July 2018).

<sup>824</sup> Article 32, VCLT.

Philippines FCN treaty, the American negotiators explained to their Philippine counterparts that the exception ‘would seem to make it possible for either country to apply reasonable restrictions with respect to military zones’.<sup>825</sup>

As another example, the US agreed with the Netherlands that measures concerning the seizure of foreign property during war and payments thereof would normally fall within the ambit of the security exception.<sup>826</sup> At the same time, the US maintained that an Argentinian law that prohibited aliens from owning real estate within 40 km of the border would *not* fall within the purview of the security exception.<sup>827</sup> Likewise, the US and Japan agreed that while restrictions on exchange controls ‘might have a national security character’ they are *not* ‘clearly’ within the scope of the exception.<sup>828</sup>

The next element that delimits the scope of valid emergency measures in armed conflict concerns the severity of the hostilities-related threat or crises that is required to invoke the exception. For instance, the CMS Tribunal asserted that the required level of the threat (to national security) should be such as to ‘result in total economic and social collapse’.<sup>829</sup> For the *Enron* and *Sempra* Tribunals, the threat should be so severe that it needs to be directed at ‘the very existence of the State and its independence so as to qualify as involving an essential interest of the State’.<sup>830</sup> However, there is nothing in the explicit language of security exceptions to support these yardsticks. What is more, such thresholds

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<sup>825</sup> State Department Records, ‘Preliminary Discussion of United States — Philippine Treaty of Friendship, Commerce and Navigation’ (17 June 1947), cited in Vandeveldt — The first BIT (n 703) 523.

<sup>826</sup> State Department Records, Despatch from the US embassy in The Hague to the Department of State, (8 September 1954), cited in *ibid*, *ibid*.

<sup>827</sup> State Department Records, ‘Discussion of US Revised Draft of FCN Treaty with Argentines’ (8 May 1950), cited in *ibid*, *ibid*.

<sup>828</sup> State Department Records, ‘Informal Discussions on the United States Standard Draft Treaty of Friendship, Commerce and Navigation’ (1 April 1952), cited in *ibid*, 524.

<sup>829</sup> *CMS v Argentina*, ICSID Case No ARB/01/8, Award, 12 May 2005, para 355.

<sup>830</sup> *Enron v Argentina*, ICSID Case No ARB/01/3, Award, 22 May 2007, para 306; *Sempra v Argentina*, Case No ARB/02/16, Award, 28 September 2007, para 348.

effectively prevent States from invoking security exceptions in the context of armed conflict, thereby leading to an absurd result that stands in stark contrast to the established circumstances of inclusion of security exceptions into investment treaties.

Because of their temporal and territorial scope, in contradistinction to prolonged and severe inflation, armed conflicts do not necessarily result in the total ‘collapse’ of the State or its institutions, as required by the investment tribunals noted above. As Lubell put it, being ‘at war’ does not necessarily mean that ‘the whole of a state is in fact embroiled in an armed conflict’.<sup>831</sup> At the same time, hostilities, irrespective of their limited scope, engage national security and necessitate measures that impinge on trade and investment policies.

For instance, while most of Iraq turned into a war zone in 2003, life for American citizens, whose armed forces fought in Iraq, and the operation of most public institutions in the US continued uninterrupted. Likewise, the topography and circumstances of the protracted conflict between the armed forces of the Philippines and the Moro Islamic Liberation Front allowed these 20-year-long hostilities to be mostly confined to Mindanao, with little effect on the population and State infrastructure in other parts of the Philippines.

Although the referenced hostilities outwardly fail to meet the threshold of *CMS*, *Enron*, or *Sempra*, it is a truism to state that these conflicts impinged upon American and Philippine national security interests. Analogous fallacies were arguably accounted for by the *Continental Casualty* Tribunal that held that, the invocation of the security exception ‘does not require that the situation has already generated into one that calls for the suspension of constitutional guarantees and fundamental liberties.’<sup>832</sup>

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<sup>831</sup> N Lubell and N Derejko, ‘A Global Battlefield? Drones and the Geographical Scope of Armed Conflict’ (2013) 11 JICJ 65, 66.

<sup>832</sup> *LG&E v Argentina*, ICSID Case No ARB/02/1, Award, 25 July 2007, para 226; *Continental Casualty v Argentina* (Award), para 180.

At the same time, the proposition that the intensity of the conflict is not dispositive for the invocation of security exceptions raises concerns over abusive invocation. Since armed conflicts do not necessarily affect every aspect of the State's activities or all parts of its territory and population, not every measure the host State adopts vis-à-vis foreign investments during hostilities relates to the armed conflict or to national security.

But just how to ensure that during armed conflict security exceptions will be invoked only in pursuance of security aims and not as disguised restrictions on investment flows that use the occurrence of hostilities as a façade, is a question of a different order that concerns the reviewability of security measures. What is meant by 'reviewability' is the degree of autonomy the State retains in the invocation of the security exception and the extent the State's invocation of the exception is conclusive upon any tribunal and renders any cause-of-action with respect to which the exception was invoked nonjusticiable.

Investment treaties may be classified into several drafting strands that arguably reflect different degrees of reviewability. According to one drafting method that characterized US treaties during the 1990s, the treaty 'shall not preclude a Party from applying measures *necessary for* the protection of its own essential security interests'.<sup>833</sup> Some suggested that the phrase 'necessary for' represents self-judging language, which means that the invocation of the exception is conclusive upon the tribunal and subject only to good faith review. However, there is nothing in this explicit treaty language, drafting history, or State practice to support this view.<sup>834</sup>

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<sup>833</sup> Eg: Article XIV, 1994 US Model BIT. See also: Article X US – Bulgaria BIT; Article IX, US – Latvia BIT; Article XV, US – Croatia BIT.

<sup>834</sup> W Burke-White and A Von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' (2008) 48 *Virginia Journal of Int'l Law* 307, 381-86. They relied on 'inferences' from State practice, such as the American argument before the ICJ in the matter of *Nicaragua v US*, where the US argued that such drafting is self-judging. While it is freely admitted that such a position was put forth by the US, in proper context it carries little probative value. US litigators, in that case, adopted the position that the language is self-judging because they hoped to have the matter dismissed on jurisdictional grounds, or at least declared inadmissible. Later, in sworn testimony before Congress, the State

The Argentine tribunals did not accept this interpretation either, nor did the ICJ.<sup>835</sup>

Another group of treaties, which characterized Indian BITs from the early 2000s, expresses the nexus between the threat that justifies the invocation of the exception and the measures taken to deal with it, not through the concept of ‘necessity’ but by using more relaxed terms. Article 12 of the India – Mongolia BIT, for instance, reserves the right of the State to take any ‘action *for* the protection of its essential security interests...’<sup>836</sup> Arguably, if it is sufficient that the measure taken relates – on *some* level (‘for’) – to national security, then the State is left with great room for appraisal. However, exceptions drafted this way are usually qualified by several conditions that limit the State’s discretion.<sup>837</sup> It is also noteworthy that the recent *CC/Devas v India* Tribunal (July 2016) rejected the contention that such drafting bars judicial review.<sup>838</sup> At any rate, this drafting lost its appeal in recent years, and most (Indian) treaties that included this language were terminated.<sup>839</sup>

Most modern investment instruments follow a different drafting style.<sup>840</sup> Under Article 28.6 CETA, for instance, the State may take measures that ‘*it considers necessary* to protect its essential security

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Department admitted that this was an inconsistent and mistaken position. And the US never made such a submission again. See further in: K Vandeveld, ‘Of Politics and Markets: The Shifting Ideology of the BITs’ (1993) 11 int’l tax & business Lawyer 159, 172 and J Alvarez and K Khamsi, ‘The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime’ in K Sauvant (ed) *Yearbook of International Investment Law and Policy* (2008- 2009).

<sup>835</sup> *CMS v Argentina* (Award), 373; *LG&E v Argentina* (Award) 212; *Enron v Argentina* (Award), para 332; *Sempra v Argentina* (Award) para 385; *Nicaragua v US*, 282.

<sup>836</sup> Article 12(2), India – Mongolia BIT; Article 12(2) India – Kazakhstan BIT; Article 12(2) India – Hungary BIT (terminated).

<sup>837</sup> These treaties usually require that any measure taken under the exception be in accordance ‘with its laws normally and reasonably applied on a non-discriminatory basis.’

<sup>838</sup> *CC/Devas v India*, PCA Case No 2013-09, Award on Jurisdiction and Merits, 25 July 2016, paras 239-45.

<sup>839</sup> See: India’s investment instruments in: <UNCTAD <http://investmentpolicyhub.unctad.org>>

<sup>840</sup> Eg: Article 18(2), US – Uruguay BIT; Article 18(2), 2012 US Model BIT; Article 22(2), Uruguay – Japan BIT; Article 16(1) Japan – Kenya BIT; Article 16(1) Japan –Oman BIT.

interests'.<sup>841</sup> The language 'it considers' is designed to confer upon the treaty parties more discretion in the application of the exception, relative to the other referenced formulations. What is less clear is how much is 'more'? If the phrase 'it considers necessary' is in fact representative of self-judging language then it is the exclusive prerogative of the host State to assess whether the intended investment poses a threat to national security, and how to react to this threat.

However, it is suggested that the phrase 'it considers' is not a shield from review. As above explained, this language originates from Article 99 of the ITO Charter, where the phrase 'action which *it* considers necessary' meant that, 'whether a measure adopted under the security exception violated the Charter because it did not relate to any of the enumerated topics, is open to review', including the question whether the measure was in fact 'taken in time of war'.<sup>842</sup> The prevailing understanding at the time security exceptions were first introduced to investment treaties was that *no* State has the right to take non-reviewable actions under the national security exception. In fact, the American position was that 'it would be far better to abandon all work on the Charter' than to incorporate self-judging provisions into the Charter that will 'provide a legal escape from compliance with the provisions of the Charter'.<sup>843</sup>

The notion that security exceptions are by no means self-judging pervaded the negotiations and drafting of US instruments, at least until the mid-1980s. The US explicitly objected to the inclusion of self-judging language (eg: 'in its own judgment') and/or any such an understanding of the language of security exceptions in its negotiations with Lebanon,<sup>844</sup> the

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<sup>841</sup> Article 26.6, CETA; emphasis added.

<sup>842</sup> Vandevelde – The first BIT (n 703) 148. On the significance of this historical context to the interpretation of the provision see *Russia – Traffic in Transit*, paras 7.90-7.100.

<sup>843</sup> UN Preparatory Committee for the International Conference on Trade and Development in Geneva, Second Meeting, Minutes of Staff Meeting of US Delegation (2 July 1947) cited in *ibid*, 147.

<sup>844</sup> Lebanon proposed the insertion, of the phrase 'to be determined solely by the Lebanese Republic' after the phrase 'essential security interest'. This was rejected by the State Department since the US did not agree to waive the right to object to 'any determination

Philippines,<sup>845</sup> Costa Rica,<sup>846</sup> Egypt,<sup>847</sup> Germany,<sup>848</sup> Pakistan,<sup>849</sup> and the Netherlands,<sup>850</sup> to name but a few.<sup>851</sup> Overall, the historical development of the provision demonstrates that the language ‘it considers’ meant that the State’s discretion concerns only the necessity of the measure, which is not subject to review; the relationship of such action to the subjects referred to, including the question *whether there was an armed conflict* at the relevant time to merit exceptions, is subject to review.<sup>852</sup> Most recently (April 2019), this proposition was adopted by the WTO in *Russia – Traffic in Transit*.<sup>853</sup>

Even if this position is not accepted, the general principle of good faith, which governs the exercise of treaty rights, including exceptions,

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whatsoever that Lebanon might make’ (US State Department, Memo: ‘Proposed Lebanese- American Treaty of Friendship. Commerce and Navigation’ (21 November 1947), cited in *ibid*, 511).

<sup>845</sup> The US rejected the inclusion of self-judging language that would have a ‘possibly undermining effect on the whole treaty’ (Telegram from the US embassy in Manila to the Department of State (20 July 1948), cited in *ibid*, 508).

<sup>846</sup> Costa Rica asked to add language that would have given it sole discretion to take certain security measures (determine whether to impose exchange controls). The State Department objected. While it agreed that Costa Rica had discretion to decide whether to impose controls it stressed that, ‘if action taken by Costa Rica were of a kind which the United States considered to be in violation of the provisions of this paragraph, it would be entitled to seek the same remedies that it would seek in the event of a violation of any other provision of the treaty’ (US State Department, Memorandum: ‘Negotiation of Treaty of Friendship, Commerce and Navigation with Costa Rica: First Meeting’ (5 June 1951), cited in *ibid*, 522).

<sup>847</sup> Egypt asked to clarify that the exception is self-judging. The US embassy objected to any such change and argued that this ‘would practically destroy the value of the provision’ (*ibid*, 521).

<sup>848</sup> The German negotiators ‘asked whether the clause was justiciable’, to which the US responded that it clearly was (Despatch from the US High Commissioner in Bonn to the Department of State (17 February 1954), cited in *ibid*, 514).

<sup>849</sup> Pakistan asked to add language that clarifies that each State is the sole judge of its security measures. This proposal was rejected by the US, who maintained that, ‘the technical effect [of this language] would be to remove the affected provision from the treaty.’ (Telegram from the Department of State to the US embassy in Karachi (27 November 1954), cited in *ibid*, 512).

<sup>850</sup> Despatch from the US embassy in The Hague to the Department of State (15 September 1954), cited in *ibid*, 397 (the States concurred that the exception is to be construed narrowly and in a manner that allows for future review of potential abusive invocation).

<sup>851</sup> See more on the above and other States in *ibid*, 510-26.

<sup>852</sup> The response of the US State Department to questions by the Senate, Memorandum headed “Questions Asked in Senate Finance Committee,” NARA, Record Group 43, International Trade Files, cited in *ibid*, 152.

<sup>853</sup> *Russia – Traffic in Transit*, section 7.5.3.1.3.



applies irrespective of treaty language<sup>854</sup> and mitigates the concern that the exception will be used in an abusive manner.<sup>855</sup> To be sure, what is meant by this is that a good faith analysis would require tribunals to distinguish between justified national security concerns on the one hand, and measures constituting a disguised form of protectionism on the other.<sup>856</sup>

Arguably, it is because even the ‘self-judging’ language ‘it considers necessary’ is not fully ‘self-judging’, in that it confers broad autonomy to invoke the exception but does not bar judicial review of this invocation, that another drafting trend emerged. In recent years, States have begun to include explicit stipulation on the non-reviewability of security measures. Depending on their language, such provisions tackle reviewability through treaty interpretation, the exercise of judicial power, or jurisdictional carve-outs, and in so doing limit or exclude altogether judicial review.

One of the earliest attempts to exclude reviewability is found in the US – Peru FTA. Article 22.2 provides that ‘nothing’ in the agreement precludes the State from ‘applying measures that *it considers necessary* for the protection of its own essential security interests’. The accompanying footnote 2 elucidates that, ‘for greater certainty, if a Party invokes Article 22 in an arbitral proceeding... the tribunal or panel hearing the matter shall find that the exception applies’.<sup>857</sup> Perhaps because this language does not exclude the judicial power to hear submission on emergency measures but rather instructs the tribunal how to apply its judicial power, the US forsook this practice in 2007 or thereabouts.<sup>858</sup>

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<sup>854</sup> However, see: Burke-White and von Staden, who mistakenly proposed that good faith review applies only when the treaty uses self-judging language (Burke-White and von Staden (n 834) 378-81. To be fair, what they had in mind under ‘good faith’ is a proportionality assessment).

<sup>855</sup> Article 23, VCLT and see generally: Salacuse – The law of investment treaties (n 17) 381; U Linderfalk, ‘Good Faith and the Exercise of Treaty-Based Discretionary Powers’ in (n 789).

<sup>856</sup> However, see Burke-White and Von Staden who proposed that a good faith review entails margin of appreciation or proportionality analyses (Burke-White and von Staden (n 834) 376-80). This proposition goes beyond what is intended here by ‘good faith review’.

<sup>857</sup> Article 22.2, US – Peru FTA.

<sup>858</sup> Sauvants – The rise of self-judging essential security interest clauses (n 788).

Other States have picked up where the US left off. For instance, Article 6.12(3) of the Singapore – India Comprehensive Economic Agreement reserves the State’s right to take ‘any action which it considers necessary for the protection of its essential security interests’. The next subparagraph (4) elucidates that the cited language ‘shall be *interpreted* in accordance with the understanding of the Parties on non-justiciability of security exceptions’.<sup>859</sup> Recent Indian practice drives the point of non-reviewability home. Article 33 of the 2016 Model BIT annunciates the State’s right to take ‘any action which it considers necessary for the protection of its essential security interests’.<sup>860</sup> Annex 1 to the Model BIT instructs that the decision to invoke ‘Article 33 at any time, whether before or after the commencement of arbitral proceedings shall be non-justiciable. It shall not be open to any arbitral tribunal... to review any such decision’.<sup>861</sup>

Other instruments aim at non-reviewability by carving out security exceptions from the subject-matter jurisdiction of the tribunal. For instance, Article 12 of the Mexico – Netherlands BIT instructs that, ‘the dispute settlement provisions [investor-State arbitration] ... shall not apply to the resolutions adopted by a Contracting Party for national security reasons’.<sup>862</sup> Notably, this provision does not clearly negate the review of security measures. While this drafting prevents investment tribunals from assessing emergency measures, it does not prevent national courts from reviewing the invocation of security exceptions.

Overall, in the context of armed conflict, security exceptions leave States ample room for appraisal with respect to emergency measures. This

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<sup>859</sup> Article 6.12(4), India – Singapore– India Comprehensive Economic Agreement; emphasis added.

<sup>860</sup> Article 33, India Model BIT (drafted 2015; revised version 2016).

<sup>861</sup> Annex 1: Security exceptions. The Annex also clarifies that, assessment of security measures cannot be done as an ancillary to the claim either (‘even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the Tribunal’)

<sup>862</sup> Article 12, Mexico – Netherlands BIT. See also Article 23, Mexico – Iceland BIT, which excludes ISDS only with respect to measures concerning the acquisition of a domestic enterprise by foreign investors.

is only right. To effectively safeguard its national security the State must be allowed to adopt policies that impinge upon its trade and investment relations. At the same time, the ability of the State to use the security exception so as to take measures that would otherwise breach investment standards of protection does not apply equally to all treaty standards. Put a different way: some treaty standards continue to apply in armed conflict notwithstanding the security exception.

One notable example, it is suggested, concerns war clauses – the PWC (as further explored in chapter 7) and the EWC.<sup>863</sup> The EWC, as suggested in chapter 3 above, effectively incorporates customary rules of war law on the treatment of private property. Namely, it was argued that the language ‘requisition by the armed forces’ and ‘destruction that is not required by the necessity of war’ (and like formulations), has a recognized meaning under IHL, and therefore, the meaning of the EWC is to be ascertained by an examination of the content of war law.

This discussion of security exceptions raises the question of whether the conflict-ridden host State may, in pursuit of national security, take measures which breach the EWC. Put simply, the issue here concerns the interaction between the EWC and the security exception. On this point, it is argued that as a matter of existing and desired law, the security exception does not derogate, or exempt from, the treatment prescribed under the EWC.

To understand the logic of this proposition it is necessary to carefully reflect on the rules of the EWC and their rationales. Essentially, to propose that, for reasons of national security in relation to armed conflict, the State may conduct wanton or excessive destruction or appropriation of the investor’s property in violation of the EWC, would leave very little of the law that was created to regulate armed conflicts. Primary IHL rules on appropriation (and destruction) of property, as referenced by the wording of

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<sup>863</sup> The interaction of the security exception with a different type of a war clause, the PWC, is addressed in chapter 7 below.

the EWC, were created by States to reflect the balance between military and humanitarian considerations and to reserve the State's ability to adopt measures in pursuit of military interests and security concerns in armed conflicts. Hence, the qualifications on appropriation (and destruction) of property (such as the requirement that any such measure be military necessary and proportionate) already reflect the limits to what a State may do to private property in order to protect its security in armed conflict.

Furthermore, to propose that under the security exception States may take measures contrary to the EWC is to effectively propose that investment treaties allow States to perform grave breaches of the Geneva Conventions and even war crimes.<sup>864</sup> Put this way, the proposition that security exceptions reserve the State's right to take measures in breach of the EWC is absurd. Perhaps it is for this clear absurdity that, while States include stipulations on the interaction between the PWC and the security exception (as further explained in chapter 7, section 3), there are no explicit references in existing BITs as to the interaction between the EWC and the security exception (according to readily available information).

Overall, the ability of the State to respond to modern forms of conflict and threats on national security must be commensurate with the ever-evolving nature of these concepts and their effects. This proposition is consistent with IHL, which recognizes the right of the parties to the conflict to prioritize the allocation of their resources in accordance with domestic law and policy insofar as these do not violate IHL. However, while broad in scope, the State's discretion is not unlimited. Unless explicitly excluded by treaty language, security exceptions are open for limited review. It is left open for tribunals to find that the measure at issue was not taken in pursuance of security interests in the context of armed conflict but was a

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<sup>864</sup> 'Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly', is a grave breach under the Geneva Conventions Article 50, GC I; Article 51, GC II, Article 147, GC IV. See also Articles 8(2)(a)(iv) and 8(2)(b)(xiii), Rome Statute.

protectionist measure that used the occurrence of the armed conflict as a fig leaf.

### **3. Hostilities-based Excuses and Justifications for Violations of Investment Standards in Armed Conflict**

This section deals with CPW. Following the footsteps of De Brabandre, who suggested that, at least in principle, the host State's human rights obligations may be crafted as a defense against investment treaty claims using the plea of necessity,<sup>865</sup> this section examines whether a host State can use the outbreak of armed conflict, the conditions of hostilities, and military aims, to defend against an investment claim that arises out of, or in relation to, hostilities. It might be argued that because conflicts involve emergency conditions and extreme circumstances that tend to affect the State's institutions and population, conflict-oriented CPW have greater potential to 'succeed', where De Brabandre found that human rights-based arguments have not,<sup>866</sup> in defending against an investment claim.

To investigate this hypothesis, the pleas of necessity, distress, self-defense, and *force majeure* are identified as potential tools through which the State may attempt to introduce the circumstances of hostilities in order to excuse or justify a violation of an investment obligation.<sup>867</sup> Then, the analysis deals with the constraints on the invocation of these conflict-based defenses in investment arbitration proceedings that concern hostilities. Overall, this section demonstrates that the outbreak of armed conflict limits

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<sup>865</sup> De Brabandre – Human Rights Considerations in International Investment (n 102) 202-09; De Brabandre – Investment Treaty Arbitration (n 135) 141-47.

<sup>866</sup> *ibid*; *ibid*.

<sup>867</sup> The proposition that countermeasures may be taken by the conflict-ridden host State against the investment in response to a prior breach by the investor's home State is not examined in this discussion. On the development of the rules on countermeasures by the ILC and ARSIWA, and the substantive and procedural limitations to countermeasures, see: C Tams, 'All's well that ends well? Comments on the ILC's articles on state responsibility' (2002) 62 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 759, 783-90. On the prohibition to take countermeasures that breach humanitarian rules, see: M Sassòli, 'State responsibility for violations of international humanitarian law' (2002) 84(846) *IRRC* 401, 424-26. On the application of countermeasures in investment arbitration see below (n 891).

rather than expands the host State's arsenal of available arguments against investment claims.

To understand the context in which the issue of hostilities-based CPW may arise in investment arbitration it is useful to resort again to the hypothetical case of *MCC v Afghanistan* from chapter 5. Here, assume that the foreign investor argues that the State breached FPS by failing to take better or other measures to protect the mine from the Taliban's repeated attacks. This time, aside from submission based on IHL norms (as proposed in chapter 5) the issue is whether Afghanistan can argue that even if it breached FPS, this violation of international law is precluded due to the circumstances of hostilities.

Potentially, Afghanistan may argue that the protracted internal hostilities with several different insurgent groups, including the Taliban, imperiled the entire survival of the State, and left it with no choice but to take measures that do not conform to its treaty obligations to protect the investment.<sup>868</sup> This argument follows the lines of Argentina's submission in *Sempra v Argentina* and relies on the plea of necessity to introduce IHL-considerations in defense against an investment claim.<sup>869</sup> Similar circumstances may also be used to argue that the failure of the armed

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<sup>868</sup> Eg: To deploy armed forces elsewhere or to instruct its forces not to focus on the security of the mine but on the protection of another asset. See: *Sempra v Argentina* (Award), para 98. For sake of accuracy, this decision was entirely annulled on the ground of manifest excess of powers (*Sempra v Argentina*, ICSID Case No ARB/02/16, Decision on Request for Annulment of the Award, 29 June 2010).

<sup>869</sup> Similarly, take the example of the American investment in Israel and the State's decision to cease the operation of the investment in Haifa in the wake of Hezbollah's threats to target the investment. Potentially, Israel may argue along the lines of the Tanzanian argument in *Biwater v Tanzania*, that the risk of an attack on the ammonia tank creates 'real threat to the public', which requires the closure of the investment, and that in such a case Israel 'has more than a right to protect the civilian population: it has a moral and perhaps even a legal obligation to do so'. *Biwater v Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, paras 434-36 and 515. There, citing human right-considerations, Tanzania cancelled the investor's concession contract to operate the water and sewerage services of Dar es Salaam and regained possession of assets previously leased to the investors. Arguably, the Tribunal assessed Tanzania's human rights-based arguments under the necessity defense, finding that 'there was no necessity or impending public purpose to justify the Government's intervention in the way that took place'. For an analysis of the way in which human rights arguments may be construed and introduced through the plea of necessity, see De Brabandere – Investment Treaty Arbitration (n 135) 143-46).

forces to protect the mine is precluded by the defense of *distress*, since to save their own lives from the attacks of the insurgents, the Afghan forces had no choice but, say, to abandon the area of the investment, which they were entrusted to protect.

