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Greed and Grievance: Corporations, States and International Investment Law in Times of Conflict

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Daria Davitti. ***Investment and Human Rights in Armed Conflict: Charting an Elusive Intersection***. Oxford: Hart Publishing, 2019. Pp. 268. £85.00. ISBN: 9781509911660.

Jure Zrilic. ***The Protection of Foreign Investment in Times of Armed Conflict***. Oxford: Oxford University Press, 2019. Pp. 312. £93.00. ISBN: 9780198830375.

Katia Fach Gómez, Anastasios Gourgourinis and Catharine Titi (eds). ***International Investment Law and the Law of Armed Conflict***. Cham: Springer, 2019. Pp. 536. £149.99. ISBN: 9783030107451.

Abstract

For those on the ground, conflict brings about devastation and displacement. For foreign investors who frequently seek commercial opportunities far and wide, conflict is not just a fellow traveller but also a crucial element of the environment in which international investment law was conceived and later took shape. This review essay seeks to uncover some of the fundamental and overarching themes underpinning the relationships between foreign corporations, states and local communities in times of conflict. By focusing on the distinct roles played by the corporation in situations of conflict – as a victim, contributor, beneficiary, perpetrator and accomplice – the essay aims to cast light on international law's troublesome origins, biases and complicities and to highlight a growing concern over the enduring lack of effective avenues for corporate accountability.

1 Introduction: Investors, Wars and the Making of International Law

The idea for this review essay was conceived shortly before the world was hit by the COVID-19 pandemic, which not only once again upended the prevailing views about

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the international legal order and its role in addressing social crises but also, more mundanely, entailed interruptions and delays in the production and publication of scholarship. Yet, as the subsequent completion of this essay coincided with the aftermath of the Western retreat from Afghanistan and the invasion by Russia of Ukraine, its timing could not be more apt: war is a uniting theme for the books on which this essay draws. Owing to the numerous pandemic-related postponements, the essay has been finalized at a time when the ongoing conflict in Afghanistan and Ukraine resulted in an appraisal that is very different from what one could have produced three years earlier.

All three volumes under review were published in 2019 and share a focus on armed conflict and its relevance to, relationship with and impact on international investment. Although there is a degree of overlap in the concepts, rules and case law discussed, each volume makes its own contribution to the literature by offering a unique lens through which the subject matter is explored. The books are also very different in terms of the aims they pursue. Daria Davitti's monograph interrogates the intersection between international investment law and human rights in armed conflict, drawing on the experience of Afghanistan and using the right to water and resource extraction as a case study to expose the shortcomings in both bodies of international law. Her aim, unremittingly and consistently maintained throughout all 268 pages, is to critique international law, challenge its existing orthodoxies and unveil the consequences of the *status quo* for the vulnerable. For Jure Zrilic, a key undertaking behind his monograph is to identify how to balance competing objectives: on the one hand, the protection of foreign investors' commercial interests, certainty and stability of frameworks governing business enterprise abroad and, on the other hand, states' sovereign right to safeguard its security and peace. He pursues this aim by meticulously revealing, articulating and systematizing the origins and current workings of international investment law as part of a broader, but fragmented, universe comprising international humanitarian law, human rights and the law of state responsibility. The volume edited by Katia Fach Gómez, Anastasios Gourgourinis and Catharine Titi comprises a selection of peer-reviewed papers presented at the 2017 Colloquium on International Investment Law and the Law of Armed Conflict. To this reader, owing to its size – 23 chapters and 536 pages – the edited collection achieves a multitude of objectives, with its most valuable accomplishment being the sheer breadth of issues explored at the interface of investment and armed conflict. While the defining feature of the edited volume is its use of the doctrinal and descriptive analysis as a principal analytical device, the coverage is remarkably comprehensive: some contributors tackle the salient issues of investment treaty law, whereas others go beyond the narrow confines of the discipline and highlight the relevance of other international legal frameworks governing corporate behaviour in times of conflict – from international criminal law to the rules governing the operation of private military contractors and soft laws on responsible business conduct.