Further, the occurrence of hostilities may be presented as ‘an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation’.<sup>870</sup> If this is the case, then the State’s failure to protect the investment from the effects of hostilities is excused by *force majeure*. Next, the State may attempt to argue that MCC and/or China dispensed with the performance of the FPS obligation (or the EWC) or permitted Afghanistan not to comply with these standards. Here, *consent* precludes the wrongfulness. Finally, *Self-defense* may be relevant in the context of hostilities when, say, the State’s armed forces inflicted damage upon the investment in breach of FPS (or the EWC) while acting, during the hostilities, in lawful self-defense.<sup>871</sup>

If so, the reality of hostilities generates, at least ostensibly, an arsenal of potential defenses capable of precluding international responsibility for violations of investment law. However, the nature of investment law and IHL is such that it effectively limits, if not excludes altogether, the availability of these excuses and justifications when the violation at issue is of an investment standard of protection with humanitarian aspects. In this regard, the notion of ‘investment standards with humanitarian aspects’ entails investment norms that explicitly incorporate humanitarian rules and investment norms that assume relevance in armed conflict because the treatment that they prescribe is of particular relevance to the reality of hostilities. An example of the former is the EWC which includes primary

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<sup>870</sup> Article 23, ARSIWA.

<sup>871</sup> Article 21, ARSIWA. Putting to one side the question whether self-defense can even be taken against non-State actors (see generally: J Paust, *Self-Defense Targetings of Non-State Actors And Permissibility of U.S. Use of Drones in Pakistan* (2010) 19(2) *Journal of transnational law and policy* 237-80).

rules on the protection of foreign property in armed conflict, and an example of the latter is the FPS standard that requires the State to take precautions to protect the investment from the effects of hostilities.<sup>872</sup> It is suggested below that the violations of these bases of liability cannot be excused or justified in the context of armed conflict.

First, the availability of necessity as a CPW to violations of the investment treaty in the context of armed conflict is limited by the laws that regulate hostilities. Namely, the host State cannot invoke necessity to justify or excuse conduct that violates IHL norms.<sup>873</sup> The ILC observed in this respect that, 'certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity'.<sup>874</sup> Arguably, if the State conducts wanton or excessive destruction or appropriation of the investor's property in violation of the EWC, which incorporates humanitarian rules on the treatment of private property, it will not be able to invoke necessity to preclude this violation of an investment standard for its humanitarian aspects.

Further, IHL may be said to exclude the plea of necessity by its object and purpose.<sup>875</sup> This is because IHL norms are tailored 'to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests'.<sup>876</sup> If IHL is the law that is made specifically for armed conflicts, which are 'by definition emergency situations',<sup>877</sup> then the entire IHL regime may be said to implicitly exclude the defense of necessity, except where explicitly stated otherwise.<sup>878</sup> By this logic, the outbreak of armed conflict cannot be used to justify or excuse violations of investment

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<sup>872</sup> Another relevant mechanism is the clause that mandates nondiscriminatory war reparations. This mechanism is addressed in chapter 7.

<sup>873</sup> Article 25(2), ARSIWA.

<sup>874</sup> ARSIWA Commentaries Article 25, para 19.

<sup>875</sup> Report of the International Law Commission on the work of its fifty-third session, 23 April - 1 June and 2 July - 10 August 2001, Official Records of the General Assembly, Fifty-sixth session, Supp No 10 83, 84; A Tanzi, 'State of Necessity', in (n 31).

<sup>876</sup> ARSIWA Commentaries Article 25, paras 19-21.

<sup>877</sup> Sassòli – State Responsibility (n 867) 416.

<sup>878</sup> *ibid.*



standards that assume relevance mostly or only in armed conflict, such as the war clauses and FPS.

Moreover, because military necessity, as explained, has already been factored into each rule of IHL, 'one cannot plead necessity as a justification for transgressions of IHL'.<sup>879</sup> Notable in this regard is the explicit and unambiguous rejection of the old maxim of *Kriegsrason geht vor Kriegsmanier*, whereby any military action that is necessary for the successful prosecution of war overrides and renders inoperative any provisions of the laws and customs of war to the contrary.<sup>880</sup> Arguably, because the EWC incorporates customary law on the dispossession and destruction of foreign property, the EWC already accounts for military necessity. Just as a State cannot invoke necessity as a defense against a violation of Article 23(g) of the Hague Regulations, which prohibits destruction of property unless when required by imperative necessity, the plea of necessity cannot be invoked as a defense against the violation of the EWC.<sup>881</sup>

At any rate, it is doubtful that necessity is a useful defense for a conflict-ridden State in investment arbitration, especially where the investment instrument contains a security exception and the host State

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<sup>879</sup> NCH Dunbar, 'Military Necessity in War Crimes Trials' (1952) 29 British Ybk Intl L 442, 444-45; L Hill-Cawthorne, 'The Role of Necessity in International Humanitarian and Human Rights Law' (2014) 47 Israel Law Review 225-55. See also: ILC, Addendum – Eighth Report on State Responsibility by Mr Roberto Ago, Special Rapporteur – The International Wrongful Act of the State, Source of International Responsibility (1980) 2(I) YBILC, UN Doc A/CN.4/318/Add.5-7, 34.

<sup>880</sup> Lauterpacht – International Law Reports (n 415) Vol 16, 543; Schmitt – Military necessity (n 412) 798; Melzer (n 411) 279-80; Hayashi – Military necessity (n 411) 52.

<sup>881</sup> To be sure, it is *not* argued that the principle of military necessity is a *lex specialis* norm that excludes the application of the secondary plea of necessity. As a matter of law, military necessity and the plea of necessity are norms of a different order that serve different functions. Military necessity is a primary rule that is exceptional in nature while the state of necessity is a secondary rule that serves a justificatory function. Additionally, both legal concepts entail distinct requirements. Whereas necessity may be invoked only when the measure in questions is 'the only means available' to safeguard the State's 'imperilled interests', there is no such requirement with respect to military necessity. It is not because military necessity is the same as secondary necessity that the former excludes the latter, but because any other results devalues IHL norms of content and distorts the delicate balance between military and humanitarian considerations.

already tried to rely on it as a defense.<sup>882</sup> What is more, the case law on the invocation of the plea of necessity as a defense against investment claims is inconsistent and unhelpful. This reality, in turn, seems to have led States to include detailed security exceptions in their investment treaties so as to preserve their right to take emergency measures in the face of a threat to their security interests through primary rules rather than to rely on vague secondary rules of international law.

Essentially, distress is inapplicable to violations of IHL for the same considerations that lead to the unavailability of necessity as a CPW to violations of IHL. In the case of distress, contrary to necessity, the peril affects the individual and not the State. It is the individual, not the State, who has no other reasonable way of saving his life or the lives of other persons entrusted to his care, but to violate international law.<sup>883</sup> The difficulty with applying this defense to situations of armed conflict is that armed conflicts, by their very nature and essence, are situations when individuals, and the armed forces in particular, are in distress. As Sassòli explained, ‘to consider, for example that a State is not responsible if its soldiers injure civilians to save their own lives would be leaving little space for that law’.<sup>884</sup>

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<sup>882</sup> As with military necessity, the availability of the plea necessity as a defense to violations of investment standards turns on the interaction between the security exception (if one exists) and the general customary rule. While there is ‘some analogy’ between security exceptions and the defense of necessity, as the *CMS v Argentina* annulment Committee observed, these are different norms that entail ‘a different operation and content’ (*CMS v Argentina* (Annulment), paras 130-31). Because security exceptions and the defense of necessity operate on different legal planes and hierarchies, security exceptions do not principally exclude the availability of necessity as a *lex specialis*. A measure by the host State that falls within the security exception does not violate the primary treaty rule; this conduct is *not* wrongful, and it does not principally result in liability for compensation (*Certain Iranian Assets (Iran v US)* (Preliminary Objections) 2019 <<https://www.icj-cij.org/files/case-related/164/164-20190213-JUD-01-00-EN.pdf>> (accessed 10 March 2019) para 42). In contradistinction, the plea of ‘necessity’ assumes relevance only with respect to wrongful State conduct, i.e., one that is not authorized the scope of the security exception (ARSIWA Commentaries to Article 25, para 2; Paddeu – Excuses and justifications (n 155) 53-61; Henckels – Security Exceptions and Armed Conflicts (n 789)). See further: R Sloane, ‘On The Use and Abuse Of Necessity in The Law Of State Responsibility’ (2012) 106(3) AJIL 447-508.

<sup>883</sup> Article 24, ARSIWA.

<sup>884</sup> Sassòli – State Responsibility (n 867) 417.

For this reason, it is difficult to see how excessive or wanton dispossession or destruction of property, in violation of the EWC, may be excused or justified by distress. It is also challenging to think that the host State may be excused from the obligation to protect investments during armed conflict on grounds of distress that affected its armed forces and law enforcement agents. Even if distress is an available CPW in the context of investment claims, it is hardly a winning argument, or at least this is how it is perceived by States, which have not, according to available records, invoked it as a defense in investment arbitration.

Just as States may not invoke the occurrence of hostilities as a CPW so as circumvent to the entire corpus of international obligations that were created to regulate the conduct of hostilities, the defense that the armed conflict itself is a *force majeure* event that precludes violations of IHL cannot stand.<sup>885</sup> In fact, Paddeu's study demonstrates that the concept of *force majeure* as a sweeping force, doing away with any obligations of the State towards foreigners, as it was employed in the 19<sup>th</sup> century, was harshly criticized at the turn of the 20<sup>th</sup> century.<sup>886</sup> Eventually, this criticism developed the notion of what is *force majeure* and by the second half of the 20<sup>th</sup> century, the plea of *force majeure* required the existence of a situation of 'material impossibility of performance' for the State that is caused by an

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<sup>885</sup> Arguably, situations, such as – tsunami, volcanic eruption, or a terror attack, which are concomitant to, but independent from, the armed conflict may be invoked as *force majeure* to preclude a violation of IHL. For instance, if a military aircraft crashes on civilians due to an unforeseen event beyond the control of the force. Condorelli and Boisson De Chazournes argue that in such circumstances *force majeure* remains an available defense since the 'non-compliant behavior has been determined by objective causes' that were beyond the control of the State (L Condorelli and L Boisson De Chazournes, 'Quelques remarques à propos de l'obligation des États de 'respecter et faire respecter' le droit international humanitaire en toutes circonstances' in C Swinarski (ed) *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (ICRC, Martinus Nijhoff 1984) 22). Compare: Sassòli – State responsibility (n 867) fn 38, who suggests that in such a situation no breach of IHL occurs and there is therefore no violation to preclude.

<sup>886</sup> F Paddeu, 'The Impact of Investment Arbitration on the Development of State Responsibility Defences' in R Hofmann, S Schill, and C Tams (eds) *ICSID at 50: Investment Arbitration as a Motor of General International Law?* (Edward Elgar Forthcoming), University of Cambridge Faculty of Law Research Paper No 4/2017 <<https://ssrn.com/abstract=2865718>>

‘irresistible force or unforeseen event, beyond the control of the State’. Whether there was in fact a ‘material impossibility of performance’ is assessed, in turn, by reference to the particular circumstances of the State and the specific obligation in question.<sup>887</sup> Construed this way, it is doubtful that it can be said that in the modern reality of warfare the outbreak of hostilities (in conflict-ridden States in particular) meets the contemporary meaning of the plea. Perhaps for this reason, States do not seem to rely on this argument. In investment jurisprudence, this defense was mostly discussed in reference to the important distinction between *force majeure* on the international level (as a CPW) and on the domestic level.<sup>888</sup>

The availability of consent as a defense against violations of international law during armed conflicts turns on the question whether investment treaties codify inalienable rights of investors or rights that are shared by the investor with his home State and enjoyed by the investor only under sufferance, or whether investment treaties merely grant investors recourse to *ad hoc* procedural mechanisms that provide for ‘the public international law equivalent of subrogation’.<sup>889</sup> If all investment treaties do is to institutionalize and reinforce the system of diplomatic protection then the host State, and not the investor, can validly consent to conduct that is otherwise not in compliance with the host State’s primary obligations vis-à-vis the home State.<sup>890</sup>

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<sup>887</sup> *ibid.*

<sup>888</sup> *Autopista Concesionada de Venezuela CA v Venezuela*, ICSID Case No ARB/00/5, Award (23 September 2003) para 108; *Sempra v Argentina* (Award), para 246.

<sup>889</sup> See: Volterra (n 32) 18-23; M Paparinsiks, ‘Investment Treaty Arbitration and the (New) Law of State Responsibility’ (2013) 24(2) EJIL 617-647; Paparinskis – Circumstances Precluding (n 170) 484-503

<sup>890</sup> This also means that countermeasures may also be invoked, provided that all necessary preconditions are met. The availability of countermeasures as a CPW in investment arbitration was addressed by three investment tribunals that were constituted under NAFTA in the context of the Sugar War between Mexico and the US, which concerned Mexico’s imposition of tax on beverages containing high-fructose corn syrup: *Archer Daniels v Mexico*, ICSID Case No ARB(AF)/04/5, Award, 21 November 2007, para 161-80; *Corn Products v Mexico*, ICSID Case No ARB(AF)/04/1, Decision on Responsibility, 15 January 2008, para 161-79; *Cargill v Mexico*, ICSID Case No ARB(AF)/05/2, Award, 18 September 2009, paras 420-428. The majority of the *Archer Daniels* Tribunal held that NAFTA Chapter 11 contains only primary obligations at the inter-State level, and thus, provided that other criteria of countermeasures are met, this defense can be invoked by

But it is difficult to frame an argument on valid consent by the home State without collapsing back into the question whether the investment instrument was effectively suspended (or terminated) by the outbreak of hostilities. In other terms, if the defense relies on, say, the contention that China agreed that Afghanistan will not take measures to protect MCC as required by FPS during the hostilities or that Afghanistan may dispossess MCC of its property without compensation in times of hostilities, then the question at hand is more about lawful suspension of treaties under the primary rules of the VCLT (and subject to the discussion in chapter 2) than about the application of the secondary rules on CPW.

Conversely, if the investor holds direct rights, then it is the investor, and not his State of nationality, who can validly consent to what would otherwise be conduct that is not in compliance with the investment treaty.<sup>891</sup> Yet, it is difficult to frame a defense based on consent in a manner that can be reconciled with practice. This would mean that, say, MCC specifically agreed (perhaps for economic motivation) that during 2014, the government will not provide it the protection required under the law. However, logically, investors that operate in conflict-ridden host States do not give any such consent.

Arbitral practice does not add much to the discussion. When investment tribunals have addressed consent, albeit indirectly, they have reached contradictory determinations on whether ‘a private party can by contract waive rights or dispense with the performance of obligations imposed on the States parties to those treaties under international law’.<sup>892</sup>

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the host State. For the other two Tribunals (and a separate opinion in *Archer Daniels*) NAFTA confers direct rights upon investors, and countermeasures concerning measures by their home State could not be opposed to these rights). For detailed analysis of the awards see: K Parlett, ‘The application of the rules on countermeasures in investment claims’ in C Chinkin and F Baetens (eds) *Sovereignty, Statehood and State Responsibility Essays in Honour of James Crawford* (CUP 2015) 398-403.

<sup>891</sup> This also means that these direct rights cannot be opposed by countermeasures that are directed in response to an anterior breach of international law by the home State. Paparinskis – Circumstances precluding wrongfulness (n 170) 488.

<sup>892</sup> *SGS v Philippines*, ICSID Case No ARB/02/6, Decision on Objections to Jurisdiction, 29 January 2004, para 154 (the Tribunal considered that ‘it is to say the least, doubtful’).

The dearth of recent case law on consent is indicative of the impracticability of this defense in investment arbitration.

At any rate, be it the investor or his home State who may principally give consent, IHL excludes the possibility of consent or waiver of humanitarian rights and entitlements. Common Article 1 to the Geneva Conventions enunciates that States are obliged to ‘respect and ensure respect of humanitarian law in all circumstances’.<sup>893</sup> There is a wide consensus among commentators and judicial forums that what emanates from this obligation is that a State cannot consent to a violation of the rules of IHL that protect victims’ rights, and that consent as a CPW is not applicable to violations of IHL.<sup>894</sup> Arguably, neither the home State nor the investor can consent-away humanitarian protections, including those included in the FPS standards and the EWC.

Similar notions limit the availability of self-defense as a CPW. The 2016 ICRC Commentaries to GC Common Article 1 clarify that another implication of the obligation to respect IHL ‘in all circumstances’ is that self-defence ‘does not preclude the wrongfulness of violations of the Conventions’.<sup>895</sup> On this point, Sassòli explains that, a ‘necessary consequence’ of the absolute separation between *jus ad bellum* on the legality of the use of force and *jus in bello*, to which IHL belongs, is that self-defence does not, nor can it, exonerate a State from a breach of humanitarian law.<sup>896</sup>

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However, see *Hochtief v Argentina*, ICSID Case No ARB/07/31, Decision on Liability, 29 December 2014, para 191. See Paparinsiks - Circumstances precluding wrongfulness (n 170) 491.

<sup>893</sup> CA1, GC.

<sup>894</sup> Condorelli and Boisson De Chazournes (n 885) 22-23; Sassòli – State responsibility (n 867) 414 (also referring to Articles 51, 52, 132, and 148, GCI, GCII, GCIII, GCIV, respectively).

<sup>895</sup> ICRC, *Commentary on the First Geneva Convention*, 2016 (CUP 2016) para 186.

<sup>896</sup> Sassòli – State Responsibility (n 867) 414-15; *Prosecutor v Martić* (Decision) IT-95-11-T (8 March 1996) para 268; *Kordić and Čerkez* (Trial Judgement) IT-95-14/2 (26 February 2001) para 452; *Kordić and Čerkez* (Appeal Judgement) IT-95-14/2 (17 December 2004), para 812

An analogous position seems to have been adopted by the ILC. Special Rapporteur Crawford suggested to exclude from the scope of self-defence obligations of 'total restraint', namely IHL obligations and certain norms of human rights that are couched as applicable to, or are intended to apply as definitive constraints even to States in armed conflicts.<sup>897</sup> Although this proposition was left out of the explicit wording of ARSIWA Article 21, the commentaries to Article 21 clarify that 'as to obligations under international humanitarian law and in relation to non-derogable human rights provisions, self-defence does not preclude the wrongfulness of conduct.'<sup>898</sup>

While it cannot be invoked to preclude violations of humanitarian rules (including the EWC), self-defense is arguably an available defense for violations of other investment norms in the context of armed conflict. In fact, Paddeu suggests that the value of self-defense, as a CPW, lies in its ability to preclude breaches of international law that are collateral to the use of force.<sup>899</sup> In support, Paddeu references *Nicaragua v US*, where Nicaragua argued that the mining and the attacks on its main ports breached the FCN treaty with the US and that the preconditions for lawful self-defense were not met by the US. At the same time, Nicaragua arguably acknowledged that self-defense may preclude these ancillary violations. Similarly, Paddeu relies on the *Oil Platforms* case, where Iran argued that the 1955 FCN treaty was breached by the US through the latter's attacks on offshore oil assets, while the US submitted that self-defense precludes such violations.<sup>900</sup>

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<sup>897</sup> Second report on State responsibility, by Mr. James Crawford, Special Rapporteur Doc A/CN.4/498 and Add.1–4 (1999) para 301.

<sup>898</sup> ARSIWA Commentaries Article 21, para 3.

<sup>899</sup> Paddeu – Self defence (n 193) 26-39; K Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-defence against non-State Terrorist Actors' (2007) 56 ICLQ 141, 146.

<sup>900</sup> Letter Dated 19 October 1987 from the Permanent Representative of the USA to the UN Addressed to the President of the Security Council, UN Doc S/19219 (1987) and *Oil Platforms Case*, para 67. See further in W Taft IV, 'Self-Defense and the Oil Platforms Decision' (2004) 29(2) Yale Journal of International Law 395-306.

Theoretically, Paddeu's arguments are sound. However, there is nothing explicit in the case law of the ICJ<sup>901</sup> or in the responses of States and academics to these judgments to support the viability of this defense against investment claims.<sup>902</sup> At any rate, it seems difficult to think of a defense that relies on lawful defensive measures in armed conflict that is *not* essentially predicated on the argument that the conduct at issue is a lawful 'attack' under IHL in the sense of API Article 49, which comprises acts of violence 'whether in offense or defence'.<sup>903</sup> Construed this way, the discussion moves away from secondary rules and returns back to the sphere of the interaction between primary norms of IHL and investment law, as set out above.

In sum, because armed conflicts, by their very nature and essence, entail extreme and dynamic conditions, States have developed primary rules that are tailored for this reality. Such international norms include not only rules of IHL but also other investment treaty mechanisms, such as security exceptions, war clauses, and precautionary obligations. Each of these rules reflects an account (or a balance) of the State's military and security priorities in hostilities and other, potentially conflicting, humanitarian considerations. The creation of such primary norms to deal with extreme conditions and threats to national security, in turn, resulted in a limitation on the application of secondary defenses, whereby States cannot use the extreme conditions of hostilities to excuse, justify, or circumvent the special primary norms that were created specifically for the regulation of the extreme conditions of hostilities. To put it colloquially: A State cannot 'double-dip' an armed conflict. Coupled with the ambiguities over the nature of investors' rights and the conflicting interpretations and

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<sup>901</sup> For instance, while explicit submissions on self-defense were made by Crawford on behalf of Iran, these were not regarded as substantive in the case as evidenced by the fact that with the exception of the separate opinion of Judge *ad hoc* Rigaux, the issue was not addressed by the Court (*Oil Platforms Case*, 362, 383-84).

<sup>902</sup> See: SB Roberts, 'US Reaction to ICJ Judgment in Iranian Oil Platforms Case' (2004) 98(3) AJIL 597-601; Taft (n 900) 295-306; Paparinskis – Circumstances precluding wrongfulness (n 170) 492-93;

<sup>903</sup> Article 49, API.



applications of excuses and defenses in investment arbitration, this notion leaves little practical value to customary defenses in the context of investment claims that arise out of, or in relation to, armed conflicts.

#### **4. Denial of Benefits on Security-Related Grounds**

This section focuses on another treaty mechanism that safeguards security interests: The DoB clause. For the purposes of this analysis, the main debates over the operation of DoB clauses, namely whether the DoB affects the jurisdiction of arbitral tribunals or the substantive protections of the investment treaty and, whether the host State can invoke the DoB clause after the investor has initiated arbitration proceedings, are put to one side.<sup>904</sup>

Principally, DoB clauses serve two functions in investment instruments. First, and famously, DoB prevent third country nationals, who own or control the investor, from gaining access to treaty protection when they would otherwise not benefit from such protection due to their nationality.<sup>905</sup> This function of DoB was developed in postwar US FCN treaties.<sup>906</sup> Such clauses are particularly useful for States that seek to confer investment protection to a wide array of companies that operate within their territory so as to attract investment inflows, and at the same time, address the risk of investment claims by shell companies.<sup>907</sup> In this respect, DoB are a safety measure for ensuring the reciprocity embodied in investment

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<sup>904</sup> See on these issues: L Mistelis and C-M Baltag, 'Denial of benefits and Article 17 of the Energy Charter Treaty' (2009) 113(4) Penn State Law Review 1301 – 1321; L Gastrell and P-J Le Cannu, 'Procedural Requirements of 'Denial-of-Benefits' Clauses in investment treaties: A review of Arbitral Decisions' (2015) 30(1) ICSID Review 78 – 97; Y Banifatemi, 'Taking into Account Control Under Denial of Benefits Clauses' in Y Banifatemi (ed) *Jurisdiction in Investment Treaty Arbitration, IAI Series on International Arbitration* (2018). 223-58.

<sup>905</sup> M Sornarajah, 'Good Faith, Corporate Nationality, and Denial of Benefits' in A Mitchell et al, *Good Faith and International Economic Law* (OUP 2015) 136-3; Dolzer and Schreuer (n 16) 55; A Sinclair, 'The Substance of Nationality Requirements in Investment Treaty Arbitration' (2005) 20 ICSID Review-FILJ 388; *AMTO v Ukraine*, SCC Case No. 080/2005, Award, 26 March 2008, paras 62-70.

<sup>906</sup> Vandavelde – US Investment agreements (n 703) 150.

<sup>907</sup> M Feldman, 'Denial of Benefits after *Plama v. Bulgaria*', in (n 684) 463-76.

treaties and a method to 'counteract nationality planning'.<sup>908</sup> This function is mostly irrelevant for the purposes of the present discussion.

Second, and pertinently, DoB serve to deny treaty protection to investors whose home State does not maintain diplomatic or normal economic relations with the host State. This too is an American creation. Such provisions were added to the US Model BIT in 1984 and modified to their more modern language in the 2004 Model BIT.<sup>909</sup> In contrast to the context in which DoB clauses are often discussed, here the DoB clause is not directed at treaty shopping, but rather as a means of furthering certain foreign policy goals.<sup>910</sup> On this point, the US State Department explained that the DoB clause is not intended to:

prescribe what policies the States or the Federal Government should or should not follow with respect to third-country controlled corporations, but is merely concerned with assuring that the treaties do not interfere with policies that the competent organs of government wish to formulate and enforce [...] [It preserves to the States] the same freedom of action as they have in the absence of the treaty, to deal as they see fit with such corporations. That is, the clause makes it clear that such corporations cannot claim treaty rights as against domestic legislation now or hereafter enacted.<sup>911</sup>

Arguably, this function of the DoB is closely related to that of security exceptions, which raises the question whether security exceptions have 'the same effect as would application of the treaties denial of benefits clause' and if not, how do these mechanisms interact.<sup>912</sup> It is suggested that while security exceptions and DoBs share several commonalities, these are

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<sup>908</sup> Dolzer and Schreuer (n 16) 55; Mistelis and Baltag (n 904) 1303; Gastrell and Le Cannu (n 904) 79-80.

<sup>909</sup> See a detailed analysis of the development in: Vandavelde – US Investment agreements (n 703) section 4.3.

<sup>910</sup> US State Department, 'Meeting with the Argentine Delegation to Discuss FCN Treaty', 4 April 1950, cited in *ibid*, 394.

<sup>911</sup> Letter from Assistant Legal Adviser Stanley Metzger to James W. Gould, 27 February 1953, cited in: Vandavelde – The first BIT (n 703) 394.

<sup>912</sup> This question was debated on the margins of the referenced Argentinian financial crisis. See: *Sempra v Argentina* (Award), Opinion of J Alvarez, para 67 responding to *Sempra v Argentina* (Award), Opinion of Slaughter and Burke-White, para 62. See decisions in: *CMS v Argentina* (Award), para 341; *Enron v Argentina* (Award) para 328; *Sempra v Argentina* (Award), paras 370 and 386.

distinct mechanisms that are not mutually exclusive in application, since they are conceptually and practically distinct. First, 'essential security' provisions are exceptions that render the investment treaty 'inapplicable' to the emergency measures.<sup>913</sup> By contrast, the DoB carves-out from the definition of 'investor' shell companies owned by nationals of a third-country, the host State, or relevantly, companies owned by enemy aliens.<sup>914</sup> Thus, under the DoB the State is under an obligation to grant certain benefits to the investment, but subject to certain conditions, it may 'deny' these benefits, whereas under the security exception, no treaty obligation arises with respect to any such investment.<sup>915</sup>

Second, these mechanisms are tailored for slightly different security concerns and entail different scopes. To apply the DoB to security-related concerns would seem to require that such concerns will be reflected in the absence of diplomatic relations with the third country that controls the investment at bar.<sup>916</sup> The same cannot be said of the scope of the security exception. In fact, the relationship between the home and host States need have nothing to do with the host State's decision to invoke the security exception. Importantly, in practice, situations of hostilities, which are capable of triggering emergency measures, are more abundant than the official absence of diplomatic relations or an economic embargo, which is required to invoke the DoB. Thus, the DoB and the security exception do not fully overlap, and they are not mutually exclusive.

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<sup>913</sup> *Continental Casualty v Argentina*, paras 164-65; Henckels – Security Exceptions and Armed Conflict (n 789).

<sup>914</sup> C Henckels 'Should Investment Treaties Contain Public Policy Exceptions?' (2018) 59(8) Boston College Law Review 2825, 2828 (explaining that carve-outs 'exempt an entire policy area or sector from the obligation or obligations'); B Legum, Defining Investment and Investor: Who is Entitled to Claim (2006) 22 Arbitration International 524, 525; Feldman (n 907) 464.

<sup>915</sup> Alvarez – Expert Opinion (n 912) paras 67-9; Henckles – Scope Limitation or Affirmative Defence (n 789); Vandevelde – Bilateral investment treaties of BITs (n 502) 179-81.

<sup>916</sup> Illustratively, the DoB would allow the US to deny the benefits of a treaty to a company that is incorporated in the territory of, say, Uruguay, but is owned or controlled by nationals of Iran, with which the US no longer maintains diplomatic relations.

Overall, the limited scope of the DoB coupled with the realization that modern hostilities do not automatically trigger severance of diplomatic relations means that in practice, this mechanism is likely to be of little use as a defense against investment claims relating to armed conflict.

## **5. Conclusion**

Chapters 3 – 5 dealt with the substantive international norms that regulate the treatment of investments in armed conflict. These analyses established that the interaction between investment law and IHL norms may affect the standards of treatment under an investment treaty and shield against a claim that the treaty was breached. For instance, where the conduct at issue was, in principle, in breach an investment standard, but it was also compliant with an IHL norms that take precedence as the *lex specialis*, the international responsibility of the State is not engaged. In continuance, this chapter 6 examined whether the reality of armed conflict and the circumstance of hostilities may be invoked to defend against an investment treaty claim.

To that end, the chapter assessed three main avenues: security exceptions in investment treaties, customary defenses (CPW), and DoB clauses. It is submitted that none of these mechanisms is a silver bullet capable of guaranteeing a defense against an investment claim. On the contrary, the broader implications of the invocation of these mechanisms against investment claims turns them into a double-edge sword in the context of armed conflict, thereby counterbalancing at least some of the concerns of abusive or excessive invocation of treaty and customary defenses during conflict.

First, security exceptions entail a self-limiting aspect. While emergency measures for military aims are likely to be taken in the context of armed conflicts, the inclusion of treaty language that negates review of security measures and the repeated invocation of such emergency measures, possess the potential of negatively depicting the regulatory environment in the host State. Host States that ‘serially’ invoke security

exceptions in times of conflict might cause foreign capital to flee; foreign capital that is often a prerequisite for the transition from conflict to sustainable peace.

The same is true, *mutatis mutandis*, for the invocation of CPW in the context of armed conflict, assuming such invocation is at all possible. Conflict-ridden host States that construe the reality of conflict as an excuse or a justification to breach investment standards of protection risk hurting their (already damaged) attractiveness as a destination for investment inflows. As for DoBs, their scope renders them mostly irrelevant for modern hostilities. While the severance of diplomatic and economic ties is a prerequisite for the invocation of the DoB on security-related grounds in investment claims, it is not a necessary condition for armed conflict. This may explain why the function of the DoB as a protection against security-related concern is mostly overlooked in practice and doctrine.

The conclusion of this chapter, that armed conflicts potentially limit, rather than expand, the scope of defences available to States is consistent with the development of international law. Because armed conflicts, by their very nature and essence, entail extreme and dynamic conditions, over time States have developed primary rules that are tailored for this reality. Such international norms include not only rules of IHL but also other investment treaty mechanisms, such as security exceptions, war clauses, and precautionary obligations (including FPS). Each of these rules reflects an account (or a balance) of the State's military and security priorities in hostilities and other, potentially conflicting, humanitarian considerations.

The creation of such primary norms to deal with extreme conditions and threats to national security, in turn, resulted in a limitation on the application of certain defenses, whereby States cannot use the extreme conditions of hostilities to excuse, justify, or circumvent the special (in the broad sense of the term) primary norms that were created specifically for the regulation of the extreme conditions of hostilities. The relative length of each section in this chapter was designated to reflect this state of play and

to correlate to what seems to be the relative weight and primacy of these defenses in modern practice.

## **Chapter 7**

### **Compensation for Losses to Foreign Investors Owing to Armed Conflict**

#### **1. Introduction**

This chapter focuses on compensation to foreign investors for losses to their property owing to hostilities. For the sake of convenience, such payments are referred to as ‘war reparations’ or ‘war losses’ throughout the discussion.

The point of departure for this analysis is that acts and omissions of a State in denying an investment the treatment guaranteed under the applicable investment treaty are internationally wrongful acts. The previous chapters laid out the pertinent customary and treaty bases of liability capable of giving rise to a cause-of-action in relation to armed conflict in investment arbitration. These mostly comprise unlawful appropriation and destruction of property (including, as explained in Chapter 3, what may be claimed by the investor to constitute unlawful expropriation but is in fact a different form of property dispossession), and failure to take precautions in and against attacks (i.e., a violation of FPS standard and/or the IHL obligation to take precautions as per the discussion in chapter 5) .

A State responsible for any such internationally wrongful act is ‘under an obligation to make full reparation for the injury caused by [its] internationally wrongful act’.<sup>917</sup> The aim of reparation is to eliminate, as far as possible, the consequences of the illegal act and to restore the situation that would have existed if the act had not been committed.<sup>918</sup> While reparation may include restitution and satisfaction ‘of the various forms of reparation, compensation is perhaps the most commonly sought in international practice’.<sup>919</sup> Compensation, in turn, entails a monetary

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<sup>917</sup> Article 31(1), ARSIWA.

<sup>918</sup> ARSIWA Commentaries, Article 31, paras 2-5; *Chorzow Factory*, 47.

<sup>919</sup> *ibid*, commentaries to Article 36, para 2.

payment for financially assessable damage arising from the violation and covers material and moral injury.<sup>920</sup>

How to assess compensation for the enumerated bases of liability is not clear since like most investment treaty standards, war clauses and the FPS provision are silent with respect to the consequences of their violation. Arguably, some guidance may be derived from the practice of investment tribunals who routinely deal with reparations for non-expropriation standards. The *SD Myers v Canada* Tribunal, for instance, which was among the early tribunals to address the calculation of compensation for violations of non-expropriation investment standards such as FET and national treatment noted that, ‘by not identifying any particular methodology for the assessment of compensation in cases *not involving expropriation*... the drafters of NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case’. To fill in the gap, the *SD Myers* Tribunal, like many others, relied on the ‘full reparation’ principle of the *Chorzów Factory* case,<sup>921</sup> which requires to wipe-out, as much as possible, the consequences of the internationally wrongful act.

Yet, however aware investment tribunals are that they are not bound by the expropriation standard of compensation when assessing reparations for non-expropriation provisions, arbitral practice is dominated by an expropriation mind-set<sup>922</sup> that focuses mostly, if not only, on the FMV of the affected property at the relevant time. Thus, tribunals reflexively cite the *Chorzów Factory* pronouncement on full reparation and proceed to use the

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<sup>920</sup> Article 36, ARSIWA.

<sup>921</sup> *SD Myers v Canada*, First Partial Award, UNCITRAL, IIC 249 (2000) paras 309-311; emphasis added.

<sup>922</sup> This expropriation-mind set results from the fact that investment treaties do not reference the obligation to make reparations to injured investors and the historical experience of arbitral tribunals which was shaped by claims concerning takeovers of Communist regimes, regimes changes following decolonialization that resulted in appropriation, NIEO policies that affected foreign property rights, etc. Additionally, litigants mostly craft their submissions on compensation for non-expropriation violations using expropriation-related standards. Salacuse – The law of investment treaties (n 17) 436; Ratner (n 361) 10-15. ARSIWA Commentaries, Article 36, para 23.



FMV-treaty standard for lawful expropriation to assess damages for non-expropriation violations, such as FET.<sup>923</sup> However, there may be more to the award of compensation to investors whose investments were damaged as a result of the host State's violations of international law during armed conflict.

Accordingly, this chapter proceeds as follows. First, the discussion addresses the scope and content of the State's obligation under IHL to compensate individuals, including foreign investors, for losses owing to armed conflict. In this respect, it is established that under customary law, as reflected in the provisions of The Hague and Geneva instruments, States are obliged to pay compensation for all violations of IHL, including for the unlawful appropriation or destruction of property. Next, it is demonstrated that although the obligation to compensate for IHL breaches traditionally applied between States, today it is widely recognized that individuals have a right to reparations for violations of IHL, albeit there are many procedural difficulties to exercise this right. Then, the section deals with the customary standard of compensation for violations of IHL – 'adequate, effective, and prompt' as reflected in the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Violations of International Human Rights and Humanitarian Law (Basic Principles on the Right to Reparation),<sup>924</sup> focusing mainly on the notion of 'adequacy'.

Section 3 deals with the obligation to pay compensation under investment law, focusing mainly on Plain War Clauses (PWC). It is argued that the PWC prescribes an obligation of nondiscrimination with respect to

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<sup>923</sup> Some tribunals attempted to analogize violations to expropriation of property and in so doing used the FMV standard (*Wena Hotels v Egypt*, ICSID Case No ARB/98/4, Award, 8 December 2000, para 118; *CMS v Argentina* (Award), para 410). See further: *MDT v Chile*, ICSID Case No ARB/01/17, Award, 25 May 2004, para 238; *Feldman v Mexico*, para 195; *Enron v Argentina* (Award) para 360-61; *LG&E v Argentina* (Award) para 30; *Sempra v Argentina* (Award) para 403; *BG Group v Argentina*, UNCITRAL, Final Award, 24 December 2007, paras 419–429; *National Grid v Argentina* (Award) paras 269–7; *PSEG v Turkey*, paras 308-15, 353; *Lemire v Ukraine*, paras 149-52, 243-49.

<sup>924</sup> The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN Doc E/CN.4/2000/62, 18 January 2001 (UN Principles on the Right to Remedy).

war reparation, which guarantees that covered foreign investors will be compensated for their losses owing to hostilities whenever the host State compensates its own investors or the investors of other countries, for whatever moral or legal reason. Section 4 returns to the analysis of the EWC. Building on the discussion in chapter 3, this section focuses on the obligation to award 'prompt, adequate, and effective' compensation under the EWC. It is argued that the interpretation and assessment of what is 'adequate' compensation for the appropriation or destruction of foreign investments in armed conflict under the EWC ought to have regard to the meaning of 'adequate' compensation under IHL, including as expressed in the Basic Principles on the Right to Reparation, and not only to the treaty standard of 'adequate' compensation for lawful expropriation which entails FMV.

Finally, section 5 deals with the occurrence of armed conflict as factual circumstances capable of affecting the assessment of compensation to foreign investors whose property was injured in the context of armed conflict. Overall, this chapter demonstrates that normative and factual considerations of hostilities could and should be accounted for in the assessment of reparation in investment arbitration.

## **2. The Obligation to Pay Compensation for War Losses under IHL**

This analysis deals with the compensation regime under IHL. First, the section addresses the scope and content of the obligation to make reparation for violations of IHL. Second, the identity of those who may claim for compensation for violations of IHL is examined. Third, the section analyzes the standard of compensation for IHL violations: 'adequate, prompt, and effective', focusing mainly on the meaning of 'adequate'. Overall, it is argued that States are under an obligation, vis-à-vis States and individuals, to pay 'adequate' compensation for violations of IHL. Such 'adequate' compensation ought to be awarded for any economically assessable damage, including moral damages and mental harm, insofar as the amount will be commensurate with the gravity of the violation, the

damage caused, and the prevailing circumstances of hostilities, including the socioeconomic abilities of the wrongdoing State.

The first step concerns the content and scope of the obligation to make reparation under IHL. Article 3 of Hague Convention IV (HC-IV) provides that ‘a belligerent party which violates the provisions of the said Regulations shall if the case demands be liable to pay compensation’.<sup>925</sup> This rule is repeated in API Article 91 which mandates that ‘a Party to the conflict which violates the provisions of the Conventions or of this Protocol, shall, if the case demands, be liable to pay compensation.’<sup>926</sup> The express language of HC-IV Article 3 and API Article 91 seems to instruct that the State is obligated to make reparations, only in the form of compensation, when the provisions of the HC or API, and these instruments alone, are breached. As regards their status, both provisions ‘are generally held to have long since entered into the domain of customary international law’.<sup>927</sup>

It is suggested however that the scope of the obligation is broader than a cursory reading of these provisions reveals. First, while HC-IV and API form part of the rules that regulate *international* armed conflicts and although IHL instruments that regulate NIACs do not mention compensation or any other form of reparations as a legal consequence of IHL breaches,<sup>928</sup> the customary obligation to ‘pay compensation’ for violations of IHL applies

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<sup>925</sup> Article 3, HC-IV.

<sup>926</sup> Article 91, API.

<sup>927</sup> G Schwarzenberger, *International Law as Applied by International Courts and Tribunals, The Law of Armed Conflict* Vol II (Stevens & Sons Ltd. 1968) 448; F Kalshoven, ‘State responsibility for warlike acts of the armed forces: from Article 3 of the Hague Convention IV of 1907 to Article 91 of the Additional Protocol I of 1977 and beyond’ (1991) 40(4) ICLQ 827, 836; F Kalshoven, ‘Expert Opinion submitted in 1997 to the Tokyo District Court, Japan, in Dutch POW and civilian detainees cases as well as in Philippine “comfort women” cases’ published in H Fujita et al (eds), *War and the Rights of Individuals: Renaissance of Individual Compensation* (Nippon Hyoron-sha 1999) 31-48, reprinted: Kalshoven – Reflections on the Law of War (n 729) 637 (stating that HC-IV Article 3 was understood to be customary at the time The Hague Law was adopted, and at any rate it attained customary status by the 1970s as evidences by the discussions of the Diplomatic Conference on the Reaffirmations and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-77)). see: F Kalshoven, ‘Supplementary Expert Opinion submitted in 1999 to the Tokyo District Court of Appeals in Dutch POW and civilian detainees’ cases as in Philippine ‘comfort women’’, in (ibid) 651-52.

<sup>928</sup> Namely, CA III, GC and the provisions of AP II.

to international *and* non-international armed conflicts.<sup>929</sup> What also emanates from the applicability of this rule to NIACs is that the obligation to ‘pay compensation’ for IHL breaches applies also to armed groups, and not only on States.<sup>930</sup>

Second, while the payment of compensation under HC-IV Article 3 and API Article 91 is notionally restricted to violations of ‘said Regulations’ and ‘the Conventions and the Protocol’, respectively, the obligation to make reparations covers all violations of IHL norms. To put this another way, the obligation to make reparations arises ‘automatically’<sup>931</sup> as a consequence of the unlawful act, regardless of whether the obligation is codified in these treaties.<sup>932</sup> Also of note is that although in certain respects IHL distinguishes between ‘breaches’, ‘grave breaches’,<sup>933</sup> and ‘serious violations’,<sup>934</sup> violations of *all* rules of IHL, and not only violations of the provisions for which there is individual criminal responsibility, give rise to an obligation to make reparation.<sup>935</sup>

Third, reparation for IHL violations are not limited to compensation and can take various other forms, including restitution and satisfaction.<sup>936</sup> While HC-IV Article 3 and API Article 91 require the violating

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<sup>929</sup> ICRC – Customary IHL Study (n 38) Rule 150.

<sup>930</sup> Eg: The agreement between the Philippines government and the National Democratic Front of the Philippines where expressly required both parties to pay reparations to the victims of IHL violations (Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law between the Government of the Republic of the Philippines and the National Democratic Front of the Philippines (concluded 16 March 1998).

<sup>931</sup> EC Gillard, ‘Reparations for violations of international humanitarian law’ (2003) 85(851) IRRC 529, 532-33.

<sup>932</sup> API Commentary (n 509) paras 3652-3653; Bothe et al – New Rules for victims of armed conflicts (n 42) 620-22; M Frulli, ‘When Are States Liable towards Individuals for Serious Violations of Humanitarian Law? The Marković Case’ (2003) 1 JICJ 406–27, 416; Kalshoven – State responsibility for warlike acts (n 927) 830-33; L Zegveld, ‘Remedies for victims of violations of international humanitarian law’ (2003) 85(851) IRRC 497, 506-7.

<sup>933</sup> Articles 50, 51, 130, 147 of GC I, II, III and IV respectively and Articles 11 and 85 of API.

<sup>934</sup> These include grave breaches, war crimes as specified under Article 8 of the Rome Statute, and other war crimes in IAC and NIAC under customary IHL.

<sup>935</sup> On the broader question whether international law distinct between serious breaches and ‘ordinary’ wrongful acts in terms of the practical consequences that each entails, see: C Tams, ‘Do serious breaches give rise to any specific obligations of the responsible state?’ (2002) 13(5) EJIL 1161-1180.

<sup>936</sup> Eg: Article 3, Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict. See further examples in Gillard (n 931) 533.

party only to 'pay compensation', this choice of language should *not* be read literally as restricting the available forms of reparation. The use of the term 'compensation' in these provisions reflects the linguistic differences between French and English in the early 20<sup>th</sup> century. While the French text of HC-IV Article 3 used the term 'indemnité', the drafters preferred 'compensation' in lieu of 'indemnity' for the English translation since the then-accepted ordinary meaning of the English term 'indemnity' denoted either an 'exemption' from reparations or a sum of money demanded by the 'victorious belligerent'.<sup>937</sup> The chosen English language ('compensation') was designated to express the idea that the obligation to make reparations is incumbent upon vanquished and victors alike, not to limit the type of reparations for IHL violations to compensation specifically.

Sassòli proposes in this regard that the requirement to 'pay compensation' is to be read and interpreted in conjunction with – not disconnected from – the phrase 'if the case demands'. For him, since compensation under HC-IV Article 3 and API Article 91 'has to be paid only "if the case demands"', it may be seen, as in general international law, as subsidiary to "*restitutio in integrum*".<sup>938</sup> Similarly, the ICRC Commentaries to API Article 91 clarify that 'if the case demands' means that compensation will be due only if restitution in kind or the restoration of the situation existing before the violation, are not possible.<sup>939</sup> If so, the language 'if the case demands' projects on the meaning of 'compensation'; it reiterates the *Chorzow Factory* pronouncement on the primacy of restitution as a form of reparation.<sup>940</sup> Put differently, the requirement to 'pay compensation if the case demands' under IHL is tantamount to the pronouncement of ARSIWA

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<sup>937</sup>OED 'indemnity' <<http://www.oed.com>> (accessed 17 October 2017). API Commentary (n 509) paras 3653-56.

<sup>938</sup> Sassòli – State responsibility (n 867) 418.

<sup>939</sup> API Commentary (n 509) para 3655.

<sup>940</sup> M Reisman, 'Compensating collateral damage in elective international conflict' (2013) 8 Intercultural Human Rights Law Review, 2-3. Kalshoven – State responsibility for warlike acts (n 927) 830-35; Zegveld (n 932) 507.

Article 36 whereby the State is under an obligation to compensate ‘insofar as such damage is not made good by restitution’.<sup>941</sup>

Without derogating from the argument that States are obliged to compensate individuals for violations of IHL, it should be stressed that in practice payments for damages suffered in the context of armed conflict are not limited to violations of IHL. Already in 1915 Brochard observed a ‘growing practice for nations to alleviate the individual losses sustained during war, for which no legal liability is incurred, by making voluntary awards of indemnity as a matter of grace and favor’.<sup>942</sup> This practice began in 1792 by France and was promoted by other States that ‘have from time to time followed this worthy example’.<sup>943</sup> Voluntary award of indemnity is as prevalent in modern warfare. For instance, the 2017 US Operational Law Handbook instructs:

If a unit deploys to the Far East or other parts of the world where payments in sympathy or recognition of loss are common, JAs should explore the possibility of making solatia payments to accident victims. Solatia payments are *not* claims payments. They are payments in money or in-kind to a victim or to a victim’s family as an expression of sympathy or condolence. These payments are immediate and, generally, nominal. The individual or unit involved in the damage has *no legal* obligation to pay; compensation is simply offered as an expression of sympathy in accordance with local custom... Prompt payment of solatia ensures the goodwill of local national populations, thus allowing the U.S. to maintain positive relations with the host nation...<sup>944</sup>

Hence, from a strategic point of view and for any number of motives ranging from sympathy through political embarrassment to diplomatic goodwill,<sup>945</sup> it may be essential that civilians be compensated following an event leading to casualties or proprietary damage even when there was *no* violation of IHL, or when any such violation was not yet established.<sup>946</sup>

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<sup>941</sup> ARSIWA, commentaries to Article 36.

<sup>942</sup> Bochar – Diplomatic Protection (n 385) 279.

<sup>943</sup> *ibid*, see nn 5 for the original French laws and the subsequent practice.

<sup>944</sup> 2017 US Operational Law Handbook (n 400) Chapter 20 – Foreign and Deployment Claims, Section M(1); emphasis in the original.

<sup>945</sup> Bochar – Diplomatic Protection (n 385) 279; Boothby (n 505) section 25.2.

<sup>946</sup> The US stressed this point in the matter of the sinking of a Japanese vessel. US Department of State, ‘Offer of Ship to Replace “Awa Maru”’ (1945) 13 Department of State

Accordingly, such payments are often accompanied by a declaration making it clear that no legal liability is recognized by the payer.<sup>947</sup> Importantly, because these payments are *ex gratia*, such practice, even if shared by many States, is attributed to a moral rather than to a legal obligation;<sup>948</sup> it is completely discretionary and as such, it cannot, and does not, evince the development or existence of an obligation to compensate in like situations.<sup>949</sup> This is an important point to which the discussion returns in section 3 below.

While it was established above that a violation of IHL imposes an obligation to make reparations on behalf of the State, the identity of those who may seek redress for violations of IHL is disputed.<sup>950</sup> Accordingly, and without pretence to exhaust the issue, for its breadth,<sup>951</sup> the following discussion examines whether individuals have a right to press a claim for compensation for violations of IHL.

The rules of general international law stress that reparations may be owed to persons or entities other than States.<sup>952</sup> Yet, whether and to what extent private persons are entitled to invoke responsibility on their own account depends on each applicable primary rule. This determination is not easy in the context of IHL since the primary rules that prescribe the

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Bulletin 249, 249-50. See additional examples in: US DoD LOAC Manual (n 34) Section 18.16.3.

<sup>947</sup> Eg: Section 2, Financial Administration Act (R.S., 1985, c. F-11) (Canada); DAOD 7004-1, Claims and Ex-Gratia Procedures (2003) (Canada); Section 3, Directive on Claims and Ex-Gratia Payments (2009) (Canada); Memorandum, Deputy General Counsel (International Affairs), US DoD to Chairman, Joint Chiefs of Staff, subject: Solatia, (26 November 2004). See also: NM Leich, 'Denial of Liability: *Ex Gratia* Compensation on a Humanitarian Basis' (1989) 83(2) AJIL 318, 322-23; H Maier, 'Ex Gratia Payments and the Iranian Airline Tragedy' (1989) 82(2) AJIL 325, 325-30; S Murphy, 'Contemporary Practice of the United States Relating to International Law' (2000) 94 AJIL 102, 102-103.

<sup>948</sup> J Joseph, 'Mediation in War: Winning Hearts and Minds Using Mediated Condolence Payments' (2007) 23 Negotiations Journal 219, 223-24.

<sup>949</sup> *North Sea Continental Shelf Cases*, para 27; *Nuclear Weapons*, para 64.

<sup>950</sup> L Cameron and V Chetail, *Privatizing War: Private Military and Security Companies Under Public International Law* (CUP 2013) 546,

<sup>951</sup> M-C Bassiouni, 'International recognition of victims' rights' (2006) 6(2) Human Rights Law Review 203-79 and T Van Boven, 'Victim-Oriented Perspectives: Rights and Realities' in T Bonacker and C Safferling (eds) *Victims of International Crimes: An Interdisciplinary Discourse* (Springer 2013) 17 – 27.

<sup>952</sup> Article 33, ARSIWA.

obligation to make reparation, HC-IV Article 3 and API Article 91, are unhelpfully silent with respect to their *ratione personarum*. In the absence of a clear stipulation, to ascertain whether individuals have a right to remedy and reparations under IHL it is necessary to determine if the interests of individuals are directly laid down and protected by IHL norms. The doctrinal assumption here is that the victim's right to remedy is a secondary right that emanates from his primary substantive right being breached. Therefore, where there is no primary substantive right, there can in principle be no secondary right to remedy.