The fact that at least three distinct volumes were published in the same year not only testifies to the recent intensification of the interest in the subject matter and the attendant proliferation in the literature but also reflects a world increasingly beset by

successive wars, disturbances and disorders. For those on the ground, conflict brings about devastation and displacement. For foreign investors who frequently seek commercial opportunities far and wide, conflict is not just a fellow traveller but also a crucial element of the environment in which international investment law was conceived and later took shape. As James Gathii reminds us in his earlier writings on the subject, war has played a constitutive role in shaping the rules of international investment law since at least the late 19th century.[1] A classic example of gunboat diplomacy, or using force to protect foreign investors' rights, took place in 1902 when Venezuela was subjected to a blockade in response to its sovereign debt default and a refusal to honour the demands of bondholders from Great Britain, Germany and Italy. This action led to Luis M. Drago, then the Venezuelan secretary of foreign affairs, formally protesting the 'collection of loan by military means', which he equated with 'territorial occupation' of Venezuelan territory.[2] The Drago doctrine heralded the subsequent crystallization of the prohibition of the use of force in collecting contract debt as a principle of international law in the early 20th century.[3]

In the aftermath of World War II, protecting commerce from the scourge of war became a primary inspiration for a new international economic order.[4] The devastating effects of World War II inspired the creation of the Bretton Woods institutions and the United Nations (UN) as the principal tenets of an institutional framework predicated on peaceful resolution of conflict. Simultaneously, the post-World War II international economic governance also supplied alternatives to territorial conquests as means of accessing resources by private corporate actors.[5] Although the early celebration of international law as an entirely non-coercive solution for resolving domestic and global issues has been subjected to much scrutiny, for Gathii, the pragmatism and functionalism of international law still have much to offer to counter the dark forces that have led to violent conflict in the past.[6] This promise of international law, however, does not obviate the need – and perhaps renders it even more essential – to acknowledge and articulate the legacies of imperial and colonial conquests that the rules and doctrines of international law relating to war and commerce carry with them.[7] International economic law has its foundations in what Sven Beckert has called 'war capitalism', and its history is 'rooted in forms of coercion and violence designed to promote the interests of powerful states and their multinational enterprises'.[8]

While all three books under review pursue different objectives and ask different questions, the legacies of empire and colonialism inevitably resurface as the implicit, albeit often unarticulated, premise underlying all core issues of international

1 James Gathii, 'War's Legacy in International Investment Law', 11 *International Community Law Review* (2009) 353.
2 *Ibid.*
3 *Ibid.*, at 357.
4 *Ibid.*, at 353.
5 *Ibid.*, at 354.
6 *Ibid.*
7 J.T. Gathii, *War, Commerce, and International Law* (2010), at xv.
8 J. Linarelli, M.E. Salomon and M Sornarajah, *The Misery of International Law: Confrontations with Injustice in the Global Economy* (2018), at 111, citing S. Beckert, *Empire of Cotton: A Global History* (2015).

investment law pertaining to armed conflict explored therein. A broader, more historically grounded reading of these diverse contributions invites us to look behind the key actors and processes of international investment law and to think beyond the traditional justifications for the role that international law plays or should play in protecting business actors in times of conflict. In what follows, this review essay will situate the core arguments made in the books under review within the broader conceptual framework of the relationships between foreign corporations, states and local communities. The principal objective is to uncover some of the fundamental and overarching themes underpinning such relationships and to articulate the issues that often remain hidden behind the traditional narratives and justifications of international investment law and other legal regimes governing investment and conflict. By doing so, the essay seeks to go beyond the dominant narratives whereby private business actors are primarily seen as creators of prosperity and thus deserve extensive legal protections in host states. After taking a critical look at the typologies of conflict in section 2, sections 3–7 each focus on the distinct roles played by the corporation in situations of conflict: as a victim, contributor, beneficiary, perpetrator and accomplice, respectively. The essay aims to cast light on international law's troublesome origins, biases and complicities and to highlight a growing concern over the enduring lack of effective avenues for corporate accountability.

2 Typologies of Conflict and the Many Roles of Corporation

To begin with, what is conflict, and when and how do international investment protections come into play to safeguard commercial interests? In international humanitarian law (IHL), armed conflict is defined as a situation involving the 'resort to armed forces between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.[9] Zrilic notes that armed conflict clauses in investment treaties have engendered a different, autonomous concept of conflict – a concept that has a lower applicability threshold than that which was developed in IHL.[10] Drawing on the insights from the 19th- and early 20th-century scholarly debates, legislative proposals and investment jurisprudence, Zrilic proposes a typology of conflicts, distinguishing between (i) international armed conflicts, (ii) internal armed conflicts and (iii) collective protests, including riots and violent demonstrations.[11] What is notable is that internal conflicts include armed violent events that involve non-state groups fighting the governing regime or fighting between themselves. This category, notes Zrilic, crosses the rigid frontiers of armed conflict defined by IHL and includes such events as internal disturbances like the Arab Spring revolutions, where the host government may lose control over the situation

[9] Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadic* (IT-94-1-T), ICTY, 2 October 1995, para. 70.