Historically, IHL norms developed between States in the form of restrictions on the conduct of the 'belligerent Parties'. The content and scope of the obligation to pay compensation for IHL violations was strongly influenced by the doctrine of diplomatic protection and traditionally conceived as an obligation to pay compensation to the State of nationality of the injured persons to which they had to refer their claim.<sup>953</sup> The notion of individual 'rights' was introduced only in the 20<sup>th</sup> century, arguably with the 1929 Prisoners of War Convention, which addresses the 'right' of prisoners to complain of their conditions.<sup>954</sup> The idea that individuals are rights holders in international law was increasingly recognized by States after WWII.<sup>955</sup> By the time the Diplomatic Conference drafted the 1949 Geneva Conventions, it had been acknowledged not only that individuals are, in some instances, rights holders, but that 'it is not enough to grant rights to protected persons and to lay responsibilities on the States; protected persons must also be furnished with the support they require to obtain their rights'.<sup>956</sup> Indeed, the Geneva Law uses the jargon of 'rights'

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<sup>953</sup> Sassòli – State responsibility (n 867) 419.

<sup>954</sup> Articles 42 and 67, GC III.

<sup>955</sup> For a detailed analysis of the relevant factors that led to this change and the manifestation thereof, see: Bassiouni (n 951) 206-10, 218-23 and R Portmann, *Legal personality under international law* (CUP 2010) 134-38 and ch 9.

<sup>956</sup> ICRC, 'Final Record of the Diplomatic Conference of Geneva of 1949 Diplomatic Conference for the Establishment of International Conventions for the Protection of War Victims Geneva' (21 April - 12 August 1949) Vol II – A (Geneva 1949) 822. This statement was made in the context of Article 30, GC IV.



and ‘entitlements’ of individuals, by that evincing the intention of States to grant at least some rights to individuals.<sup>957</sup>

Moreover, some provisions of the Geneva Conventions specifically concern the right of the individual to have recourse to a complaint procedure for IHL violations,<sup>958</sup> thereby demonstrating that IHL instruments intend to accord individuals the right to seek redress. Aside from these stipulations, IHL comprises many other rules that contain ‘implicit’ elements of individual benefits.<sup>959</sup> On this point, Zegveld suggests that the grave breaches provisions could be construed as ‘conferring individual humanitarian rights’ against acts, such as wilful killing, torture or inhuman treatment.<sup>960</sup> Considered this way, the obligations of belligerent parties are mirrored by the rights of war victims and their cause-of-action against a warring party who violated their rights.<sup>961</sup>

Nevertheless, even if, *substantively*, individuals hold rights or entitlements under IHL, *procedural* challenges may still prevent them from exercising their rights. To address this problem, belligerents sometimes established special tribunals *postbellum* to adjudicate the claims of former enemy individuals against them.<sup>962</sup> But aside from such tribunals, the practice on the right to reparation under IHL has mostly been limited to inter-State claims until the mid-20<sup>th</sup> century.<sup>963</sup> In 1952, in what is commonly

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<sup>957</sup> Article 7, GC I; Articles 6 and 7, GC II; Articles 7, 14, 84, 105, and 130 GC III; Articles 5, 7, 8, 27, 38, 80, and 146, GC IV; Articles 44(5), 45(3), 75, and 85(4), API; and, Article 6(2), APII.

<sup>958</sup> Article 78, GC III; Article 30, GC IV.

<sup>959</sup> Zegveld (n 932) 504.

<sup>960</sup> *ibid.*

<sup>961</sup> True, many IHL instruments also address the ‘rights’ of States, and not only their obligations (eg: Articles 14, 31, 38 GCI). Nonetheless, an instrument can confer rights upon different entities and can be partly non-self-executing for one purpose but still be directly operative for another (J Paust, ‘Judicial power to determine the status and rights of persons detained without trial’ (2003) 44(2) *Harvard International Law Journal* 503, 515; Zegveld (n 932) 510).

<sup>962</sup> For instance, the tribunals constituted under Article 304 of the Treaty of Versailles and the claims commissions established by the US, the UK, and France in their respective occupation zones in Germany after WWII (Freeman (n 657) 375-389 and Sassòli – State responsibility (n 867) 419).

<sup>963</sup> C Tomuschat, ‘Reparation in Favour of Individual Victims of Gross Violations of Human Rights and International Humanitarian Law’ in M Kohen (ed) *Promoting Justice, Human*

referred to as the first time an adjudicative instance recognized the existence of an individual right under HC-IV Article 3,<sup>964</sup> the Higher Regional Court of Münster accepted a claim based on the individual's right to invoke violations of IHL. For many years this case remained an outlier. Few claims have been filed by individuals until the early 2000s and even fewer claims succeeded.<sup>965</sup>

While the consistent rejection of such claims outwardly casts doubt on the proposition that individuals hold rights under IHL, a careful assessment of this national jurisprudence reveals that claims by individuals for war reparation failed worldwide mostly on procedural, rather than substantive grounds, such as – State immunity,<sup>966</sup> signed peace treaties,<sup>967</sup> standing and lack of procedure,<sup>968</sup> or policy considerations.<sup>969</sup> It is also important that practically none of the domestic instances that dismissed claims for reparations unequivocally denied the underlying right of the

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*Rights and Conflict Resolution through International Law: Liber amicorum Lucius Caflisch* (Leiden: Brill, 2007) 576.

<sup>964</sup> Higher Administrative Court Münster, Münster (Oberverwaltungsgericht Münster) (1952): Judgment of 9 April III A 1279/51, NJW 1952, 1030

<sup>965</sup> In the 1990s, the question whether individuals can invoke the right to remedy for IHL violations re-emerged in the framework of the 'comfort-women' claims. The claimants in these cases, namely women who were used as sex-slaves during WWII, argued that they have a right to compensation under customary law and under HC IV Article 3. Their claims were mostly rejected. See: M Igarashi, 'Post-War Compensation Cases, Japanese Courts and International Law' (2000) 43 *The Japanese Annual of International Law* 45-82; T Yu, 'Reparations for Former Comfort Women of World War II (1995) 36 *Harvard Journal of International Law* 528; S Lee, 'Comforting the Comfort Women: Who Can Make Japan Pay?' (2003) 24(2) *U Penn Journal of Int Econ Law* 509-547. For a review of the caselaw preceding these claims, see: Kalshoven (n 729) and Expert Opinion by E David, 'The direct effect of Article 3 of the Fourth Hague Convention of 18th October 1907 respecting the Laws and Customs of War on Land', and Expert Opinion by C Greenwood, 'Rights to compensation of former prisoners of war and civilian internees under Article 3 of the Hague Convention No. IV, 1907', both in (n 927).

<sup>966</sup> Eg: *President of the Council v Markovic*, Corte di Cassazione, Decision 5 June 2002, No 8157/2002; *Margellos and others v Federal Republic of Germany*, Anotato Eidiko Dikastirio (Special Supreme Court), Judgement, 17 September 2002.

<sup>967</sup> Gillard (n 931) 537-38.

<sup>968</sup> Eg: *President of the Council v Markovic*, Corte Suprema di Cassazione, Decision 11 March 2004, No 8157/2002, 2006 ILR 652 (656); *Chinese victims of sexual violence v Japan*, Tokyo District Court, Judgment, 24 April 2003.

<sup>969</sup> *Handle v Artukovic*, US District Court of the Central District of California, US 601 Supp. 1421, Judgment 31 January 1985. On US jurisprudence: Paust (n 961) 514-16.

individual to compensation.<sup>970</sup> In other words, the grounds for the rejection of these claims go to the *exercise* of a right to reparations, and not to the *existence* of that right.

Additionally, the practice, jurisprudence, and the constitutive instruments of specialized bodies that were established in the aftermath of hostilities, such as the UN Compensation Commission (UNCC) and the EECC, support the notion that individuals are right holders under IHL.<sup>971</sup> Furthermore, the recognition of the individual's right to remedy for IHL violations is demonstrated in a consistent record of international authorities. Most notably, at the close of 2005, and at the desire of the 'majority of States that a UN normative instrument on the right to reparations for victims of human rights and humanitarian law violations be adopted',<sup>972</sup> the UN

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<sup>970</sup> For instance, the Netherlands breached IHL and sought compensation for their losses. The Appeals Court of Amsterdam rejected a claim by nationals of the former FRY, who argued that in participating in the NATO bombardment campaign, the Netherlands breached IHL and sought compensation for their losses. The Court recognized the possibility of deriving individual rights from IHL norm but it did not consider that the Appellants, personally, were the victims of violations of IHL, even assuming IHL norms were violated (Appeals Court of Amsterdam, *Dedovic vs Kok*, Case No 759/99 SKG, 6 July 2000, Judgment). See also: German Federal Court of Justice *Compensation for Distomo Massacre (Greek citizens v Germany)*, Appeal judgment, 42 ILM 1030 (2003). For an analysis of case law, see: Gillard (n 931) 538.

<sup>971</sup> The UNCC was established in 1991 to implement Iraq's liability, 'under international law', for any direct loss or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait (UNSC Resolution 687 (1991) of 8 April 1991, para 16). The vast majority of the 2.6 million claims received were from individuals (legal and natural). For an example of a UNCC decision recognizing the rights of the individual, see Decision No 7, UN Doc S/AC.26/1991/7, para 6. The EECC was established in 2000 to decide 'through binding arbitration' all claims for loss, damage or injury by nationals (including both natural and juridical persons) of one party against the Government of the other part that 'result from violations of IHL, including the 1949 Geneva Conventions' (Article 5(1), Agreement between the Government of Ethiopia and the Government of Eritrea, 12 December 2000, 40 ILM 260 (2001)). Some 400,000 claims by individuals of each of the two States were filed with the EECC for violations of IHL by the States. Of course, the need to create bodies such as the UNCC and the EECC for the purpose of enabling individuals to press claims against States demonstrates, arguably, that individuals have no right to remedy under IHL unless such has been first created for them in the constitutive instruments of a special instance. However, the treaties establishing post-conflict bodies did not, as Kalshoven explained, 'create rights individuals did not already possess: they merely transposed those rights to another, international, level of procedure' (Kalshoven – Expert opinion (n n 729) 644-45).

<sup>972</sup> Bassiouni (n 951) 249. See: Common Position Paper, 'The Draft Basic Principles And Guidelines On The Right To A Remedy And Reparation For Victims Of Violations Of International Human Rights And Humanitarian Law' <<https://redress.org/wp->

Commission on Human Rights (UNCHR) recognized the interests and rights of victims of IHL violations in the Basic Principles on the Right to Reparation. The Basic Principles are the result of more than 20 years of research work and a broad consultative process with States,<sup>973</sup> international organizations such as the ICJ and the ICRC.<sup>974</sup>

The Basic Principles on the Right to Reparation do not prescribe new international legal obligations. They do not address the substantive claims of human rights and IHL and they do not enumerate what falls under their respective ambit. The Basic Principles simply say that ‘violations require remedies.’<sup>975</sup> Accordingly, these Principles ‘identify mechanisms, modalities, procedures and methods for the implementation of the existing legal obligation’ to make ‘adequate’ war reparations<sup>976</sup> to *individual* victims for ‘gross’ violations of human rights law and ‘serious’ violations of IHL.

The different adjectives, ‘gross’ and ‘serious’, represent an attempt of certain States to limit the scope of the Basic Principles and to demonstrate the difference between human rights law and IHL. However, this attempt should not be understood to imply a separate legal regime for reparations according to the particular right violated, but rather taken to qualify situations ‘with the view of establishing a set of facts that may figure as a basis for claims adjudication’.<sup>977</sup> It ought to be borne in mind that the Basic Principles on the Right to Reparation are drafted from the view point of the victim. And for the victim, it is ‘artificial and counterproductive’ to make a separation on the basis of legal definitions,<sup>978</sup> since victims are indifferent

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content/uploads/2018/01/NGO\_common\_position\_paper.pdf> (accessed 20 November 2018) (accessed 20 November 2018).

<sup>973</sup> For a detailed account of the development of the Principles see: Bassiouni (n 951) 247-51.

<sup>974</sup> See the introductory note and procedural history at <[http://legal.un.org/avl/ha/ga\\_60-147/ga\\_60-147.html](http://legal.un.org/avl/ha/ga_60-147/ga_60-147.html)> accessed 20 December 2017.

<sup>975</sup> Bassiouni (n 951) 253.

<sup>976</sup> Annex, Recital 7, UNGA Res 60/147.

<sup>977</sup> Bassiouni (n 951) 251.

<sup>978</sup> *ibid*, 255.

to whether their losses in hostilities are properly pigeonholed as the consequences of violations of IHL or of breaches of human rights obligation.

In the wake of the adoption of the Basic Principles on the Right to Reparation, several specialized international bodies recognized the right of the individual to receive direct compensation from the State for IHL violations.<sup>979</sup> In 2005, for instance, the Report of the UN Commission of Enquiry on Darfur noted that, even if originally the obligation to make reparation for violations of IHL was ‘conceived of as an obligation of each contracting State towards the other contracting State’, it has evolved so that today it is owed to individuals. On this point, the Report cited the Basic Principles.<sup>980</sup> Also notable are the Report of fact-finding mission to Beit Hanoun by the UN Human Rights Council (2008),<sup>981</sup> the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (2009),<sup>982</sup> the ILA Declaration of International Law Principles on Reparation for Victims of Armed Conflict (2010),<sup>983</sup> and the 2016 Commentaries to the Geneva Conventions.<sup>984</sup> All of these authorities recognized that individuals have a right to reparations for IHL violations from the violating State and

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<sup>979</sup> Eg: Hague Agenda for Peace and Justice, Recommendation 13, The Agenda for Peace, UN Doc. A/54/98; Amsterdam Centre for International Law cited in Zegveld (n 932) 499-500; UNCHR, ‘Updated sets of principles for the protection and promotion of human rights through action to combat impunity’, 61st Session, 8 February 2005, E/CN.4/2005/102/Add.1; International Human Rights Law Institute, Chicago Council on Global Affairs, The Chicago Principles on Post-Conflict Justice (2007) Principle 3.

<sup>980</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva 25 January 2005, paras 593-600 <f (accessed 18 October 2018). That same year the ICRC affirmed the individuals’ right to reparation and referenced the Basic Principles (Customary IHL Study (n 38) Rule 50).

<sup>981</sup> UN Human Rights Council, ‘Report of the High-Level Fact-Finding Mission to Beit Hanoun established under Council resolution S-3/1’ 1 September 2008, A/HRC/9/26, para 67.

<sup>982</sup> Independent International Fact-Finding Mission on the Conflict in Georgia, Vol 1 (2009) 1-33.

<sup>983</sup> Committee on the Reparation for victims of armed conflict, ‘Draft Declaration of International Law Principles on Reparation for Victims of Armed Conflict (Substantive Issues)’ in International Law Association Report of the Hague Conference (2010) (International Law Association, The Hague 2010) 293. The principles of the Hague Declaration were reaffirmed by the ILA in the 2014 Washington Conference (Committee on the Reparation for Victims of Armed Conflict, in International Law Association Report of the Seventy-Sixth Conference (Washington 2014) (International Law Association, Washington 2014)).

<sup>984</sup> 2016 Commentary to GC I (n 895) para 3022.

referenced the Basic Principles on the Right to Reparation as a codification and reflection of this right.

The jurisprudence of the ICJ also reflects a recognition of the individual right to remedy for violations of IHL. In the 2004 *Wall Advisory Opinion*, for instance, the Court recognized the ‘obligation to make reparation for the damage caused to all the natural and legal persons concerned’.<sup>985</sup> Likewise, while settling an inter-State dispute, the Court acknowledged the responsibility of Uganda for injuries suffered by persons in the DRC.<sup>986</sup> Some commentators suggest that in so doing, the Court implicitly recognized the State’s obligation to repair individual damage.<sup>987</sup> Finally, parallel developments in other fields of international law, namely human rights and criminal law, reinforce the view that today individuals have a right to remedy for IHL violations.<sup>988</sup> Overall, it is argued that while some contemporary authorities, such as the 2016 US DoD LOAC manual, still maintain that individuals have ‘no private right to compensation under customary international law or the 1949 Geneva Conventions’,<sup>989</sup> these views are overshadowed by a growing amount of consistent modern authorities to the contrary.

Having established that individuals have a right to be compensated for the harm caused to them by the violating State, the discussion moves to ascertain the standard and form of any such compensation. IHL follows the general maxim that the violating State must make ‘full reparation’ ‘in an adequate form’ for the injury caused by the violation of IHL, such that the consequences of the wrongful act will be wiped out.<sup>990</sup> Yet, it remains

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<sup>985</sup> *Wall Advisory Opinion*, para 152.

<sup>986</sup> *DRC v Uganda*, paras 259-60.

<sup>987</sup> See C McCarthy, ‘Reparation for Gross Violations of Human Rights Law and International Humanitarian Law at the International Court of Justice’ in C Ferstman et al (eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity* (Brill 2009) 283-84.

<sup>988</sup> For an overview of the cross fertilization on this point, see: Gillard (n 931) 544-48, and Zegveld (n 932) 514-23.

<sup>989</sup> DoD LOAC Manual (n 34) Section 18.16.4.

<sup>990</sup> *Factory at Chorzów*, 21; ICRC – Customary IHL Study (n 38) Rule 150; Sassòli – State Responsibility (n 867) 148; *Certain Activities carried out by Nicaragua in the Border Area*

unclear what might ‘full’ reparations look like in respect of acts that violate IHL and how would the consequences of such acts be ‘wiped out’ in an ‘adequate form’? In reality, ‘it would be callous and naïve’<sup>991</sup> to think that an award of compensation would restore war victims to the situation they were in prior to the violation. Since the adverse effects of war are widespread and lasting, the consequences of IHL violations cannot be fully ‘wiped out’. Nevertheless, the receipt of prompt, effective, and adequate compensation<sup>992</sup> is an important element in enabling victims to try to rebuild their lives.<sup>993</sup>

To elucidate what is meant by ‘adequate compensation’ for violations of IHL the discussion returns to the Basic Principles on the Right to Reparation, which make repeated use of the adjective ‘adequate’ to qualify the standard of reparation.<sup>994</sup> Notably, Principle 15 explains that the promotion of justice requires that ‘adequate, effective and prompt’ compensation ‘should be proportional to the gravity of the violations and the harm suffered’.<sup>995</sup> Principle 20 goes on to explain what damages merit ‘adequate, effective and prompt’ compensation and, that what is adequate

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(*Costa Rica v Nicaragua*) (Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica, Judgment) 2018 <<https://www.icj-cij.org/files/case-related/150/150-20180202-JUD-01-00-EN.pdf>> (accessed 10 March 2018) paras 30-32, 40-42, 148-55.

<sup>991</sup> Gillard (n 931) 530.

<sup>992</sup> The notions of ‘effectiveness’ and ‘promptness’ are not analyzed below. In the context of IHL, as with investment law and general international law, ‘effective payments’ mostly entail convertible currency while what is ‘prompt’ is determined on a case-by-case basis. ‘Prompt compensation’ does not denote ‘immediate’, but rather ‘timely’ payments within a reasonable period. See: J Barker, ‘Compensation’ in J Crawford et al *The Law of International Responsibility* (OUP 2010) 602 and *DRC v Uganda*, Order of 1 July 2015, para 3.

<sup>993</sup> Gillard (n 931) 530; Zegleb (n 932); ICRC – Customary IHL Study (n 38) Rule 150; API Commentary (n 509) para 3655.

<sup>994</sup> Principle 1, 11, 15, 15, and 20, Basic Principles on the Right to Reparation. Notably, the Principles were revised several times, but the requirement to accord ‘adequate remedies’ remained constant throughout 15 years of drafting (UNCHR, ‘Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Mr. M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights resolution 1998/43’, UN Doc E/CN.4/1999/65 (8 February 1999) paras 11 and 36 (describing the changes between the 1993 and 1996 drafts and the proposed amendments of 1997)).

<sup>995</sup> Principle 15, UN Principles on the right to remedy.

is to be determined per the circumstances of each case. The implication of conditioning the award of compensation by what is 'appropriate' in light of the 'circumstances' of each violation is that the resources, abilities, and concomitant obligations of the wrongdoing State are also taken into account in the assessment of compensation. Arguably, this suggests that the potentially crippling effect of a compensation payment should be considered in determining its quantum. Principle 20 reads:

20. *Compensation* should be provided for any economically assessable damage, *as appropriate and proportional to the gravity of the violation and the circumstances of each case*, ... such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.<sup>996</sup>

For the investment lawyer, the use of the trinity 'adequate, effective and prompt' to qualify the obligation to compensate might call to mind the well-known *Hull* formula from the 1928 note of US Secretary of State, Hull, to the Mexican ambassador, where the US 'recognize[d] the right of a sovereign State to expropriate property for public purposes' subject to 'adequate, effective, and prompt compensation'.<sup>997</sup> Today, as mentioned, the vast majority of investment instruments contain the Hull formula.<sup>998</sup> But the materials and discussions leading up to the adoption of the final text of the Principles indicate that the language of the Principles and their pronouncement of the obligation to award 'adequate, effective and prompt' compensation does not originate from any form of American practice, let

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<sup>996</sup> Principle 20,

<sup>997</sup> M Whiteman, *Digest of international law*, Vol 8 (Washington: Government Printing Office 1967) 1020.

<sup>998</sup> See discussion in chapter 3 and B Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (OUP 2011) 92-102; I Marboe, *Calculation of compensation and damages in international investment law* (OUP 2009) 44-9.



alone Hull's note. Rather, the standard 'adequate, effective, and prompt' that qualifies the obligation to compensate for violations of IHL originated predominantly from human rights instruments and was introduced in 1993 to the Basic Principles with a human rights-driven meaning.<sup>999</sup> That the trinity 'prompt, adequate, and effective', which qualifies the obligation to pay war reparations to individuals under the Basic Principles, is detached from the Hull formula, which the US perceives as customary, and denotes a different meaning is evinced by the consistent American opposition to the adoption of this standard, arguing it reflects 'soft law', and by the attempts of the US to prevent the Principles from being adopted by the UNGA.<sup>1000</sup>

Nonetheless, the American position was successfully disputed by the consensus among 'scholars and government representatives [that] international humanitarian law and human rights law largely overlap' on the point of compensation for violations.<sup>1001</sup> In December 2004, this non-

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<sup>999</sup> While the first set of principles that Van Boven prepared (E/CN.4/Sub.2/1993/8 of 2 July 1993, section IX (first draft) did not include the qualifier 'adequate' in the text of the principles, he explained that the obligation itself substantively relies on the standard of 'adequate' compensation as it appears in human rights instruments. Namely: Article 2(3)(a) of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) and UNGA Res 1904 (XVIII) November 20, 1963. Declaration on the Elimination of All Forms of Racial Discrimination; Article 21(2) of the African Charter on Human and Peoples' Rights, 21 ILM 58 (1982) (ibid, para 27); Article 14(1), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (ibid, para 28); Article 6, International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1965) 660 UNTS 195 (ibid, para 30); Articles 15(2), 16(4), 16(5), Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries (adopted 27 June 1989, entered into force 5 September 1991) 1650 UNTS 383 (ibid, ibid); Articles 63(1) and 68, The American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 144 UNTS 123 (ibid, para 31); and, Article 39, The Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (ibid, para 32). The second and third drafts that Van Boven prepared included explicit use of 'adequate' (E/CN.4/Sub.2/1996/17 of 24 May 1996 (second version); E/CN.4/1997/104 of 16 January 1997 (third version)).

<sup>1000</sup> K McCracken 'Commentary on the basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law' (2005) *Revue internationale de droit penal*, 77-79 and Bassiouni (n 951) 252, see note 255 for the objections and reservations raised by the US, the UK, and France.

<sup>1000</sup> *ibid*.

<sup>1001</sup> *ibid*.

American meaning of 'adequate' compensation was put before States for comments and corrections; it was reaffirmed.<sup>1002</sup> On 13 April 2005, the Commission on Human Rights adopted the Basic Principles by a roll-call vote (at the request of the US)<sup>1003</sup> of: 40 Yes; 0 No; and, 13 abstentions.<sup>1004</sup> Eventually, in December 2005, the Principles were adopted by the UNGA without a vote.<sup>1005</sup>

From the foregoing, it is suggested that there is an international consensus over the notion that the 'adequacy' of compensation for violations is assessed through the perspective of the victim and his need to reconstruct his life. War compensation under IHL are payments that reflect not only the economically assessable damages, but also the gravity of the violation, and the circumstances of the breach, including the resources and abilities of the wrongdoing State and its concomitant international obligations during and post hostilities.

### **3. Nondiscriminatory Compensation for Losses to Investments Owing to Armed Conflict**

In contrast to IHL, which confers certain substantive rights upon individuals but does not (necessarily) create a procedure to exercise them, investment treaties generally grant investors direct recourse to international adjudication and the ability to press a claim for compensation owing to, say,

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<sup>1002</sup> See discussions and list of the participating 50 States in: UNCHR, 'Report of the third consultative meeting on the "basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law"' (Geneva, 29 september-1 October 2004) and Note by the High Commissioner for Human Rights Mr Alejandro Salinas, UN Doc E/CN.4/2005/59 (21 December 2004).

<sup>1003</sup> Bassiouni (n 951) 250.

<sup>1004</sup> States voting in favour: Austria, Argentina, Armenia, Belgium, Bolivia, Brazil, Burkina Faso, Chile, Congo, Costa Rica, Cyprus, Czech Republic, Dominican Republic, Ecuador, Estonia, Finland, France, Greece, Guatemala, Hungary, Ireland, Italy, Japan, Latvia, Mexico, Netherlands, Nigeria, Norway, Paraguay, Peru, Poland, Portugal, Romania, Slovenia, Spain, Sweden, Switzerland, the UK, Uruguay, and Venezuela. The obtaining States: Australia, Egypt, Eritrea, Ethiopia, Germany, India, Mauritania, Nepal, Qatar, Saudi Arabia, Sudan, Togo, and the US.

<sup>1005</sup> According to the UN: 'When consensus on the text is reached all of the Member States agree to adopt the draft resolution without taking a vote. Adopting a draft without a vote is the most basic definition of what consensus means' <<https://outreach.un.org/mun/content/how-decisions-are-made-un>> (accessed 20 October 2018). ARSIWA were likewise adopted without a vote.

the unlawful destruction of the investment in armed conflict.<sup>1006</sup> Accordingly, this section deals with the first principle on the award of war reparations in investment treaties: nondiscrimination.

Over 1500 investment instruments,<sup>1007</sup> starting from the very first Germany – Pakistan BIT (1959) through the modern treaties of conflict-ridden States,<sup>1008</sup> contain provisions referring to compensation for ‘war’ or ‘other forms of armed conflict or similar events’ (plain war clauses (PWC)). For example, Article 4(3) of the Turkey – Afghanistan BIT provides:

Investors of either Party whose investments suffer losses in the territory of the other Party owing *to war, insurrection, civil disturbance or other similar events* shall be accorded by such other Party treatment *no less favourable than* that accorded to its own investors or to investors of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses.<sup>1009</sup>

Notwithstanding the ubiquity of PWCs, many questions concerning their meaning and scope remain. First, the function of these provisions is not clear. According to some investment tribunals, PWCs prescribe a special standard of treatment for instances of hostilities, which derogates and exempts from other general standards, such as FPS. Under another view, the PWC merely duplicates part of the general nondiscrimination obligation with respect to reparations; it does not prescribe a substantive, let alone, a special standard of treatment. Further, the qualifications for a valid invocation of the PWC are contested. Namely, it is not clear what type of emergencies invoke the PWC and how severe such emergencies should be. Likewise, the identity of the party whose actions during an emergency

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<sup>1006</sup> What remains unclear but does not require resolution for the purpose of the present discussion, is whether these investment treaties grant rights to investors and, if so, whether these are substantive and/or procedural in nature (See discussion in chapters 1 and 6).

<sup>1007</sup> According to UNCTAD, some 1539 investment instruments, some of which are not yet, or no longer, in force, contain analogous provisions.

<sup>1008</sup> Eg: Article 5(1) Pakistan – Bahrain BIT; Article 3(2) Pakistan – Bosnia – Herzegovina BIT; Article 5(1), Austria – Libya BIT; Article 5(1), Libya – Croatia BIT; Article 5, Libya – Ethiopia BIT; Article 4(1) Ukraine – Israel BIT; Article 4(3), Germany – Afghanistan BIT; Article 7(1), Syria – Azerbaijan BIT; Article 5(1), Syria – Slovakia BIT.

<sup>1009</sup> Article 4(3), Turkey – Afghanistan BIT; emphasis added.

result in the 'losses' which form the subject-matter of the PWC is debated. The analysis below takes these three ambiguities in turn.

Arbitral and scholarly jurisprudence attributes different functions to the PWC. According to one view, which was expressed by the dissenting opinion in *AAPL v Sri Lanka*<sup>1010</sup> and by the *LESI v Algeria* Tribunal,<sup>1011</sup> PWCs prescribe a special standard of treatment for hostilities which conflicts with and derogates from the FPS obligation.<sup>1012</sup> The *LESI* Tribunal postulated that Italy and Algeria included a PWC in their BIT with the intention to be held to a more relaxed, relative standard of nondiscrimination during armed conflict instead of the due diligence standard of the FPS provision.<sup>1013</sup> Accordingly, the Tribunal explained that where the conditions for the invocation of the PWC had been met the State is exempt from the obligation to accord FPS to foreign investments.<sup>1014</sup> The Tribunal went on to clarify that, because the PWC operates as an exception that effectively limits the protection accorded to foreign investments, the scope of the PWC and the emergencies capable of invoking it should be interpreted restrictively.<sup>1015</sup>

Methodologically, the *LESI* reasoning is sound. It rests on the principle of *effet utile*, whereby each provision in the treaty performs a function. This is to say, if all the PWC does is to prescribe non-discrimination (treatment that is no less favorable than) as the treaty language seems to

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<sup>1010</sup> *AAPL v Sri Lanka* – Dissent, 582, stating that the PWC 'must prevail over' the FPS provision 'as the applicable provision. This means that [the PWC] exhausts all the possible grounds of liability. Consequently, it is not open to the Tribunal to invoke [FPS] as the basis for the Respondent's liability after a definitive ruling that the Respondent is not liable under [the PWC]'

<sup>1011</sup> *L.E.S.I. S.p.A. v Algeria*, ICSID Case No ARB/05/3, Award, 12 November 2008.

<sup>1012</sup> On the content of FPS, see chapter 5 above.

<sup>1013</sup> *LESI v Algeria*, paras 174-75 ('d'une clause générale de protection pleine et entière et d'une clause spéciale en cas de troubles politiques prévues par un traité bilatéral d'investissement').

<sup>1014</sup> *ibid* ('lorsque ses conditions d'application sont réunies, l'Etat contractant n'est pas tenu de garantir aux investisseurs de l'autre Etat une protection et une sécurité « constantes, pleines, et entières...')

<sup>1015</sup> *ibid* ('S'agissant d'une exception au principe général de pleine et entière protection... qui ont pour conséquence d'amoinrir substantiellement le niveau de protection de l'investisseur, doivent cependant être interprétés strictement...')

imply, then the general nondiscrimination obligation in the treaty renders it redundant.<sup>1016</sup> This interpretation of the PWC is also appealing since it is functional and cohesive. In proposing that the PWC operates as an exception to the FPS standard that may be invoked only under limited circumstances, the *LES/* Tribunal accounted for other contested elements of the PWC, namely the level of severity of the emergencies capable of invoking the PWC and for the interaction of the PWC with other standards of treatment, namely FPS.

However, the contention that the PWC is a special standard of protection for times of hostilities that operates as an exception to the FPS standard and the doctrinal underpinnings of this argument are erroneous. First, the principle of effectiveness essentially means that treaty provisions are intended to have *some* significance and to achieve *some* end; effectiveness does not mean that each provision has a unique ‘one-off’ meaning.<sup>1017</sup> On this point, Fitzmaurice noted that the principle of effectiveness is ‘all too frequently misunderstood as denoting that agreements should always be given their maximum possible effect, whereas its real object is merely... to prevent them failing altogether’.<sup>1018</sup>

In the case of PWC, the interpreter must choose between the express treaty language, ‘treatment no less favorable than’, which means that the PWC duplicates a portion of the national or MFN treatment clause on the one hand, and a reading whereby the PWC is an exception to other obligations, and in so doing allocates a unique meaning to the PWC, on the other. ‘In such cases’ – Lauterpacht observed – ‘there is really... no question of choosing between *valeat* and *pereat* – the question is one of less or more *valeat*.’<sup>1019</sup> In other words, the reliance on the principle of

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<sup>1016</sup> *AAPL v Sri Lanka*, Dissent, para 2; *ibid*, para 175.

<sup>1017</sup> T Gazzinni, *Interpretation of Investment Treaties* (Hart 2016) 170.

<sup>1018</sup> GG Fitzmaurice, ‘Vae Victis or Woe to the Negotiators! Your Treaty or Our “Interpretation” of It?’ (1971) 65 AJIL 358, 373

<sup>1019</sup> H Lauterpacht, ‘Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties’ (1949) 26 British Ybk Intl L 48, 70.

effectiveness to award the PWC a meaning that differs from the express treaty language is misplaced.<sup>1020</sup>

Moreover, the principle of effectiveness is an interpretive *technique*; it is not a mandatory *rule* of treaty interpretation.<sup>1021</sup> Therefore, the concept of *effet utile* cannot be invoked to introduce an interpretation that does not arise from the ordinary meaning. Nor can effectiveness justify the preference of an interpretation that finds no support in the express treaty language. Indeed, Fitzmaurice warned that a mistaken application of effectiveness will ‘result in parties finding themselves saddled with obligation they never intended to enter into, in relation to situations they never contemplated, and which often they could not even have anticipated’.<sup>1022</sup> Arguably, it is the incorrect application of the principle of effectiveness that led the *LES/ Tribunal* to erroneously postulate that PWC were included in investment treaties so as to exempt from FPS in wartime. As further explained below, the drafting history of PWCs and the circumstances of their inclusion into investment treaties far from corroborate this assumption.

Additionally, there is nothing in the explicit wording to support the proposition that PWCs derogate from FPS. The PWC is not drafted using language that is characteristic of investment treaty exceptions (e.g.: ‘notwithstanding the FPS obligation, nothing shall preclude’. etc.).<sup>1023</sup> Instead, the provision is crafted using language that is typical of national or MFN treatment provisions (‘no less favorable than’). In fact, it stands to

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<sup>1020</sup> In contrast, in *CEMEX v Bolivia*, the Tribunal held that ‘this principle does not require that a maximum effect be given to a text. It only excludes interpretations which would render the text meaningless, when a meaningful interpretation is possible’ (*CEMEX v Bolivia*, ICSID Case No ARB/08/15, Jurisdiction, 30 December 2010, para 144).

<sup>1021</sup> Effectiveness does not appear in Article 31 VCLT. The principle found a place in Waldock’s Third ILC Report but was removed in subsequent ILC drafts (for a comparative analysis on these drafts see Annex III in Weeramantry (n 466) 226 and Pauwelyn (n 62) 248-49. Arguably, effectiveness is implicit in the VCLT through the principles of good faith and the ‘object and purpose’ criteria (YILC (1966-II), para 6; Gazzinni (n 1017) 170). This proposition is mostly considered unconvincing (Wälde (n 457) 738-40; Gardiner (n 456) 150; Weeramantry (n 466) 143-44).

<sup>1022</sup> Fitzmaurice (n 1018) 373.

<sup>1023</sup> See the analysis in chapter 6 above.

reason, as the *Suez v Argentina* Tribunal noted, that if States wanted PWCs to serve as an exception to other BIT provisions and not to prescribe nondiscrimination obligations, ‘they certainly would have so stated specifically’.<sup>1024</sup>

The prevailing interpretation of PWCs in doctrine and arbitral practice is that PWCs ‘provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency’.<sup>1025</sup> The *CMS v Argentina* Tribunal explained that the function of this rule is to ensure that ‘any measures directed at offsetting or minimizing losses will be applied in a nondiscriminatory manner’; the clause does not derogate or exempt from any other treaty provision.<sup>1026</sup> The PWC only ‘duplicates a portion’ of the protection otherwise provided by the general right to national and MFN treatment.<sup>1027</sup> This proposition finds support in drafting practice that includes the PWC as a sub-paragraph in the MFN or nondiscrimination provision, thereby clarifying the PWC as a specification of the broader principle.<sup>1028</sup> In contradistinction, the PWC is *never* included as a sub-paragraph of the security exception provision.<sup>1029</sup>

While the proposal that the PWC reproduces a part of the nondiscrimination standard does not deem the provision completely ineffective, it does however raise an interpretive question: ‘What difference would it make if that provision did not figure in the instrument at all?’<sup>1030</sup> To resolve this question, the discussion takes a step back and looks at the historical development of the rule on nondiscrimination in relation to war reparations and the circumstances of its inclusion into investment treaties.

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<sup>1024</sup> *Suez v Argentina Award* para 270.

<sup>1025</sup> *CMS v Argentina* (Award) para 375; *LG&E v Argentina* (Award) paras 243, 261; *BG Group v Argentina* (Final Award) para 381-87; *Enron v Argentina* (Award) paras 320-21; *National Grid v Argentina* (Award) para 253; *Suez v Argentina* (Award) paras 269-71.

<sup>1026</sup> *CMS v Argentina* (Award) para 375.

<sup>1027</sup> Vandeveld – US Investment Agreements (n 703) 432.

<sup>1028</sup> Article 3, Bosnia – Herzegovina – Pakistan BIT; Article 5, Syria – Indonesia BIT; Article 6(2), Switzerland – Algeria BIT.

<sup>1029</sup> See discussion in chapter 6.

<sup>1030</sup> *Certain Expenses of the United Nations (Art 27, paragraph 2 of the Charter)* (Advisory Opinion) [1962] ICJ Rep 151, Separate opinion of Fitzmaurice 198, 207.

This analysis demonstrates that the obligation to grant investors nondiscriminatory treatment with respect to war reparations served to create a legal basis for an obligation to compensate for losses owing to war where war law imposed no such obligation.

Briefly put, the prevailing view concerning the obligation to compensate for losses to private property owing to war during the 19<sup>th</sup> century was that, first, the obligation arose only when the laws of war had been breached and, second, that this obligation was not owed to individuals. Importantly, internal insurrections, riots, and civil strife, were regarded as criminalities that were regulated by domestic legislation, not as hostilities governed by war law.<sup>1031</sup> In practical terms this meant that States hardly ever compensated their *own* nationals, as a matter of a legal obligation (not *ex gratia*) for losses owing to attempts to quell an internal strife or due to attack by the adversary. In turn, the treatment of *foreign* nationals in such instances was, at best, as of the State's own nationals. The result was, as Bluntschli conveniently explained in 1874, that, 'States are not obliged to compensate for losses or injuries suffered by aliens or nationals resulting, from hostilities, internal disturbances or civil war.'<sup>1032</sup>

While international law did not impose an obligation to compensate individuals for losses owing to internal hostilities, civil strife, etc. such compensation payments were often obtained in practice by way of force, courtesy, or both. For instance, the British Government demanded indemnification from the Grand Duke of Tuscany on account of damages sustained by British subjects during the revolutionary movements in Naples and Tuscany (1849 – 50) and sent an English fleet to Naples to expedite its claim. In an attempt to avoid war, the Grand Duke, who opposed the British demand, asked Austria, which assisted to quell the revolution in Naples, to

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<sup>1031</sup> See: Borchard – Diplomatic Protection (n 385) 246-70 and the references therein to other contemporaneous scholarship.

<sup>1032</sup> JC Bluntschli, *Le droit international codifié* (Paris Guillaumin et cie. 1874) para 380 bis. See also: P Pradier-Fodéré and C Pradier-Fodéré *Traité de droit international public européen & américain* Tom 1 (Paris, A Pedone 1906) 348-49 and A Pillet, *Les lois actuelles de la guerre* (Paris A Rousseau, 1901) 29.



submit its opinion on the obligation to compensate in such cases and requested the court of Russia to serve as arbitrator. Together the views of these States assist to understand the prevailing legal position.

While Russia refused to take up the role of arbitrator, the Russian Minister of Foreign Affairs wrote to London stating that, 'according to the rules of public law as they are understood by Russian policy', since law does not mandate compensation to national or aliens for such losses, the British Government has no claim. He opined that an award of compensation in this case will 'result in giving to British subjects an exceptional position abroad, far beyond the advantages enjoyed by the inhabitants of other countries and would create for the governments which welcome them an intolerable situation'.<sup>1033</sup> The Austrian position was that, if during hostilities the property of 'foreigners established in the country is injured, it is a public misfortune which foreigners must share with nationals'.<sup>1034</sup> Officially, these views led the British Government to withdraw its claim.<sup>1035</sup> However, in the course of a debate in the House of Commons two months after the Austrian and Russian dispatches had been received in London, Lord John Russell stated that the British Government managed to convince (likely with its fleets) the Neapolitan Minister of Foreign Affairs to offer compensation 'as a measure of hospitality'.<sup>1036</sup>

Another indicative incident is addressed in Baty's *International Law*.<sup>1037</sup> In 1834, Belgium was 'about to pass legislation decreeing indemnities to natives who had sustained losses during the revolution of 1830'.<sup>1038</sup> At that time, it was common that such voluntary payments 'may limit the classes of the beneficiaries as the state deems best', and that as a

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<sup>1033</sup> H Arias Madrid, 'The non-liability of States for damages suffered by foreigners in the course of a riot, an insurrection, or a civil war' (1913) 7(4) AJIL, 724, 743.

<sup>1034</sup> *ibid.*

<sup>1035</sup> Calvo mentioned this incident in his writing noting that GB withdrew its claim (Calvo C, *Le droit international theorique et pratique*, Vol III (5<sup>th</sup> edn. Paris, 1896) 145).

<sup>1036</sup> TC Hansard (ed) *Hansard's Parliamentary Debates*, Vol CXII (Cornelius Buck 1850) 701-02 (debate dated 28 June 1850).

<sup>1037</sup> T Baty, *International Law* (London J Murray, 1909).

<sup>1038</sup> *ibid.*, 97-8.

result, 'occasionally foreigners have not been included among those indemnified'.<sup>1039</sup> In Belgium's case, Baty reported that 'foreign nations put in claims to participate' in the indemnities that it considered offering to its own nationals.<sup>1040</sup> Specifically, in 1836, GB declared that:

As long as Belgium took *no* steps to indemnify its own subjects for similar losses, His Majesty's Government did not feel justified in pressing for a decision in favour of British subjects, who *could only be entitled to be placed on the same footing* as Belgian subjects.<sup>1041</sup>

It was the concern that a voluntary gesture will turn into a financial burden or a war with GB that 'effectually stopped the matter from proceeding further' and Belgium withdrew the idea of any voluntary compensation altogether.<sup>1042</sup>

Latin American States were even more susceptible to pressure by other States and 'have at times been compelled by the nations of Europe to assume a heavy liability, beyond that required by the strict rules of law, for injuries sustained by aliens during war'.<sup>1043</sup> In 1877, for instance, Colombia passed law No 67 by which, as a matter of 'liberality', the State chose to compensate nationals and foreigners for the losses caused by the rebellion of 1866.<sup>1044</sup> Later, the Colombian Government decided that foreigners should receive payment in the form of drafts on the custom houses while Colombian nationals shall receive monetary payments. Following British pressure to accord its nationals nondiscriminatory treatment, Colombia passed a new law in 1878 whereby payments to British nationals should be paid in cash or in documents of public credit, 'as may be agreed upon between the executive power and the party interested'.<sup>1045</sup> 'In this incident', Arias Madrid explained, 'we find an example of the unjustifiable pressure

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<sup>1039</sup> Borchard – Diplomatic Protection (n 385) 279.

<sup>1040</sup> Baty (n 1037) 97-8.

<sup>1041</sup> *ibid*; emphasis added.

<sup>1042</sup> Arias Madrid (n 1033) 743. For further similar practice (*ibid*, 744-45).

<sup>1043</sup> Borchard – Diplomatic Protection (n 385) 280.

<sup>1044</sup> GB, *British and Foreign State Papers* Vol 68 (1876-1877) (London HMSO) 776.

<sup>1045</sup> GB, *British and Foreign State Papers*, Vol 69 (1877-1878) (London HMSO), 376.

that sometimes is brought to bear by the powerful states on the Central and South American republics'.<sup>1046</sup>

To 'counteract the unwarrantable claims' of more powerful States that discretionary payments that were accorded to the nationals of the State should be extended to aliens, Latin American countries began to include in their FCN treaties the co-called 'clause de non-responsabilité'.<sup>1047</sup> Essentially, these clauses prescribed the non-liability of the State for losses suffered by foreigners as a result of insurrections, strife, and like hostilities.<sup>1048</sup> Arias Madrid explained the prevalence and effect of such practice:

According to agreements now existing [1913], Belgium cannot demand compensation for her subjects injured by revolutions in Mexico and Venezuela. France, Holland, Sweden and Norway have bound themselves individually not to prosecute claims of this nature against Mexico. Germany and Italy have also signed treaties containing the same provision in favor of Colombia and Mexico. Spain will no longer claim the privilege for her subjects in Colombia, Ecuador, Honduras, and Peru.<sup>1049</sup>

While growing in popularity during the last decade of the 19<sup>th</sup> century, the practice on non-liability clauses also encountered significant opposition. The IDI, for one, considered these provisions to be 'mischievous', since 'they excuse States from the performance of their international duty to protect their national abroad and their duty to protect foreigners within their own territory'.<sup>1050</sup> Further, Russia, Austria-Hungary, the US, and GB did not

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<sup>1046</sup> Arias Madrid (n 1033) 751-52.

<sup>1047</sup> *ibid*, 755.

<sup>1048</sup> Eg: Article XI, France – Mexico Treaty of 1886 provided that, 'excepte les cas dans lesquels il y aura faute ou manqué de surveillance de la part des autorités du pays ou de ses agents, ne se rendront pas réciproquement responsables pour les dommages, oppressions ou exactions que les nationaux de l'une viendraient à subir sur le territoire de l'autre en temps d'insurrection ou de guerre civile de la part des insurgés ou par le fait de tribus ou hordes sauvages qui refusent leur obéissance au gouvernement'. (GB, *British and Foreign State Papers* Vol 77 (1885-1886) (London HMSO) 1094); Article 4, Colombia – Spain treaty of 1894 (reported in: P Olivart, *Colección de tratados de España* Vol 11 (Madrid 1890) 64. See Arias Madrid (n 1033) 755-56 for further examples.

<sup>1049</sup> Arias Madrid (*ibid*) 755-56.

<sup>1050</sup> Institut De Droit International, 'Règlement sur la responsabilité des États à raison des dommages soufferts par des étrangers en cas d'émeute, d'insurrection ou de guerre civile, adopté par l'Institut de Droit International en séance du 10 septembre 18 1900', *Annuaire de l'Institut de Droit International* (1900) 254-55.

accept this practice. None of their FCN treaties included such non-liability provisions. Not only did the US not accede to this practice, it introduced FCN treaty clauses that prescribed national treatment with respect to war reparations to guarantee compensation for losses to its nationals whenever the host State compensated its nationals, even when such compensation payments were a 'liberty or bounty, and not an indemnity'.<sup>1051</sup> For instance, Article 2(3) of the Swiss-American FCN treaty instructed:

*In case of war or of expropriation for purposes of public utility, the citizens of one of the two countries residing or established in the other shall be placed upon an equal footing with the citizens of host State with respect to indemnities for damages they may have sustained.*<sup>1052</sup>

The cited provision ensured that Swiss individuals receive war reparations whenever American nationals were compensated for war losses for whatever extra-judicial reasons, whilst Spanish nationals or even other Americans were not entitled to such compensation as a matter of law. Thus, during the 19<sup>th</sup> century nondiscrimination obligations with respect to war reparations, whether in the form of a treaty provision or gunboat diplomacy, served powerful States to effectively guarantee a standard of treatment to foreigners that went beyond what was mandated by war law.

But international war law changed in the wake of the adoption of The Hague Conventions and Regulations (1907) and with it changed the law on State responsibility for losses to foreign property owing to hostilities. Pertinently, and as explained in chapter 3, The Hague instruments included explicit qualifications on the State's right to dispossession of property, such as the requirement to compensate for the taking of property for military needs and the prohibition on the destruction of property, unless required by imperative military necessity. HC-IV Article 3, in turn, instructed that a breach of (these) IHL rules denotes compensation. Nonetheless, internal

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<sup>1051</sup> Arias Madrid (n 1033) 763-64.

<sup>1052</sup> Article 2(3) Swiss-American FCN Treaty (concluded 25 November 1850); emphasis added.

hostilities involving non-State actors were principally not treated as war and remained unaffected by these developments.

To illustrate the development in international law and the prevailing position, it is useful to recall the materials of the 1930 Hague Conference on the Codification of International Law. The participating States agreed that the State must 'make good damage to foreigners by the requisitioning of their property by its armed forces or authorities' and, that it must 'make good damage caused to foreigners by destruction of property by its armed forces or authorities... unless such destruction is the direct consequence of combat acts'.<sup>1053</sup> These notions essentially reproduce the language of The Hague Regulations.<sup>1054</sup> At the same time, as civil strife was not construed as war, the responsibility of the State for 'damage done to the person or property of foreigners by persons engaged in insurrections or riots, or though mob violence', remained contested.

In an attempt to distil and advance a legal position on the latter point, governments were asked by the Codification Committee whether the State must compensate aliens for losses to property during internal disturbances.<sup>1055</sup> Having reviewed the responses, the Committee concluded that 'in principle, the replies do not admit that a State is responsible for damage caused to foreigners by insurgents, rioters or mob violence'.<sup>1056</sup> Based on this conclusion and mindful of the practice on *ex gratia* payments, 'a second question [was] raised in the request for information'. This time, States were asked 'what is the position: Where the Government pays compensation for damage done in such cases to its own nationals or to other foreigners?'<sup>1057</sup> Most States, while maintaining that there is no obligation as a matter of law to compensate for losses owing to

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<sup>1053</sup> This agreement is deduced from the responses of States as submitted and summarized in Basis of Discussion No 21 (Rosenne (n 445) 529). See also: Conclusions Annexed to the Report of M Guerrero, Rapporteur of the Committee of Experts for the Progressive Codification of International Law, Conclusion 9 (ibid, 252-53).

<sup>1054</sup> See discussion in chapter 3.

<sup>1055</sup> Rosenne (n 445) 161-253, 529-533.

<sup>1056</sup> Observations on Point IX(a) and Basis of Discussion No 22 (ibid, 533).

<sup>1057</sup> Point IX(b) (ibid, 536-38).

the referenced events, agreed that, if ‘the Government pays compensation to its own national or other foreigners’ then it is required to compensate foreigners for losses owing to insurrections, riot, or mob violence.<sup>1058</sup> This position rested mostly on the notions that, ‘it is important to avoid discrimination... between foreigners of different nationalities’ and that ‘foreigners are entitled at least to the same protection in respect of their property as afforded to nationals’.<sup>1059</sup>

Accordingly, the Codification Committee concluded that, ‘a State must accord to foreigners to whom damage has been caused by persons taking part in an insurrection or riot or by mob violence the same indemnities as it accords to its own national in similar circumstances’.<sup>1060</sup> For sake of convenience, the Codification Committee proposed that this conclusion ‘be combined in a single text’ with the consensus over the obligation to compensate for appropriation and destruction of property for military necessities.<sup>1061</sup> And so, the prototype of modern war clauses in investment treaties was born. Basis of Discussion No 21 read:

- A State is not responsible for damage caused to the person or property of a foreigner by its armed forces or authorities [...] The State must, however:
- (1) Make good damage to foreigners by the requisitioning... their property by its armed forces or authorities;
  - (2) Make good damage caused to foreigners by destruction of property by its armed forces or authorities..., unless such destruction is the direct consequence of combat acts;
  - (3) [...]
  - (4) Accord to foreigners to whom damage has been caused by its armed forces or authorities in the suppression of an insurrection, riot or other disturbance *the same indemnities as it accords to its own nationals in similar circumstances*.<sup>1062</sup>

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<sup>1058</sup> See response by South Africa (letter of 11 December 1928; *ibid*, 165), Australia (letter of 9 June 1929; *ibid*, 175), Belgium (letter 12 March 1929; *ibid*, 181), Finland (31 October 1928; *ibid*, 195), GB (letter 14 November 1928; *ibid*, 204), Hungary (29 October 1928; *ibid*, 208), Japan (*ibid*, 213); Norway (*ibid*, 216), Holland (*ibid*, 223)

<sup>1059</sup> *ibid*, Vol II, 223.