[10] J. Zrilic, *The Protection of Foreign Investment in Times of Armed Conflict* (2019), at 9.

[11] *Ibid.*, at 11.

or part of the territory.[12] The third category, in turn, comprises 'violent events and clashes carried out by a large group of people that are typically precipitated by unpopular economic or social policies or motivated by xenophobic sentiments'.[13]

While Zrilic's typology is helpful for differentiating between distinct categories of conflict and identifying the applicable legal rules, it reminds us that the root causes of conflict may defy a rigid categorization. It also reminds us that the varying definitions and typologies of conflict are not just an exercise in disciplinary ordering; rather, the existing categories can obscure the multitude of forces and actors at play in each type of conflict and the distinct international legal responses they elicit. What the reader could glean from all three volumes under review is that the prevailing legal definitions and typologies of conflict – and the attendant notions of states' international responsibility to protect commercial interests – are predicated on a certain vision of statehood – here, the Westphalian state with exclusive territorial jurisdiction and control.[14]

What is more, the definitions of conflict in contemporary international law have long underplayed the role of private actors, including private business actors, in using or encouraging the use of force, waging wars or otherwise benefiting from violence. Already in the 18th and 19th centuries, chartered trading corporations were mandated to wage war to expand the commercial interests of European powers.[15] Vested with military, judicial and diplomatic power, these mercantile corporations eroded the boundaries between 'the economic and political, non-state and state, property rights and sovereignty, the public and private'.[16] Violence has long been 'marketized as a commodity beyond the presumed monopoly of the state'.[17]

Indeed, one of the key themes that runs through all three volumes is the different roles the corporation has historically played on the conflict stage. While none of the three books have the corporation as the principal object of analysis, the narratives and arguments advanced invariably converge around the corporation as a salient, albeit not always the most visible, actor in armed conflict. Although the corporation can simultaneously or otherwise be a victim, perpetrator, accomplice and benefactor of violence, international investment law – and the wider corpus of rules governing armed conflict and the rights of those affected by it – tends to favour its own distinct visions of the role that private business actors play in monetizing, encouraging the use of or suffering from violence. As discussed in the following sections, all three books under review compellingly demonstrate that, for international investment law, the corporation is predominantly a victim of conflict, and it is perhaps this clarity of vision that lies beneath the creation of some of the most wide-ranging, powerful and enforceable protections afforded to private business actors in international law. Contrastingly, readers will find that international law is yet to effectively address the

[12] *Ibid.*
[13] *Ibid.*
[14] See further Gathii, *supra* note 7, at 192–193.
[15] *Ibid.*, at 197.
[16] J. Thompson, *Mercenaries, Pirates and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (1994), at 10–11; Gathii, *supra* note 7, at 201.
[17] Gathii, *supra* note 7, at 193.

rather contentious, troubling and under-regulated roles that the corporation can play, including as an enabler, contributor and beneficiary of conflict.

3 The Corporation as a Victim of Conflict in Developing States

In keeping with its time-honoured tradition, the primary objective of international investment law and the protections it offers is to ensure the investor is safeguarded from outbreaks of war. Regardless of whether the harm suffered by investors is attributed to the host state or third parties, the central premise of international investment law is that investors should be adequately shielded from violence and upheavals. In cases involving conflict-ridden states – as well as developing countries generally suffering from a lack of institutional resources – investors are often presented as victims of instability or of non-existent or inadequate legal and institutional mechanisms. This understanding reflects a particular vision of investors (deserving of strong and effective protections when operating abroad) and of host states (expected to be strong and effective, capable of pre-empting conflict and maintaining the conditions essential for foreign investment to thrive).