<sup>1060</sup> Basis of Discussion No 22(b) (*ibid*, 538).

<sup>1061</sup> Observations on Point IX(b) (*ibid*).

<sup>1062</sup> Rosenne (n 445) 529; emphasis added. See the analysis of the EWC in chapter 3.

Against this backdrop, in 1959, the first-ever BIT between Germany and Pakistan was concluded. Article 3(3) of the Germany – Pakistan BIT instructed that:

Nationals or companies of either Party who *owing to war or other armed conflict*, revolution or revolt in the territory of the other Party suffer the loss of investments situate there, shall be accorded *treatment no less favourable* by such other Party than the treatment that Party accords to persons residing within its territory and to nationals or companies of a third party, as regards restitution, indemnification, compensation and other considerations...<sup>1063</sup>

Because the role and effect of nondiscrimination with respect to war reparations was traditionally circumscribed by war law, the present function of the PWC should also be assessed against modern IHL. Indeed, since 1930, the law regulating the conduct of hostilities has developed to encompass protracted internal hostilities and conflicts involving non-State actors, which were traditionally left outside the scope of war law. Correspondingly, States that inflict damage to private foreign property during, say, a NIAC, are obliged to make reparation. At the same time, notwithstanding the developments in the law regulating the conduct of hostilities, the purpose and effect of instructions on nondiscrimination in war reparation remain unchanged. Today, as in the 18<sup>th</sup> and 19<sup>th</sup> centuries, the need for the repeated specification of the nondiscrimination obligation in the context of war compensation mostly lies with *ex gratia* payments.

In a reality where war reparations are not limited to violations of international law and legal obligations, the PWC performs an important function: It effectively guarantees that the host State will be obliged to compensate the foreign investor whenever it pays war compensation for *whatever* legal or moral reason to its own investors or to the investors of third parties.<sup>1064</sup> And this is important since it is unclear whether the general nondiscrimination and/or MFN treatment obligation achieves this outcome. In other terms, the express language of the PWC negates the debate over

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<sup>1063</sup> Article 3(3) Germany – Pakistan BIT; emphasis added.

<sup>1064</sup> Newcombe and Paradell (n 30) 406.

one of the more contested questions in investment law regarding the types of measures or behaviors by the host State that can be called ‘treatment’ within the meaning of nondiscrimination obligations. Whether discretionary *ex gratia* payments are a ‘treatment’ for the purposes of the national and/or MFN treatment clauses or not, the PWC mandates nondiscrimination.

At the same time, the conclusion from the previous paragraph raises the concern that the PWC will effectively de-incentivize States from making *ex gratia* payments, a desired practice that assists those who suffer losses in the context of hostilities to reconstruct their lives, so as to avoid compensation claims by foreign nationals who demand ‘to be placed on the same footing’.<sup>1065</sup> However, this concern is easily resolved with appropriate treaty language. States that wish to exclude certain special or national reparation programs from the nondiscrimination obligation of the war clause can carve-out these programs. Such is the case, for instance, with the 9/11 compensation programs, which are carved-out of US treaties and their nondiscrimination obligations.<sup>1066</sup>

Two more remarks are required regarding the interaction between the nondiscrimination and/or MFN treatment provision and the PWC. First, the nondiscrimination standard of the PWC assumes relevance when the investment treaty contains a security exception. For instance, a security exception may guarantee that a host State will not violate the investment treaty when it restricts the activities of an investor or imposes special reporting requirements on his investments due to security concerns regarding, say, his State of nationality or country of residence.<sup>1067</sup> However, the security exception does not seem to allow derogation from the specific nondiscrimination obligation of the PWC.

UNCTAD explained in this respect that, since the PWC establishes obligations ‘expressly in a situation where the national security is at stake,

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<sup>1065</sup> Baty (n 1037) 97-8; Arias Madrid (n 1033) 743.

<sup>1066</sup> Eg: Article 5(4), 2004 US Model BIT, Article 5(4), 2012 US Model BIT. The aim of these provisions was addressed by Vandevelde – US investment agreements (n 703) 435-36.

<sup>1067</sup> *ibid*, 114.



it would be contradictory to dispense the parties from their fulfilment for national security reasons'.<sup>1068</sup> Thus, subject to treaty language to the contrary, a State cannot refuse to offer foreign investors the same war reparations it offers its nationals or investors of third parties under the pretense that such payments were made as an exceptional measure for the protection of essential security interests and as such, these payments are exempted from the PWC.<sup>1069</sup>

That the PWC remains unaffected by the invocation of the security exception is supported by a growing trend in treaty drafting practice whereby States explicitly carve-out war clauses from the scope of the security exception. For instance, Article 19 of the 2015 Japan – Ukraine BIT provides that, 'notwithstanding any other provisions in this Agreement *other than the provisions of* [the PWC], each Contracting Party may take any measure which it considers necessary for the protection of its essential security interests'.<sup>1070</sup> Similarly, Article 12 of the 2017 Israel – Japan BIT instructs that, 'neither Contracting Party shall be derogated from its obligation under [the PWC] by reason of its measures taken pursuant to paragraph 2 of Article 15'. Article 15(2), in turn, provides that, '*subject to* [the PWC], nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures which it considers necessary for the protection of its essential security interests'.<sup>1071</sup>

Having established the function of the PWC, it is necessary to address the spectrum of situations covered by this obligation. Typically, the clause enumerates a list of situations using ascertainable expressions, such as war, armed conflict, revolution, revolt, insurrection, or riot. Alongside this list, some provisions use more open-ended terms, such as 'a state of

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<sup>1068</sup> UNCTAD – Security exceptions (n 820) 112.

<sup>1069</sup> However, see: Vandevelde – US Investment Agreements (n 703) 433 ('To the extent, however, that a host state's payment of compensation were a measure necessary for the maintenance of public order or the protection of that state's own essential security interests, it would be exempted from the obligations imposed by this provision').

<sup>1070</sup> Articles 14 and 19, Ukraine – Japan BIT; emphasis added. See also Articles 12(1) and 15 (2)(b)(ii), Japan – Colombia BIT;

<sup>1071</sup> Articles 12(3) and 15(2), Israel – Japan BIT; emphasis added.

national emergency' or 'like situations'.<sup>1072</sup> Such language indicates that the list of events covered by the clause is not exhaustive. Potentially, this means that the PWC covers not only inter-State conflicts or other modern forms of hostilities, and even economic and social tribulations.

It is suggested, subject to treaty language to the contrary, that PWCs cover international and non-international armed conflicts as well as hostilities and violence that do not rise to the level of a NIAC. PWCs do not, however, encompass economic crises unless specified otherwise. First, the plain language of the provision implicitly excludes economic emergencies. To be covered by the clause, any 'similar' situation or 'other emergency' must have a certain nexus to the characteristics of the stipulated situations.<sup>1073</sup> The common denominator of the enumerated emergencies (i.e., riots, armed conflicts, and revolts) is physical turmoil, albeit of potentially different scale or duration, which usually takes the form of violence. Put differently, the stipulated situations project onto the more open-ended terms,<sup>1074</sup> leaving financial and socioeconomic crises that have no physical manifestations outside the scope of the provision.<sup>1075</sup>

Second, while States have occasionally revised the common formulation of the PWC since it was first introduced to BITs in 1959 and have made sure to include modern challenges such as 'terrorism',<sup>1076</sup> and even non-violent emergencies like 'natural disasters',<sup>1077</sup> economic

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<sup>1072</sup> Eg: Article 5(1), Kazakhstan – UAE BIT (signed 8 March 2018, not in force); Article 8(1), Brazil – Ethiopia BIT (signed 11 April 2018, signed not in force); Article 7, Singapore – Kazakhstan BIT (signed 21 November 2018, not in force).

<sup>1073</sup> Newcombe and Paradell (n 30) 173.

<sup>1074</sup> In *RFCC v Morocco*, the Tribunal was required to ascertain whether bad weather conditions are 'other similar events' that are covered by the scope of the PWC. The Tribunal assessed the common features and outcomes of the emergencies enumerated in the PWC and determined that weather conditions, even if exceptional, do not fall within the ambit of the provision (ICSID Case No ARB/00/06, Award, 22 December 2003, paras 55, 80-1).

<sup>1075</sup> *BG Group v Argentina* (Award) para 377; *National Grid v Argentina* (Award), para 250-53; *LESI v Algeria*, para 175. For treaty practice see: Article 4, Israel – Belarus BIT; Article 12, Israel – Japan BIT.

<sup>1076</sup> US Treaties are indicative of this fluctuation, by inserting and deleting, for eg, the reference to 'terrorism' in the provision. See: Vandevelde – US Investment Agreements (n 703) 437.

<sup>1077</sup> Article 12, Canada – Jordan BIT.

emergencies have *not* been explicitly enumerated in PWCs. It is noteworthy that even the Kenya – Slovakia BIT, the only treaty to reserve the State’s right to take any measure that ‘it considers necessary for the protection of its essential security interests in time of war or armed conflict, *financial, economic, [or] social crisis*’,<sup>1078</sup> left economic and social crisis outside the scope of the war clause.<sup>1079</sup> Also of note is that States that underwent significant financial crises in recent years, such as Argentina and Iceland, ‘whose interests’ are thereby ‘specially affected’,<sup>1080</sup> have not introduced economic emergencies into their post-crises war clauses.<sup>1081</sup>

At the same time, the provision is not limited to ‘armed conflicts’; lesser forms of collective violence, such as civil unrest, riots, isolated acts of terrorism, or other sporadic acts of violence are explicitly covered by the provision. This is important, because it means that the application of the war clause is not conditioned by ‘classification of conflict’, i.e., the identification of the type of conflict to which particular hostilities amount as a matter of law;<sup>1082</sup> One of the most complex questions in IHL. A related, yet separate, point concerns the juxtaposition of ‘war’ and ‘armed conflict’ in most PWCs (‘losses owing to war or armed conflict’). Since in contemporary international law the concept of ‘war’ is supplanted by the term ‘armed conflict’,<sup>1083</sup> the stipulation of both ‘war’ and ‘armed conflict’ with the disjunctive ‘or’ is superfluous. Indeed, modern investment instruments have gradually omitted ‘war’ from the wording of the provision.<sup>1084</sup>

Finally, to grasp the scope of the PWC, it is necessary to resolve the question whether the ‘losses’ subject-matter of the provision encompass damage that results from State measures or only damage that is the result

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<sup>1078</sup> Article 14(1), Slovakia – Kenya BIT (signed 14 December 2011, not in force).

<sup>1079</sup> Article 6, *ibid.*

<sup>1080</sup> *North Sea Continental Shelf Case*, 74.

<sup>1081</sup> Eg: Article 6(1), Argentina – Qatar BIT (signed 6 November 2016, not in force); Article 5(1) Iceland – Egypt BIT.

<sup>1082</sup> See discussion in chapter 1.

<sup>1083</sup> GC CA II.

<sup>1084</sup> See Article 12, Israel – Japan BIT; Article 12, Iraq – Japan BIT; Article 12 Japan – Colombia BIT; Article 5(3), 2012 US Model BIT.

of the conduct of third parties.<sup>1085</sup> While some practitioners are of the view that the PWC deals only with losses owing to the conduct of third parties,<sup>1086</sup> it is suggested that the PWC applies regardless of the person or entity that is responsible for the losses. First, there is nothing in the language of the clause to explicitly exclude State measures from its scope. Further, the historical development of the rule clarifies that it was designed to guarantee nondiscriminatory compensation to foreigners ‘to whom damage has been caused’ by the State’s ‘armed forces or authorities’ and, subject to failure to act in due diligence, ‘by insurgents, rioters, or mob violence’.<sup>1087</sup>

In sum, whether the PWC guarantees national and MFN treatment or only MFN treatment, it does not require that compensation be paid. If, however, the host State pays compensation in like situations to its nationals, for whatever legal or moral reason, it will be required to offer such payments to the foreign investor. Likewise, if the State is obliged to compensate the investor because the ‘losses owing to armed conflict’ result from a breach of an investment treaty standard, or if the host State elects to make solatia payments to the investors, such payments must be on a nondiscriminatory basis.

#### **4. ‘Adequate’ Compensation for Requisition and Destruction of Property**

This section focuses on another criterion that investment treaties prescribe in relation to war reparations: The standard of ‘adequate compensation’ for losses owing to destruction and appropriation of property.

As explained in chapter 3, some investment instruments, including the instruments of conflict-ridden States<sup>1088</sup> add to the relative obligation of the PWC an absolute right to compensation under certain circumstances

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<sup>1085</sup> This was the position of the investor in *National Grid v Argentina* (Award) para 217.

<sup>1086</sup> G Bottini, ‘Reflections on the origins and evolution of war and civil disturbance clauses’, ESIL – SEDI Colloquium International Investment Law & the Law of Armed Conflict (Athens, 5-6 October 2017).

<sup>1087</sup> Rosenne (n 445) 529-30; J Goebel, ‘The International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence, Insurrections and Civil Wars’ (1914) 8(4) AJIL 802, 813-14, 830-45.

<sup>1088</sup> Eg: Article 4, Israel – Ukraine BIT.

(‘extended war clauses’ (‘EWC’)).<sup>1089</sup> For instance, Article 4 of the Israel – Ukraine BIT reads:

1. Investors of the Home Contracting Party whose investments in the territory of the Host Contracting Party suffer losses owing to war or other armed conflict... shall be accorded by the Host Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, not less favourable than that which the Host Contracting Party accords to its own investors or to investors of any third state...

(2) ...Investors of the Home Contracting Party who suffer losses in the territory of the Host Contracting Party, resulting from:

(a) requisitioning of their property by the State authorities of the Host Contracting party

(b) destruction of their property by the State authorities of the Host Contracting Party, which was not caused in combat action or was not required by the necessity of the situation,

*shall be accorded restitution or adequate compensation...*<sup>1090</sup>

Chapter 3 suggested that aside from secondary rules on remedies,<sup>1091</sup> the EWC prescribes primary rules on the treatment of foreign property in armed conflict. First, the EWC includes a pronouncement of the State’s right to appropriate private property in armed conflict subject to certain qualifications. Second, the EWC codifies the customary prohibition on the destruction of private property unless when required by ‘the necessity of war’. Finally, the provision goes on to instruct that the addressed conducts denote ‘adequate’ compensation. As the former two elements of the EWC were addressed in Chapter 3, this section focuses on the meaning and scope of the requirement to accord ‘adequate compensation’.

First, the common construction of the EWC suggests that the obligation to accord ‘adequate’ compensation modifies *both* the rule on lawful requisition and the consequences for unlawful destruction of foreign property. In almost every instance, the EWC comprises two sub-paragraphs that deal with requisition and destruction of property, respectively, which are

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<sup>1089</sup> According to UNCTAD, over 1000 instruments contain EWC.

<sup>1090</sup> Article 4, Israel – Ukraine BIT; emphasis added.

<sup>1091</sup> EWCs are often titled ‘compensation for losses’ in treaties. Eg: Article 4, Angola – UK BIT (signed 7 July 2000, not in force); Article 5, Libya – Croatia BIT; Article 5, Libya – Austria BIT; Article 4, Estonia – Ukraine BIT.

followed by a separate, and final, sentence that requires the States to accord 'adequate compensation'.<sup>1092</sup> The placement of the language 'shall be accorded adequate compensation' (and like formulations) in a separate sentence below both sub-paragraphs demonstrates that it modifies both conducts. This is the logical consequence of the two-fold use of the phrase, which acts as part of the primary or secondary rule depending on the sub-paragraph to which it relates.<sup>1093</sup>

A related, separate question concerns the meaning of the yardstick 'adequate compensation'. Given that most investment instruments include an obligation to pay 'adequate compensation' against expropriation, the interpretive question here is whether the expression 'adequate compensation' in the EWC is effectively a cross-reference to the expropriation provision and thus entails the FMV of the destroyed or appropriated property at the relevant time? Or, is 'adequate' also informed by IHL-considerations, namely the obligation to accord 'adequate' compensation under Principles 15 and 20 of the Basic Principles on the Right to Reparations, and if so, what would be the practical effect of that?

Since this is essentially a question of treaty interpretation, the response to it ought to arise, in the first place, from the language of the EWC and its ordinary meaning in context. To the end, it is useful to compare the language of the expropriation provision and the EWC, within the same instrument. But this exercise does not yield a clear result.

Some American treaties explicitly cross-reference the compensation standard under the EWC with the expropriation clause. Article 4 of the US – DRC BIT, for instance, instructs that, 'the national or company shall be accorded restitution or compensation in accordance with Article III' for damages resulting from requisition or destruction of property. Article III, in turn, mandates that 'compensation shall be equivalent to the fair market

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<sup>1092</sup> Eg: Article 5, Austria – Libya BIT; Article 5(5), US – Rwanda BIT; Article 7(2), Syria – Azerbaijan BIT; Article 9, Nigeria – Morocco BIT (signed 3 December 2016, not in force).

<sup>1093</sup> See discussion in chapter 3(6).

value of the expropriated investment'.<sup>1094</sup> Modern Austrian treaties<sup>1095</sup> and some Swiss instruments<sup>1096</sup> follow a similar practice. Such treaty language leaves no room for doubt that compensation for losses owing to armed conflict under the EWC shall be equivalent to the FMV of the investment before it was requisitioned or destroyed.

A different category of treaties may be said to articulate the linkage between the expropriation provision and the EWC implicitly. For instance, Article 5 of the Albania – Cyprus BIT prescribes 'prompt, adequate, and effective' compensation for expropriation, explaining that '[s]uch compensation shall amount to the fair market value of the investment'.<sup>1097</sup> The subsequent Article 6, the EWC, prescribes 'prompt, adequate, and effective' compensation for requisition and destruction of foreign investments in armed conflict. Arguably, the use of the exact same language in two adjacent provisions, in the context of compensation, within the same treaty, establishes, in the aggregate, that the parties intended to award the trinity 'prompt, adequate, and effective' a single meaning: FMV.

Yet another group of treaties uses drafting that demonstrates an intention to account for considerations that go *beyond* the FMV standard in the assessment of compensation under the EWC. For instance, the Azerbaijan – Syria BIT requires that compensation for requisition and destruction of property shall be 'adequate compensation in the light of the particular circumstances'.<sup>1098</sup> Thus, even if 'adequate' is used in the EWC to reference FMV, the language 'in light of the particular circumstance' not

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<sup>1094</sup> Articles 3-4, US – DRC BIT. See also: Article 3(2), OECD, The Multilateral Agreement on Investment: The MAI Negotiating Text as of 24 April 1998, DAF/MAI/NM(98)2/REV1; Article 5(5), 2004 US Model BIT and Article 5(5), 2012 US Model BIT.

<sup>1095</sup> Articles 4-5, Austria – Libya BIT. See also: Articles 4-5, Austria – Oman BIT; Article 5-6, Austria – Uzbekistan BIT; Articles 5-6, Austria – Lebanon BIT; Articles 5-6, Austria – Georgia BIT.

<sup>1096</sup> Eg: Article 7, Switzerland – Tunisia BIT.

<sup>1097</sup> Articles 5-6, Albania – Cyprus BIT ('prompt, adequate, and effective'); Article 5-6, Albania – San Marino BIT; Article 8-9, Nigeria – Morocco BIT ('adequate compensation'); Articles 4-5, Israel – Ukraine BIT ('adequate compensation'); Articles 5,7, Libya – Croatia BIT ('adequate compensation'); Articles 5-6, Pakistan – Bahrain BIT ('prompt, adequate, and effective').

<sup>1098</sup> Articles 6-7, Azerbaijan – Syria BIT.

only allows, but *requires*, the tribunal to adjust FMV to the prevailing reality of hostilities. Similarly, the EWC in the US – Australia FTA provides that, ‘any compensation shall be prompt, adequate, and effective in accordance with [the expropriation provision], *mutatis mutandis*.<sup>1099</sup> This wording mandates the application of FMV subject to the necessary alternations as required by the situation of hostilities.

At the same time, many investment instruments point to *no* nexus between the standards of reparation. For instance, while Article 6 of the Angola – South Africa BIT includes a clear stipulation that expropriation denotes FMV compensation, the EWC instructs that ‘compensation shall be paid’ referencing no standard.<sup>1100</sup> With such treaties it cannot be presupposed that the States intended to assess compensation for, say, destruction of property during hostilities at a scale that is close, or equal to, the FMV of the investment right before its destruction.

The 2018 Singapore – Kazakhstan BIT is also indicative. Article 6 prescribes ‘adequate’ compensation, which ‘shall be equivalent’ to FMV, against expropriation. The subsequent Article 7, the EWC, prescribed compensation for losses owing to destruction and requisition ‘as appropriate for such loss’.<sup>1101</sup> There is nothing in this language to demonstrate an intention to incorporate implicitly or explicitly the FMV standard of the expropriation provision; certainly so if it is also considered that Article 7 instructs that, ‘compensation shall be made...in accordance with Article 8 (Transfers) of this Agreement’, but it does not cross-reference Article 6 (expropriation) in a like manner.<sup>1102</sup>

It follows that a sweeping conclusion that the adjective ‘adequate’ in the EWC necessarily means FMV in all instances *cannot* be reached. Nonetheless, it might still be argued that States aspire for unity with respect to the standard of compensation for lawfully appropriated property, whether

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<sup>1099</sup> Articles 11.6 and 11.7.2-4, US –Australia FTA.

<sup>1100</sup> Articles 5-6, Angola – South Africa BIT.

<sup>1101</sup> Articles 6-7, Singapore – Kazakhstan BIT.

<sup>1102</sup> *ibid*, Article 7-8.



during peace or war, and that the use of the same adjectives ('adequate') is indicative of the intention to assess losses against the FMV benchmark. This contention however is not convincing. At its highest it justifies the application of the FMV standard *only* for lawful takings in armed conflict. It does not however explain why FMV applies to compensation for unlawful appropriation and destruction of property.

In fact, the differences between expropriation in peacetime and appropriation in armed conflict justify a context-based assessment of what are 'adequate' payments under the EWC that is not limited to FMV. As explained in chapter 3, while expropriation may be grounded in various kinds of public purpose, takings in armed conflict are lawful only for military needs. Additionally, in contrast to expropriation, IHL places limitations on the types of property that may be lawfully appropriated for military needs during hostilities. Further, unlike expropriation, dispossession of property in armed conflict is not conditioned upon compliance with due process. Seeing as expropriation differs from other forms of appropriation in hostilities in most qualifications, it is logical that the assessment of 'adequate' payments for such takings will too differ.

What then is the compensation standard represented by the treaty language 'adequate' and where would the interpreter find its meaning outside the expropriation provision that contextualizes the EWC? The response is primarily found in the VCLT, which instructs that 'together with the context', the interpretation of the 'adequate compensation' under the EWC will also be informed by 'any relevant rules of international law applicable in the relations between the parties.'<sup>1103</sup> Indeed, investment tribunals have invoked VCLT Article 31(3)(c) when assessing reparation. For instance, in his separate opinion in *CME v Czech Republic* Brownlie stated in relation to compensation that, 'in case the treaty provisions are not

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<sup>1103</sup> Article 31(3)(c), VCLT.

in themselves clear, the Vienna Convention justifies reference to the position in general international law'.<sup>1104</sup>

Relevantly, IHL prescribes 'adequate' compensation for war reparation, with the Basic Principles on the Right to Reparation elucidating that 'adequate' compensation 'should be proportional to the gravity of the violations and the harm suffered' (Principle 15).<sup>1105</sup> Principle 20 instructs:

20. *Compensation* should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, ... such as:

- (a) Physical or mental harm;
- (b) Lost opportunities, including employment, education and social benefits;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Moral damage;
- (e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.<sup>1106</sup>

But the Basic Principles on the Right to Reparation should be treated with care. To be taken into account in the interpretation of the EWC, the Basic Principles ought to pass the admissibility hurdles of VCLT Article 31(3)(c), including the requirement that the instrument be a 'rule of international law'.<sup>1107</sup> The notion of 'rules' implies that 'binding' instruments, such as treaties, customary law, and general principles of law, are admissible while acts of international organizations, such as the UNCHR, and their implementation by other specialized bodies are left out.<sup>1108</sup>

In fact, when the Basic Principles were adopted by the UNGA, several States argued that they were not legally binding. On this point, they relied on the seventh preambular recital that stipulates that the Principles do not entail new international legal obligations but identify mechanisms for the implementation of existing legal obligations under international human

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<sup>1104</sup> *CME v Czech Republic*, para 309.

<sup>1105</sup> Principle 15, Basic Principles on the Right to Reparation.

<sup>1106</sup> Principle 20, Basic Principles.

<sup>1107</sup> For an analysis of the other admissibility hurdles, see discussion in chapters 3 and 5.

<sup>1108</sup> Pauwelyn (n 62) 254-56.

rights law and IHL.<sup>1109</sup> But the argument actually yields an opposite conclusion. Indeed, the Principles are not intended to create new or additional obligations. This is because they are ‘declaratory of legal standards in the area of victims’ rights’ and were meant to ‘to serve as a tool, a guiding instrument for States in devising and implementing victim-oriented policies and programmes’, as Van Boven, who drafted the Principles, explained.<sup>1110</sup>

Even if the Basic Principles do not reflect customary law, they may still be construed as a ‘rule’ in the sense of VCLT Article 31(3)(c), since in practice, international tribunals have exhibited readiness to ‘apply this condition somewhat less restrictively.’<sup>1111</sup> For instance, in the interpretation of the ECHR, the ECtHR considered UNSC resolutions, recommendations and resolutions of the Committee of Ministers and the Parliamentary Assembly or reports by various independent commissions, the Universal Declaration on Human Rights, and Guidelines and ‘Conclusions’ published by the UN High Commissioner on Refugees.<sup>1112</sup> Similarly, the jurisprudence of investment tribunals demonstrates an inclination to read the ‘rule’ condition of VCLT Article 31(3)(c) to include ‘soft’ concepts such as separability and rules on evidence and procedure.<sup>1113</sup> Wälde and Weeramantry suggested in this respect that the UNIDROIT Principles of International Commercial Contracts may be considered as ‘rules of international law’ in the sense of VCLT Article 31(3)(c).<sup>1114</sup>

Hence, although the Basic Principles on the Right to Reparation are not a treaty and even if Principles 15 and 20 are not considered as

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<sup>1109</sup> Preamble, Basic Principles on the Right to Reparations. For a description of the adoption process see (n 951).

<sup>1110</sup> Van Boven (n 951) 32.

<sup>1111</sup> Dörr (n 456) 564.

<sup>1112</sup> Eg: *Demir and Baykara v Turkey* [GC] Merits and just satisfaction, App No 34503/97, (2009), paras 74–75; *Bayatyan v Armenia* [GC] App No 23459/03, Judgment (2011), para 107; *Al-Adsani v UK* [GC] App No 35763/97 Judgment (2001), para 60.

<sup>1113</sup> Eg: *Plama v Bulgaria*, Jurisdiction, para 212 (while not citing the VCLT, these Tribunal referenced the ‘nowadays generally accepted principle of the separability (autonomy) of the arbitration clause’ in the interpretation of the MFN clause).

<sup>1114</sup> Wälde (n 457) 755; Weeramantry (n 466) 94.

customary, their meaning of ‘adequate compensation’ may nonetheless be taken into account in the assessment of what are ‘adequate’ compensation under the EWC. Indeed, the Basic Principles have been consistently referred to or invoked by domestic and international fora as a source of reference when faced with issues of victims’ rights and reparations, even before they received final approval by the UNGA.<sup>1115</sup>

Further, supplementary means of interpretation support an IHL-informed reading of ‘adequate compensation’ in the context of the EWC. As explained, the language of the EWC is traced verbatim to the above cited Basis 21 of the Hague Conference. Basis 21, in turn, sought to codify the customary rules on the treatment of private property during war, as reflected in The Hague Law in the context of State responsibility for losses to foreign nationals. If the EWC essentially incorporates primary IHL rules, and chapter 3 suggested that it does, then it is only logical that, correspondingly, the standards of reparation for the violation of these said rules will also be informed by IHL.<sup>1116</sup>

Of course, even if parts of the EWC incorporate customary international law on the treatment of private property in hostilities, it may be that by using the language ‘adequate compensation’, which is characteristic of FMV in investment treaties, States intended to award the qualifier a *special*, expropriation – rather than IHL – oriented, meaning. However, if the ordinary meaning of the language of the EWC is a reference to customary IHL (as suggested), then to preclude this reference *only* for the last sentence of the EWC and to provide *only* the language ‘adequate compensation’ a special non-IHL meaning, it ought to be ‘established that the parties so intended’.<sup>1117</sup> However, there is nothing to support such an intention. And so, absent explicit language to the contrary, it cannot be presumed that by prescribing ‘adequate compensation’ for dispossession

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<sup>1115</sup> See (n 974) and the authorities mentioned there.

<sup>1116</sup> On the correlation between the primary rules and the remedies for their breach, see: Ratner (n 361) 23-6.

<sup>1117</sup> Article 31(4), VCLT.

of property in armed conflict, States wished to create a special regime of reparation for violations of war law that is detached from customary IHL.

It should be clarified that by suggesting an IHL-oriented meaning of ‘adequate compensation’, the argument does not propose to supplant the treaty language of the EWC with the Basic Principles on the Right to Reparation. Rather, it is suggested that investment tribunals ought not to take lightly the differentiations that States make between the expropriation provision and the EWC and should not assume that the ostensible similarity, where it exists, between these clauses suffices to ‘automatically’ read FMV into the EWC.<sup>1118</sup> Likewise, the apparent resemblance between the language of the EWC and that of the Basic Principles (‘adequate compensation’) should not be overstated. It is highly unlikely, put mildly, that States intend to incorporate the Basic Principles on the Right to Reparation in their investment treaties by using the adjective ‘adequate’.

By taking the IHL standard into account in assessing what is ‘adequate’ compensation under the EWC the interpreter must look beyond the FMV of the investment at the time of the injuring measure, and rather assess the ‘adequacy’ of the compensation in proportion to the gravity of the violation and the circumstances of each case, including the State’s resources, abilities, concomitant international obligations, and the severity of the violation. Granted, accounting for these considerations does not yield a clear valuation methodology, but ‘it helps in avoiding unlikely or absurd conclusions’ that may lead to the award of unreasonable compensation.<sup>1119</sup> In turn, preventing absurd awards is important for maintaining (and restoring) the legitimacy of the regime.

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<sup>1118</sup> D Desierto, ‘The Outer Limits of Adequate Reparations for Breaches of Non-Expropriation Investment Treaty Provisions: Choice and Proportionality in *Chorzów*’ (2017) 55 *Colombia Journal of Transnational Law* 395, 426.

<sup>1119</sup> G Schwarzenberger, *International Law* Vol 1 (Stevens & Sons Ltd. 1957) 529.

## **5. War Reparations in Investment Arbitration: FMV and IHL-Considerations**

Having outlined the main aspects of the obligation to pay war reparations under IHL and investment law, this section hones in on the assessment of compensation in investment arbitration for losses to property owing to armed conflict. Accordingly, the analysis briefly lays out the bases of liability capable of giving rise to a cause-of-action in international investment arbitration concerning the conduct of the State in armed conflict. Next, the section outlines the approach that investment tribunals have adopted in such instances and its impediments. Finally, it is proposed that the occurrence of armed conflict is a circumstance that affects the assessment of damages for war losses in investment arbitration and suggest the possible doctrinal ways to account for it.

Overall, this section proposes that investment tribunals ought to adopt a nuanced approach to the assessment of compensation for losses to the investor's property in the context of armed conflict that goes beyond the existing expropriation-oriented methodology. Well-reasoned awards that take armed conflicts and the law regulating armed conflict, IHL, into consideration in the assessment of war reparations not only prevent crippling and unreasonable burdens on the limited budget of the war-torn host State, but they also contribute to the acceptance of arbitral decisions by the disputing parties and more widely.

As a preliminary to the discussion below, it should be stressed that this discussion does not presume to offer a formula for the assessment of war reparations in international law that is to be applied across doctrinal areas. This examination does not aim at, nor is it predicated on, the notion of unity of remedies. On the contrary, the following analysis assumes that different institutions have adopted distinct approaches to the award of reparations for violations of international law in the context of hostilities. This is only logical given that *ad hoc* tribunals, regional human rights bodies, standing international courts, and specialized criminal fora follow different

institutional rules, aim at different purposes, apply specific fields of international law, and adopt distinct procedures. Mindful of these differences, proposing uniformity of remedies for its own sake risks ignoring regime specific goals thereby leading to incorrect outcomes.<sup>1120</sup>

Normally, investment claims that arise out of, or in relation to, armed conflict concern losses owing to the appropriation or destruction of the investor's property. In practice, the investor's property may be destroyed as a result of the State's breach of the FPS obligation by failing to take precautionary measures in and against attack. If the investor's property is destroyed because the State's armed forces failed to take precautions in *their* attack against the adversary, the consequences of this FPS breach will be covered by the EWC that prescribes 'adequate' compensation for destruction that was caused by the State's 'authorities'. However, if the property is destroyed by the adversary, and the State's authorities failed to take feasible precautions to protect the property from the adversary's attack, the consequences of this breach of FPS will *not* covered by the EWC, which does not encompass conduct of third parties.

Additionally, the obligations of the war clauses themselves may be breached. If, for instance, the State refuses to grant foreign investors compensation for losses owing to hostilities at a similar scale or at the same form as it grants its domestic investors or the investors of third parties in like situations, this State likely breaches the PWC. Similarly, if the investor's property was destroyed by the State's armed forces wantonly (i.e., destruction that is not required by military necessity) and the State blatantly refuses to accord to the investor 'adequate compensation', or any reparation for that matter, it is likely breaching the EWC.

How to assess compensation for the above cases is not clear since like most investment treaty standards, war clauses and the FPS provision are silent with respect to the consequences of their violation. Historically,

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<sup>1120</sup> On the uniformity in remedies see: Ratner (n 361) 31-2.

because most investment disputes arose with regards to expropriation, the assessment of damages in investment arbitration developed as an expropriation-oriented exercise. However, in a growing number of recent disputes claimants have sought, and tribunals have awarded, compensation for damage arising out of State conduct other than expropriation, that constitutes a breach of investment treaty standards, such as FET, FPS, ‘umbrella clauses’, and national treatment and/or MFN treatment. Hence, some guidance on this point may be found in the practice of investment tribunals that routinely deal with reparations for non-expropriation standards.

Arbitral tribunals that were confronted with non-expropriation violations have typically referred to the customary rules on the award of reparations as reflected in ARSIWA,<sup>1121</sup> which require ‘full reparation’ for damage resulting from an internationally wrongful act, including in the form of compensation that shall cover ‘any financially assessable damage’<sup>1122</sup> and to the dictum of the PCIJ in the *Chorzów Factory* judgment, whereby reparation must as far as possible ‘wipe-out all the consequences of the wrongful act’ and ‘re-establish the situation’ which would have existed if the wrongful act would have not been committed.<sup>1123</sup> The application of these authorities to non-expropriation cases mostly led tribunals to maintain that the investors should be *fully compensated* for their losses.<sup>1124</sup>

But stating that the compensation ought to be ‘full’ does not quite explain how to measure any such compensation. It is on this point that investment tribunals usually collapse back into an expropriation-dominated thinking that focuses mostly, if not only, on the FMV of the affected property. In other terms, tribunals reflexively cite the *Chorzów Factory* pronouncement on full reparation and proceed to use the FMV-treaty

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<sup>1121</sup> Eg: *SD Myers v Canada*, paras 309-311.

<sup>1122</sup> Articles 31 and 36, ARSIWA.

<sup>1123</sup> *Chorzów Factory*, 47.

<sup>1124</sup> For a review of case law, see: S Ripinsky, ‘Assessing damages in investment disputes: Practice in search of perfect’ (2009) 10(1) *JWTI* 1, 4-7.



standard for lawful expropriation to assess ‘full compensation’ for non-expropriation violations.<sup>1125</sup>

Pertinently, investment tribunals that were faced with disputes that arose out of, or in relation to, the destruction of property, assessed compensation by focusing on the market value of the investment lost.<sup>1126</sup> In *AAPL v Sri Lanka*, for example, the Tribunal found that the destruction of the investment resulted from the State’s failure to take precautions in favour of the investment during a counter-insurgency operation against the LTTE, in breach of the FPS standard. Accordingly, the Tribunal held that the amount of awarded compensation ought to reflect ‘the full value of the investment lost’.<sup>1127</sup> This approach may be explained by the fact that in such cases the non-expropriation violation results in effects tantamount to the total dispossession of the investment or to significant diminution in the value of the investment,

However, assessing compensation in the context of armed conflict through the prism of FMV, and it alone, is problematic. FMV is not synonymous with the notions of ‘full reparation’, ‘adequate remedy’, or ‘adequate compensation’, as the ICJ emphasized in *Avena and Other Mexican Nationals (Mexico v US)*.<sup>1128</sup> There, the Court explained that ‘the general principle on the legal consequences of the commission of an internationally wrongful act’, as articulated in the *Chorzów Factory* case, ‘is that the breach of an engagement involves an obligation to make *reparation in an adequate form*’. As for ‘what constitutes ‘reparation in an adequate form’’, the Court stressed that the notion of wiping-out the consequences of the wrongful act denotes a contextual assessment of the adequacy of reparations, through the examination of the actual violation and its characterization on the one hand, and the full scope of the resulting injury,

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<sup>1125</sup> See authorities in (n 923).

<sup>1126</sup> Ripinsky - Practice in search of perfect (n 1124) 6.

<sup>1127</sup> *AAPL v Sri Lanka*, paras 67, 88-96. In *AMT v Zaire*, the Tribunal held that it is necessary ‘to assess the true value or the actual market value of the properties destroyed, or the loss suffered by AMT’ (para 7.13).

<sup>1128</sup> *Avena and Other Mexican Nationals (Mexico v USA)* (Merits) (2004) ICJ Rep 12.

on the other.<sup>1129</sup> Hence, under customary law, ‘adequate remedy’ or ‘full reparation’ for violations of, say, FPS in the context of armed conflict do not require providing the aggravated investor with FMV of the investment immediately before its dispossession or destruction. Rather, international law mandates considering the broader normative and factual reality in which the violation occurred.<sup>1130</sup>

Further, a methodology that assesses damages and compensation in the context of hostilities based on the value of the investment alone risks over-compensation. In armed conflict, it may be difficult to ascertain whether the diminution in the value of the investment occurred solely as a result of the State’s wrongful act (eg: failure to take precautions in favor of the investment in the face of an attack) or *also* by the reality of armed conflict that affects the state of the market, the value of assets, and, in itself, is damaging to property.<sup>1131</sup> In other terms, the existence of hostilities, in and of itself, entails adverse implications (and losses) on the entire civilian population. A certain amount of these implications and losses must be absorbed by each affected individual, including the foreign investors.<sup>1132</sup>

Investment tribunals often account for several factors capable of reducing compensation, such as contributory fault and the investor’s risk. Contributory fault relates to the broader notion of causation by proposing that the acts or omissions of the injured party have played a role in the

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<sup>1129</sup> *ibid*, para 119, citing *Chorzow Factory* (Jurisdiction), 21; *Desierto* (n 1118) 402.

<sup>1130</sup> Ripinsky – Practice in search of perfect (n 1124) 4-6.

<sup>1131</sup> This concern was somewhat addressed in *CMS v Argentina* (Award) para 3. But, see: *BG v Argentina* (Award), paras 438-444, where the Tribunal did not seem to consider that the diminution in value may also stem from the economic crisis in Argentina for which the State is not responsible. See further: Ripinsky (*ibid*) 7.

<sup>1132</sup> This notion is well-established under IHL. Since IHL does not deal with the lawfulness of the hostilities as such, but with their regulation, the occurrence of the armed conflict, as such, is outside the scope of IHL. What this means is that, IHL confers rights upon individuals to be protected from certain conducts during war, but IHL does not grant individuals a right to peace. Likewise, IHL does not protect persons against stresses and tensions that are the ‘normal’ consequences of air strikes and land operations unless where a violation of a norm is involved. See Zegveld (n 932) 501-502 and nn 20 therein for Dutch jurisprudence.

ultimate damage suffered.<sup>1133</sup> The concept of contributory fault, in turn, is linked with notions of inadequate risk assessment and/or the voluntary assumption of risk. As for risk, it forms part and parcel of any economic endeavor including investment abroad. Essentially, the notion of risk relates to the possibility that future occurrences will adversely affect anticipated financial gains.<sup>1134</sup> Accordingly, vigilant investors are expected to, and do in fact, research the investment climate in the designated host State and assess the risks of investing there so as to locate the potential sources of risk and project the probability of losses, before making the investment abroad.<sup>1135</sup>

In practice, investment tribunals have reduced the awarded compensation when the investor conducted an inadequate risk assessment and when the investor assumed risk voluntarily. This practice is essentially grounded in the idea that the State should not be held liable for losses that were produced, in whole or in part, by the investor's poor business judgment.<sup>1136</sup> If the risks that materialized and led to losses were known to the investor and voluntarily assumed by him, they should be reduced from the awarded compensation, for 'it would be unjust to attribute the whole of the loss to a governmental action'.<sup>1137</sup>

Ripinsky takes the notion of compensation-reducing elements one step further. He suggests that compensation should be reduced even if the risk of a particular event was 'unforeseeable and beyond the investor's control, was not a result of flawed business judgment, and assumption of

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<sup>1133</sup> Article 39, ARSIWA. See eg: *MTD v Chile* (Award), paras 239-43; *MTD v Chile*, ICSID Case No ARB/01/7, Decision on Annulment, 21 March 2007, para 101.

<sup>1134</sup> See further in: A Komarov, 'Mitigation of Damages', in Y Derains and R Kreindler (eds) *Evaluation of Damages in International Arbitration* (ICC, Paris, 2006), 37-56; Y Taniguchi, 'The Obligation to Mitigate Damages', in *ibid*, 79-99; Ripinsky – Practice in search of perfect (n 1124) 18-9.

<sup>1135</sup> LD Howell, 'Evaluating political risk forecasting models: What works?' (2014) 56(4) *Thunderbird International Business Review* 305-16; *Oscar Chinn (UK v Belgium)*, Judgment [1934] PCIJ Rep, Ser A/B, No 63, 65.

<sup>1136</sup> Eg: *Azurix v Argentina* (Award), paras 424-29; *Biwater v Tanzania*, paras 789-792.

<sup>1137</sup> Ripinsky – Practice in search of perfect (n 1124) 20.

the risk did not constitute contributory fault on the part of the investor'.<sup>1138</sup> Arguably, the *AMT v Zaire* Award supports this suggestion. There, the Tribunal held that, 'it would neither be practical nor reasonable to apply the method of assessment of compensation in a way so far removed from the striking realities' of the prevailing volatile political climate in the State.<sup>1139</sup> In so doing, the Tribunal arguably accounted for the investor's own choice to operate in Zaire.

But such a view is not without flaws in the reality of hostilities. While it is true that the obligation to absorb some costs of the hostilities arises from the investor's business risk,<sup>1140</sup> this notion should not be applied too expansively lest investment tribunals set a policy that effectively disincentivizes investment inflows into conflict-ridden States, thereby frustrating post-conflict reconstruction, which often depends in great part on the inflows of foreign capital. Tribunals should be careful not to effectively 'penalize' investors for investing in war-torn countries.

For instance, making an investment in gas exploration in the east-Mediterranean basin off-shore Israel is not, in and of itself, a compensation-reducing element just by virtue of Israel's geopolitical history. Nor can it be said that carefully planned and heavily guarded exploration activities by ExxonMobil in contested waters offshore Cyprus or by ENI in contested waters offshore Turkey,<sup>1141</sup> necessarily evidence poor risk assessment just for being conducted. In contrast, making an investment in arms and munition in the western countryside of Damascus during the civil war in Syria and the coalition operations against Daesh, in an attempt to profit from

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<sup>1138</sup> *ibid.*

<sup>1139</sup> *AMT v Zaire*, paras 7.14-7.15.

<sup>1140</sup> S Ripinsky, 'Damages assessment in the Spanish renewable energy arbitrations: First awards and alternative compensation approach proposal (2018) TDM, 12.

<sup>1141</sup> Z Weise, 'Med natural gas find brings conflict dividends' (*Politico*, 3 June 2018) <<https://www.politico.eu/article/natural-gas-mediterranean-cyprus-turkey-more-gas-more-problems/>>; Daily Sabah, 'US Navy denies reports of bolstering East Med presence to guard Exxon Mobil exploration off Cyprus' (*Daily Sabah* 9 June 2018) <<https://www.dailysabah.com/energy/2018/03/08/us-navy-denies-reports-of-bolstering-east-med-presence-to-guard-exxon-mobil-exploration-off-cyprus>> accessed 20 February 2019.

the sale of arms to the belligerents, may well be construed as a voluntary assumption of risk. Likewise, the decision to invest in a conflict-area in Afghanistan is not, of itself, indicative of poor business judgment insofar as the investor and the State allocate risks and responsibilities for the security of the project in advance and take proper arrangements and precautions. However, poor business judgment is likely present in instances when American investors make no security arrangements, relying on investment treaties and the support of the State, while ignoring consistent official warnings by the State Department that:

Anti-government and political violence are common and public concerns regarding security constrain economic activity. Security is a primary concern for investors. Foreign firms operating in country report spending a significant percentage of revenues on security infrastructure and operating expenses.<sup>1142</sup>

At the same time, while the *act of investing* in a war-torn State, in and of itself, does not (and should not) reduce the award of reparations, *the occurrence* of hostilities is a circumstance that should be taken into account in the assessment of compensation.<sup>1143</sup> On this point, the EECC stressed that, ‘the difficult economic conditions found in the affected areas of Eritrea and Ethiopia must be taken into account in assessing compensation there’.<sup>1144</sup> The Claims Commission appears to have taken the view that the potentially crippling effect of a compensation payment could be considered in determining its quantum,<sup>1145</sup> noting that, ‘huge awards of compensation by their nature would require large diversions of national resources from the

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<sup>1142</sup> State Department, ‘2018 Investment Climate Statement – Afghanistan’ <<https://www.state.gov/e/eb/rls/othr/ics/investmentclimatestatements/index.htm#wrapper>> (accessed 20 June 2018).

<sup>1143</sup> See further: U Kriebaum, ‘The Relevance of Economic and Political Conditions for Protection under Investment Treaties’ (2011) 10 *The Law and Practice of International Courts and Tribunals* 383–404; M Gritsenko, ‘Relevance of the host state’s development status in investment treaty arbitration’ in (n 192) 341–52.

<sup>1144</sup> *Ethiopia’s Damages Claims*, para 26.

<sup>1145</sup> Crawford – State Responsibility (n 992) 483. However Draft Article 42(3) of ARSIWA, which *had* stated that, ‘in no case shall reparation result in depriving the population of a State of its own means of subsistence’, was intentionally deleted from the second reading of ARSIWA (ibid, 481–83 and ARSIWA Commentaries, Article 33, para 5).

paying country—and its citizens needing health care, education and other public services—to the recipient’.<sup>1146</sup>

Considered this way, it may be said that the *AMT v Zaire* Tribunal regarded the existence of hostilities, and not the fault of the investor, when it stated that the ‘realities of the current situation’ in the State should be accounted for when determining the method of compensation, the compensable heads of damages, and the valuation. The Tribunal held that the unstable political and business environment in Zaire meant that lost profit and interest cannot be compensated as if the investor was operating ‘in an ideal country where the climate of investment is very stable, such as Switzerland or Germany’.<sup>1147</sup> With the aforementioned caveats, this seems to be a reasoned proposition.

To recap, the occurrence of armed conflict is a circumstance that affects the award of compensation in various forms. It is contextualized in the determination of the head of damages, the causation, and valuation, and it can be used to cap the award in order to prevent crippling results. Arbitral fora have exhibited some readiness to apply such thinking, albeit in different contexts, noting, for instance, that the Argentine ‘crisis cannot be ignored and it has specific consequences on the question of reparation’<sup>1148</sup> and highlighting the ‘obvious and significant negative effects of the Iranian Revolution’ on the calculation of full compensation to injured investors.<sup>1149</sup> There is certainly room for such considerations in the context of armed conflicts.

## **6. Conclusion**

This chapter dealt with the obligation to adequately compensate investors for losses to their property owing to armed conflict. Accordingly, section 2 outlined the compensation regime under IHL and then used the inferences from this analysis to ascertain the content and meaning of investment treaty

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<sup>1146</sup> *Ethiopia’s Damages Claims*, para 21.

<sup>1147</sup> *AMT v Zaire*, para 7.14.

<sup>1148</sup> *CMS v Argentina* (Award), para 410.

<sup>1149</sup> *Phelps Dodge Corporation v Iran* (1986) 10 Iran–US CTR 157.

standards on compensation for losses during armed conflict. The historical review that was provided in this chapter demonstrates that the primary rules on the treatment of aliens and the consequences of their breach emanate from the application of contemporaneous war law. An examination of the materials of the 1930 Hague Conference evidences that the rules on dispossession and destruction of foreign property and the compensation thereof stem directly from war law. The materials and conclusions of the Hague Conference, in turn, made their way into modern investment treaties, where they remain to date, in the form of war clauses.

While sections 2 through 4 dealt with the normative framework, section 5 addressed the consideration of the fact of hostilities in the assessment of damages. It was argued that the occurrence of hostilities can be accounted for in the determination of the head of damages, the causation, and valuation, and it can be used to cap the award in order to prevent crippling results. Overall, this chapter suggested that in their assessment of compensation for losses to foreign investments in the context of hostilities, investment tribunals should consider IHL and the occurrence of hostilities. This proposition is supported by the development of international law, it is reflected in the express treaty language of investment instruments, and it is desired as a matter of policy for its ability to prevent crippling effects on the war-torn host State, without compromising the interests of the victim-investor.

## **Chapter 8**

### **Conclusion**

#### **1. The Protection of Foreign Investments in Armed Conflict**

So, what protection does international law accord foreign investments in armed conflict? The short answer is that 'it depends'. Namely, 'it' depends on the specific treaty language and on the prevailing circumstances. These two factors inform the operation of the investment treaty during hostilities, the obligations of the State towards the investments, the classification of the investment as a civilian object or a military objective, the level of protection the State is required to guarantee to the investment, the extent to which the State's measures vis-à-vis the investment are open to judicial review, and the assessment of damages.

The longer answer was provided over 6 chapters in this study. As a preliminary, it was established that the outbreak of hostilities does not *ipso facto* abrogate investment treaties and their standards of protection remain applicable in armed conflict (chapter 2). As regards the treatment that these treaties prescribe, chapter 3 proposed that investment treaties contain primary rules on dispossession of investments in armed conflict, the EWC. Under these rules, the taking of private property is lawful insofar as it is carried out for military needs and against compensation, while the destruction of foreign investments in armed conflict is prohibited, unless required by military necessity.

Having addressed the State's authority to lawfully interfere with protected investments the thesis examined whether and when the State may lawfully target investments. Chapter 4 demonstrated that the complex situation whereby foreign investments may be classified as targets that are susceptible of lawful attacks for the same reasons for which investment law guarantees their protection is the consequence of expansive warfare practices coupled with investment liberalization policies. As for all other instances when the investment is treated as a protected object in armed conflict, it was established that the host State is under an obligation to take



feasible precautions to protect foreign investments under its control from the effects of attacks, whether the State is the author of the attack or not. Chapter 5 focused on the FPS standard and argued that assessment of compliance with this obligation ought to take into consideration all the prevailing circumstances in the host State, including its capacity and ability.

The thesis then examined whether there are international mechanisms that, in the reality of hostilities, exempt States from investment obligations that apply in armed conflict or justify or excuse the breach of these standards (chapter 6). It was established that while security exceptions and DoB clauses may be invoked in relation to security concerns in the context of armed conflict, these treaty mechanisms are of limited scope and they are open to judicial review. It was also established that while CPW ostensibly assume relevance in the reality of conflict, the paradigm of hostilities excludes the application of many CPW thereby preventing the State from circumventing obligations with humanitarian aspects, such as FPS and the war clauses. Finally, it was argued that the occurrence of hostilities and the law regulating the conduct of hostilities ought to inform the obligation to award 'adequate' compensation to investors for losses owing to armed conflict (chapter 7).

## **2. IHL and Investment Law: The Big Picture**

While the research was not concerned with the relationship between the regimes of IHL and investment law, as such, but with the interaction of specific norms that regulate a given situation, an inductive reasoning informs four broader questions that concern these regimes: First, does IHL affect the interpretation and application of investment norms and if so, how? Second, does investment law affect the interpretation and application of IHL and if so, how? Third, how does IHL interact with investment law? And, finally, what, if anything, does the interaction between the concepts and laws of war and foreign investments tell of international law?

Does IHL affect the interpretation and application of investment standards? This thesis suggests that it most certainly does. Chapter 3

argued that the EWC essentially incorporates, pursuant to the VCLT, customary rules on the treatment of private property in armed conflict. It was suggested that the language of this treaty standard originates from the Hague Law. It was also suggested that IHL rules on appropriation and destruction of property should be taken into account in the interpretation of the EWC. Then, chapter 5 dealt with the obligation to take precautions in favor of foreign investments. In this regard, the thesis looked at the interpretation and application of FPS in light of the obligation to take precautions under IHL. It was suggested that while both norms should be interpreted in harmonization, under certain circumstances these norms may lead to conflicting results. In such cases, the IHL obligation to take precautionary measures in and against the effects of hostilities may limit or exclude the application of FPS.

Chapter 6 demonstrated that security exceptions in investment instruments were created to safeguard trade and investment policies during war. It was further argued that the terms 'war' or 'armed conflict' in security exceptions should be interpreted to encompass modern forms of hostilities, such as NIACs. Additionally, it was suggested that IHL curtails the range of available customary defenses (CPW) capable of excusing or justifying violations of investment standards with humanitarian aspects in armed conflict.

Chapter 7 established that PWC were designed by States to create an obligation to compensate aliens for losses to their property in hostilities, where such an obligation did not arise from contemporary war law. To a degree, 19<sup>th</sup> century war law (and its limits) generated the need for this investment treaty mechanism. In a slightly different vein, it was also argued in chapter 7 that IHL rules on the award of war reparations should be taken into account as relevant rules of international law in the interpretation and assessment of 'adequate' compensation under the EWC. Additionally, it was suggested that the reality of armed conflict should be taken into consideration in the determination of the heads of damage, the causation,

and valuation of reparations, thereby affecting again the application of investment norms.

‘Is it just IHL that affects investment law, or does investment law affect the interpretation and application of IHL?’ This question was put to me in my interview for the PhD program at UCL by Dr Trapp. Chapter 4 reflects three years of thinking over her question. It established that one of the more prevalent, yet contentious, practices of targeting – the bombing of RGT – was created in the context of an inter-state investment arbitration. The argument that objects in certain economic sectors may be lawfully targeted for their ability to generate revenues and contribute to the development of the belligerent was born in the framework of the American submissions in defense against a British FPS claim arising out of the American Civil War. For decades, albeit unknowingly, military manuals used investment arbitration as a ‘precedent’ for the definition that they put forth for ‘military objective’. To a degree, it may be said that investment law lies at the core of the most fundamental principle of IHL – the distinction between civilian objects and military objectives.

Furthermore, the analysis of dual-use objects and RGT through the prism of investment law suggested that policies on the promotion, facilitation, and protection of investments may be used to augment humanitarian considerations by offering additional counterweight against controversial warfare practices. In this case, it is investment law (and its developmental and security-building potential for host States) that calls for the reconsideration of the interpretation and application of API Article 52(2) and what qualifies as a ‘military objective’.

The forgoing allows us to make some broader inferences and identify several different levels of interaction between IHL and investment law. Chapter 3 suggested that the EWC and the IHL rules on the appropriation and destruction of property are compatible in that they seem to go in the same direction with respect to the treatment that they prescribe for foreign investments in armed conflict. It was suggested that this complementary

relationship is the result of the development of the EWC from the customary standard of treatment of aliens in war, which, in turn, emanated from customary rules on dispossession and destruction of property as codified in the Hague instruments. Accordingly, chapter 3 suggested that interpretive means (namely VCLT Articles 31(1), (4) and 31(3)(c)) allow us to avoid a conflict (as defined in chapter 1) between investment law and IHL norms.

By contrast, chapter 4 illustrated several potential instances of divergence between investment law and IHL. One such divergence arises when the host State loses control over the territory where a foreign investment is located, *and* that investment becomes susceptible to targeting because the adversary uses it to sustain its war-fighting against the host State. As in the examples involving mines in Afghanistan, in such cases, an incompatibility may exist between the State's *obligation* to protect the investment as a host State (the investment is arguably within the geographical scope of the relevant treaty) and the potential *authorization* under IHL, as a belligerent, to target that same investment. Professedly, this situation is, per the broad definition outlined in chapter 1, a conflict.

Potentially, a conflict may also arise between the State's *obligation* to guarantee the investment certain treatment as a host State (eg: regulatory stability or protection of reasonably-based expectations) and its *obligation* (rather than a permission) under IHL to protect the civilian population. Such is the case, as with the example of the American investment in Israel, where IHL arguably required (obliged) that the investment be relocated, removed, or terminated so as to protect the civilian population from the adverse effects from its targeting, but such measures are arguably a simultaneous breach of investment standards of treatment. This too seems to be a case of a conflict, under the broad definition set out in chapter 1 above.

Further, the State's policies and practices on investment promotion and targeting may collide. Thus, by way of reciprocity, when the State adopts expansive approaches to target classification as a party to a conflict,

namely concerning RGT, it risks 'inviting' the targeting of its foreign investments by its adversary. As with the example of Iraq and the US, if the American stance that, under IHL, a party to a conflict is *authorized* to target any economic object or commercial activity that generates revenues for the adversary (eg: mining), then, under IHL, this is as true for the targeting of American investments in conflict-ridden States. But it is doubtful that the US, as a home State, maintains the same views that it holds as a belligerent that attacks economic targets abroad (often the property and operations of US corporations). On the contrary, as a home State, the US seeks to promote and protect the investments of its nationals into conflict-ridden States (eg: in mining) and it takes measures to secure them.

In the examples set out above, in contrast to what was proposed regarding chapter 3, the potential incompatibility cannot be avoided through, say, harmonious interpretation of the concept of 'military objective' and the relevant investment standard of treatment or by way of 'interpreting away' the divergence between the obligation to remove military objectives from civilian areas and the limitations to such measures under investment standards of treatment. In such cases, chapter 1 suggested that a possible conflict may be resolved, particularly using the *lex specialis* maxim.

But it may also be that in these cases, the conflict is 'unresolvable' in that the potential incompatibilities between the norms, practices, and policies set out above arguably exceed the scope of conventional interpretation and priority rules. Arguably in these cases, the State should make a 'policy call' – a strategic decision – that gives due respect to its national and international policies on the promotion and protection of investments and its targeting policies. It was further proposed in chapter 4 that this seems to be the way in which such tensions have, in fact, been resolved in the examples set out above.

Chapter 5 suggested that the FPS standard and the IHL obligation to take precautions in and against attacks should, principally, be complementary and go in the same general direction, since these norms

prescribe a relative standard of due diligence that accounts, to a degree, for the State's level of development and available means. This complementarity stems from, and is consistent with, the development of international law from uniform, absolute standards that were equal, but not necessarily equitable, in application to relative standards that account for the prevailing circumstances in the host State, including its abilities and resources.

However, chapter 5 demonstrated that the ambiguity in contemporary investment law over the content of FPS may result in a normative conflict (as defined in chapter 1). For instance, an apparent conflict may arise where a State takes certain precautions to protect the investment from an attack, and these measures comply with IHL, in that IHL does not require the State to do more or go beyond the measures it had adopted (or: permits the State not to take other measures), but these measures simultaneously breach FPS, which holds the State to a higher standard, requiring it to adopt additional or other measures to protect the same investment in the same circumstances.

Building on the broad definition of 'conflict' (as set out in chapter 1), chapter 5 examines whether such a conflict between the two norms may be avoided through harmonious interpretation of FPS under the VCLT, namely by way of taking the IHL norms as part of the context under VCLT Article 31(3)(c). It was suggested that in this case, interpretation does not allow us to avoid the conflict. Nonetheless, it was argued that the conflict can be resolved, namely by applying the *lex specialis* principle to ascertain which norm deals with the factual-matrix more closely and in more detail or goes further in the way that it deals with the situation. Notably, the discussion in chapter 5 and its analysis of the interpretation and application of the FPS standard in the context of armed conflict assists to clarify the scope and meaning of this standard irrespective of hostilities.

Chapter 6 pointed to another way of reading IHL and investment law standards harmoniously with respect to security exceptions. In this respect,

it was suggested that whenever a security exception in an investment treaty references 'war' or 'armed conflict', it encompasses modern forms of hostilities, including NIACs, even absent express language. This is because these treaty terms should be interpreted in a dynamic evolutionary manner in accordance with the understanding of 'war' and 'armed conflicts' at the time of interpretation, not the time of the conclusion of the treaty.

It was also proposed that the scope of the security exception and its interaction with other treaty mechanisms, namely the EWC, should be read against the backdrop of IHL, the law that was created to regulate the conduct of hostilities, and its rationales. In this respect, an IHL-informed interpretation allows us to avoid absurd outcomes whereby the security exception in investment treaties may (effectively) allow State to commit grave breaches and war crimes against foreign investments, for reasons of 'security interests'.

Further, chapter 6 demonstrated that the use of the DoB clause in the context of hostilities is also a function of the interaction of investment law with contemporary warfare. It was demonstrated that the limited scope of the DoB coupled with the fact that modern hostilities do not automatically trigger severance of diplomatic relations means that in practice, this investment treaty mechanism is of little practical use as a defense against investment claims relating to armed conflict. Thus, the use (or lack thereof) of the DoB in the context of armed conflict is consistent with the modern form in which hostilities are conducted.

Chapter 7 proposed that the compensation regimes (or legal frameworks) under IHL and under investment arbitration are potentially complementary in that one regime fills-in the gaps and shortcoming of the other. Thus, while investment law and investment treaties are not clear on the nature of investor's rights, investment treaties often provide individuals direct recourse to international adjudication against the State, allowing them to press claims for the unlawful destruction or appropriation of their property

in armed conflict or for the failure to take precautions to protect their property from attacks.

By contrast, modern IHL seems to support the proposition that individuals are holders of substantive rights, but IHL does not create a mechanism where individuals may file claims against the State for the unlawful destruction or appropriation of their property in hostilities or for the State's failure to take practicable and practical means to protect them from the effects of hostilities. In this respect, investment treaties and investment arbitration provide what otherwise does not exist for individuals, including investors, who sustain losses owing to armed conflict: adjudication.

Additionally, chapter 7 demonstrated another level of compatibility between investment law mechanisms and IHL. It was proposed that the obligation to grant investors nondiscriminatory treatment with respect to war reparations, which appears today in the PWC, traditionally (i.e., prior to the era of the BITs and investment arbitration) served to create a legal basis for an obligation to compensate aliens for losses owing to war where war law imposed no such obligations. It was also demonstrated that the function and scope of the PWC is to be read against the modern reality of war reparations whereby such reparations are not limited to violations of international law and legal obligations (*ex gratia* payments). Thus, the IHL-informed analysis of the PWC assists not only to harmonize IHL and investment law norms and practices but also to bring further clarity to the meaning and scope of the PWC and to resolve the debate over the function of this provision and its origins.

Moreover, consistent with the methodology of chapters 3 and 5, chapter 7 proposed that the notion of 'adequate' compensation should be contextualized with relevant IHL rules under VCLT Article 31(3)(c). It was proposed therefore, that under a VCLT-consistent interpretation of the EWC, to ascertain what compensation is 'adequate' for unlawful destruction or appropriation of investments in armed conflict, the interpreter is to look beyond the expropriation provision and its standard of FMV, and consider



also the severity of the violation, the capacity of the State, and other concomitant international obligations that are incumbent upon the war-torn host State.

To recap this point, the thesis set out an overall argument that the potential for conflict between investment law and IHL is a significant issue, as the two regimes (through their specific norms) may, and do in fact, regulate the same conduct and the same circumstances but, in some cases, with different objectives in mind. Nonetheless, international law mostly (but not entirely) has the tools to resolve any such conflict through customary rules of interpretation or through rules of priority.

Finally, considered from a higher degree of abstraction, this thesis tells the tale of the development of international law. Namely, the historical review that was provided in this study demonstrates the effects of codification attempts in the 20<sup>th</sup> century. The primary rules on the treatment of aliens in war and the consequences for the breach of these norm coalesced through the application of war law, mostly as codified during The Hague Conferences, by claims commissions that were tasked with the assessment of reparations for losses to private foreign property during hostilities in Latin America and Europe. In the framework of this litigation, State were required to articulate their position on the law that regulated the treatment of foreign property in war, and they turned to war law. Adjudicators, then, were required to determine the governing legal position, which they ascertained by reference to war law. In turn, these cases promoted academic engagement. Over time, this resulted in a consisted record of authorities that delimited and crafted the standard of protection of aliens by using the treaty language and customary standards of war law, as evidenced, *inter alia*, in the materials of the 1930 Codification Conference. Eventually, this language made its way into modern investment treaties, where it remains to date.

Further in this regard, it may be suggested upon reflection that the thesis reveals that the contribution of investment law to the development of

international law is underestimated.<sup>1150</sup> Chapter 2 demonstrated that the question of war's effect on treaties traditionally arose from, and was resolved in the context of, FCN treaties. These predecessors of investment instruments and the litigation over the compliance with their standards of protection catalyzed the development of the broader legal position on the effect of armed conflict on treaties. It may be said that early forms of litigation of investment instruments assisted to develop the law of treaties. But investment arbitration had a radiating effect not only in general international law but also in the contemporary law of targeting. Chapter 4 demonstrated that some modern targeting practices, namely RGT, originate from early forms of investment treaty arbitration, in particular FPS claims.

Simply put, war lies at the heart of investment law and foreign investments are at the core of warfare, and the encounters between the notions of 'war' and 'foreign investment' over the years are responsible for the progressive development of international investment law, IHL, and general international law.

### **3. The Protection of Investments in Armed Conflict: From Unification to Fragmentation in 50 Years or Less**

Finally, it may be appropriate to use for the very first time in this thesis the 'F Word' and examine what this research has to add, if anything, to the discussion of the fragmentation of international law.

'Fragmentation of international law', as Pauwelyn explained, and the questions of harmonization and conflict that it raises as between norms and institutions, 'is a reality'.<sup>1151</sup> Fragmentation is not a new phenomenon but something that is 'inherent in the architecture of international law as a functionally, regionally, and procedurally decentralized and diverse system'.<sup>1152</sup> Indeed, this study supports the view that the proliferation of

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<sup>1150</sup> Although there is a line of literature that increasingly recognizes the significance of investment law in the development of public international law (eg S Schill et al (eds) *International Investment Law and History* (Elgar 2018) 3-28).

<sup>1151</sup> J Pauwelyn, 'Fragmentation of International Law' in (n 31), para 41.

<sup>1152</sup> *ibid.*

treaties, international organizations, and specialized adjudicative fora have heightened the challenges of fragmentation. In this regard, this thesis adds nothing new to the notion of fragmentation that has not already been said of investment law on the one hand and trade, environmental law, or human rights on the other. That said, this thesis does capture particular aspects of the causes and implications of fragmentation of international law and the difficulty to deal with it.

The ILC Analytical Study on Fragmentation and Pauwelyn maintained that while fragmentation is a concern, it is not an irreconcilable complexity, since the tool-box of international law (i.e., conflict resolution techniques as set out above) is sufficiently flexible to assist lawyers, policy makers, and adjudicators to find a balance between the need for specialized regimes and specific solutions on the one hand, and the need to maintain an overall unified system of international, on the other.<sup>1153</sup>

On this point, the ILC noted that, if ‘lawyers feel unable to deal with this complexity [of fragmentation], this is not a reflection of problems in their “tool-box” but in their imagination about how to use it’.<sup>1154</sup> The protection of foreign investments in armed conflict is one instance where the problem is not with the tool box, but with its users. In other words, even if the gap between investment law and IHL, as is the case for other regimes, derives from the diversity of international law both in substance and procedure, the *extent* and *breadth* of this fragmentation is mad-made.

Although this research demonstrated that, in certain respects, war law developed investment standards of protection and that IHL and investment law evolved in a complementary, symbiotic manner, there is nothing to that effect in modern doctrine or jurisprudence of investment law or IHL. While IHL scholarship is mindful of the complementary and

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<sup>1153</sup> *ibid*, para 42; ILC, Report of the Study Group of the International Law Commission ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (Analytical Study) (2006) UN Doc A/CN.4/L.682, paras 220-222.

<sup>1154</sup> ILC, para 222.

conflicting interaction of humanitarian law with other fields of international law, such as criminal law and human rights law, a link to investment law was never discussed.<sup>1155</sup>

By overlooking investment jurisprudence, IHL academics neglect the growing body of doctrine and practice on the treatment of private property in hostilities and compensation thereof and the long pedigree of international jurisprudence that recognizes the right of the individual to press a claim against the State for war compensation. In so doing, IHL commentators also miss a significant portion of State practice on the conduct of hostilities as reflected in the positions and submissions of States before international (investment) tribunals.

Of note here is that none of the international reports on the Civil War in Sri Lanka reference the *only* international tribunal that ever adjudicated military operations against the LTTE and the only instance where Sri Lanka was found liable for violations of international law during the hostilities and made reparations thereof: *AAPL v Sri Lanka*.<sup>1156</sup> In so doing, such reports neglect to take account of the official position of the State regarding its responsibility (or lack thereof) for the conduct of the STF, thereby potentially calling into question their completeness and probative value.

Additionally, military practitioners and specialized institutions fail to account for the role of investments in the development of IHL. A review of State practice in the ICRC's study of customary IHL reveals that the ICRC struggled to locate pertinent practice and declarations by Afghanistan to illustrate its perception and implementation of IHL. Interestingly, of the handful of relevant declarations that the ICRC was able to find and include in its study of customary law are declarations that Afghanistan made with respect to the protection foreign investments. Under 'Practice relating to Rule 7, The Principle of Distinction between Civilian Objects and Military

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<sup>1155</sup> UNCHR, Res 1998/43, ESCOR Supp. (No 3) UN Doc E/CN.4/1998/43 (1998), para 2.

<sup>1156</sup> UN Human Rights Council, 'Report of the OHCHR Investigation on Sri Lanka (OISL)', UN Doc A/HRC/30/CRP.2 (16 September 2015); Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka, Sri Lankan War Crimes, 31 March 2011.

Objectives', for instance, the ICRC cited the plea that Afghan President made to the Taliban 'to stop pursuing objectives of outsiders'.<sup>1157</sup>

To recall, chapter 5 explained that this public appeal by the President was made in response to a series of attacks against MCC's investment in Mes Aynak and as part of how Afghanistan construed its investment obligations.<sup>1158</sup> By neglecting to recognize the context in which the President's declaration was made, the ICRC failed to exhaust the full potential of the fact that investment protection is a catalyst for State practice and declarations in the context of hostilities. This study shows that States are more inclined to make public declarations concerning the obligation to protect civilian objects from hostilities when such objects are owned or controlled by foreign nationals, who stand to benefit said State's economy. Had it not ignored this context, the ICRC would have found ample State practice and declarations by Afghanistan on the obligation to take precautions in and against attacks, which, like the cited plea of the President, were made in relation to Mes Aynak.<sup>1159</sup>

Likewise, investment tribunals and investment lawyers overlook the IHL-roots of modern treaty clauses and read into these mechanisms meaning and content that they never had and should never have. Interestingly, this ignorance stands in stark contrast to the amount of ink that has been spilt over the interaction between human rights and investment law and the growing trend to include stipulations on trade commitments, environmental standards, and human rights obligations in investment instruments.

Additionally, while investment climate statements routinely review the taxation, environmental, financial, and prudential regulations in the host State, the State's judiciary and institutions, and even the prevailing security

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<sup>1157</sup> ICRC – Customary IHL Study (n 38) Practice of Afghanistan on Rules 7 and 38 (treatment of cultural property)

<sup>1158</sup> (n 757)

<sup>1159</sup> See: ICRC – Customary IHL Study (n 38) Practice of Afghanistan. The ICRC was not able to locate relevant practice on Rule 22 (precautions in attack).

and political conditions in the State, such assessments *always* ignore the way that the host State perceives its IHL obligations. Investment climate statements of conflict-ridden host States contain no reference to the State's military manuals, rules of engagement or use of force (ROE and RUF), or practice on *ex gratia* payments. Granted, such materials are not always readily available. However, a review of the State's implementation of IHL rules on the protection of the civilian population by specialized institutions, such as the ICRC, is readily available online, but it too is overlooked.

And this is a big miss since the civilian population includes, in principle, foreign investors and investments. In terms of risk allocation and negotiations of investment agreements, the State's practice and declaration with respect to its obligations under IHL to protect civilians reveal the 'floor' treatment that is likely to be accorded in armed conflict to investments, as civilian objects. This 'floor' may therefore be treated as the starting point for negotiations of detailed security arrangements for the protection of investments that go beyond (or clarify beyond doubt) what the host State understands international law to require it to do as a minimum.

For instance, MCC's lawyers would have benefited from a review of the ICRC study of customary IHL, where they would have found declarations by Afghanistan on the obligation to take precautions in attacks, referencing specifically the obligation to take precautions in favor of civilian objects in the Logar Province, where the Mes Aynak investment is located.<sup>1160</sup> Such a (binding) declaration by a head of State, where the State acknowledges its obligation to act or refrain from acting under certain circumstances, may prove invaluable in an investment dispute that turns on the State's obligation to protect the investment in Mes Aynak.<sup>1161</sup>

If so, position holders, investment lawyers, military practitioners, in-house counsels, diplomats, and risk assessors at all levels stand to benefit

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<sup>1160</sup> *ibid*, Practice of Afghanistan on Rule 15.

<sup>1161</sup> *Nuclear Tests (Australia v France; New Zealand v France)* (Judgments) [1974] ICJ Rep 253, pp 267-8, paras 43, 46 and pp 472-3, paras 46, 49.

from a more nuanced thinking over the protection of investments in a reality of hostilities. The sheer existence of this thesis, however, is indicative of the fact that such thinking, as desired as it may be, does not exist today. But it did exist in the past.

Already in 1870 it was clear to American lawyers that IHL norms that permit or authorize the State to act in a certain manner may serve as a strong line of defense against treaty claims that arise out of, or in relation to, hostilities, especially where such claims involve the failure to guarantee 'the most complete protection and security' (FPS) to foreign property.<sup>1162</sup> As early as 1916 Brochard was able to conclude that the rules on the 'international responsibility of the state for injuries sustained by [aliens] in time of war' and the rules on awarding 'compensation for private losses arising out of war' can only be derived from 'an examination of the subject in the light of precedent and principle' under the prevailing rules of war law.<sup>1163</sup> And, in 1960, the Abs – Shawcross draft Convention on Investment Abroad announced that, 'the generally accepted laws of war delineated the treatment of aliens'.<sup>1164</sup> So where has this knowledge gone?

Is it a problem in the 'imagination' of lawyers, as the ILC suggested, that has led to the fragmentation of IHL and investment law?<sup>1165</sup> Not exactly. It is suggested that it is rather a reflection of the qualifications of investment lawyers and the way that international law is taught in law schools today. During the 20<sup>th</sup> century, leading commentators and 'generalists', such as Lauterpacht(s), Oppenheim, Schwarzenberger, and Borchard wrote not only of war and the protection of property abroad separately, but also of the protection of alien property in war as a topic. This is because for them, 'public international law' comprised war law and the treatment of aliens, and

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<sup>1162</sup> Reports of the US Agent (n 584) 55-60. See further on this authority in chapter 4.

<sup>1163</sup> Borchard – Diplomatic Protection (n 385) 247. On this point, see the discussion in chapters 3 and 7.

<sup>1164</sup> Abs – Shawcross Draft Convention (n 460) Article V. In this regard, see the discussion in chapters 3 and 5.

<sup>1165</sup> Report of the Study Group on Fragmentation (n 1153) para 222.

therefore the treatment of aliens *in* war was the result of the application of both regimes to a given situation.

By contrast, 21<sup>st</sup> century ‘generalists’ and investment lawyers simply do not know IHL while IHL lawyers see no need to know investment law. This is arguably because IHL is often not taught in faculties as part of ‘public international law’, but as a separate expertise, while investment law is often taught as a modality of commercial arbitration or as a ‘niche’ of economic law. Investment lawyers ignore IHL and IHL lawyers disregard investment law not for want of authorities to evince the connection between their norms nor for a deliberate intention to neglect an entire field of law, but simply because they do not know what they do not know. This suggestion is consistent with the above proposition that until the 1960s IHL and investment law were not fragmented. In other words, it is not imagination or originality that is required to integrate what has been needlessly fragmented, but a return to basics.

This thesis provided an account of the relevant rules and standards that regulate the protection of foreign investments in times of armed conflict. The thesis offers an overall argument that the potential for conflict between investment law and IHL is a significant issue, since the norms of both regimes may (and do in fact) regulate the same conduct with different objectives in mind, but that international law mostly (but not entirely) offers tools to resolve this (potential) conflict through interpretation or through priority rules. Further research should consider not only the possibility, but also the desirability, of IHL adjudication in investment tribunals and the implications on the law and policy of investment law and IHL thereof. An assessment of this type of hostilities-oriented investment disputes, which is mindful that investment tribunals stand to assess the State’s conduct in armed conflict, may offer an opportunity to revise the burdens and standards of proof of violations of investment standards and the qualifications of adjudicators from a fresh perspective.



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