The idea that weak states should be punished for their inability to prevent and rein in violence, and thus shield investors from conflict-related losses, is not new. Zrilic recounts the *Sambiaggio* case,[18] in which the Italian-Venezuelan Claims Commission was tasked with determining whether the host state was responsible for losses incurred by Italian nationals during the 1892 revolution and civil war in Venezuela. In the Venezuelan commissioner's view, situations involving lasting internal disorder reflected the state's loss of control and demonstrated its inability to protect the property and commercial interests of foreigners. He pointed out that foreigners had been aware of the circumstances and had willingly assumed the risk.[19] By contrast, the Italian commissioner's stance very much reflected the prevailing sentiments of US and European powers. He argued that countries in which internal disorders were commonplace and, therefore, foreseeable were under a duty to 'show higher levels of vigilance in protecting foreigners'. [20] A similar stance was taken by the umpire, Henry M. Duffield, of the German-Venezuelan Mixed Claims Commission who considered that 'the continuously turbulent conditions of the host state extended the scope of the state's responsibility'.[21]

To Zrilic, these cases capture the profound schism between the views on what a well-organized state is expected to do and what a particular state is able to do for foreign investors in such circumstances. Zrilic notes that '[di]fferentiation between Western civilized nations and the unruly periphery was advocated by influential, mostly American, legal scholars and diplomats', and it was relied upon 'as a legal justification

[18] *Sambiaggio Case (Italy v. Venezuela)*, 13 February and 7 May 1903, reprinted in UNRIAA, vol. 10, 499.
[19] Zrilic, *supra* note 10, at 26.
[20] *Ibid.*, at 26.
[21] *Ibid.*

for military intervention in less powerful countries when the latter failed to protect Western nationals and economic interests in the course of disorder'.[22] He is critical of the stances whereby a failure to be well organized should lead to state responsibility towards foreign investors. Instead, Zrilic advocates for a 'more nuanced view' according to which the continuity or recurring nature of a conflict would necessitate foreign investors to adjust their expectations as to the level of security in a volatile country and require the state to adjust its means and capabilities to the new realities, to the extent that this is possible.[23]

Echoes of the fundamental disagreement in the reasoning of the commissioners in *Sambiaggio* can be detected in investment arbitration today. Contemporary international investment law largely preserves the continuity of the early 20th-century idea that host states, irrespective of their historical struggles with conflict and instability and of their inability to restore and maintain lasting peace, have a duty to investors to protect against harm that arises as a result. One could argue that the two key investment treaty provisions governing state responsibility in times of conflict – the so-called war clauses and the full protection and security (FPS) standard – have been designed and continue to be construed in a manner that caters to the interests of powerful investors *vis-à-vis* weak(er) states of the global South. As Suzanne Spears and Maria Fogdestam Agius reveal in their chapter in the edited collection, some investment treaties contain war clauses that impose a form of strict liability with/via an obligation for the host state to compensate investors for damage from war and civil disturbance, irrespective of whether the loss was caused by governmental forces or non-state actors.[24] This is reminiscent of writings advocating the theory of absolute responsibility at the turn of the 20th century. Zrilic draws attention to one such scholar, Paul Fauchille, who argued that 'foreign investors brought development and money to the state in which they had invested and should therefore be protected under risqué étatif, hence obliging the host state to assume the risk of violent events and compensate investors for any damages suffered in the course thereof'.[25] Even at the time, support for the idea of absolute responsibility was exceptional,[26] making it all the more startling that contemporary investment treaties still contain provisions to the same effect.

It is, however, the FPS standard that exposes international law's enduring juxtaposition between civilized nations and their 'less orderly' counterparts and how these categories bear on the scope of privileges and protections afforded to corporations investing therein. The edited volume by Gómez, Gourgourinis and Titi features Christoph Schreuer's primer on the key standards of protection in times of conflict.[27]

[22] *Ibid.*

[23] *Ibid.*, at 27.

[24] Spears and Fogdestam Agius, 'Protection of Investments in War-Torn States: A Practitioner's Perspective on War Clauses in Bilateral Investment Treaties', in K.F. Gómez *et al.* (eds), *International Investment Law and the Law of Armed Conflict* (2019) 283, at 296.

[25] Zrilic, *supra* note 10, at 22, citing Fauchille, 'Droits et devoirs en cas d'insurrection', 18 *Annuaire de l'Institut de droit international* (1900) 234.

[26] *Ibid.*, at 22.

[27] Schreuer, 'War and Peace in International Investment Law', in Gómez *et al.*, *supra* note 24, 12.

Schreuer notes that the ubiquitous FPS standard is at times framed as the 'most constant protection and security' standard. While Schreuer believes this variation of the language to be of no significance, to this reviewer the term 'most constant protection' once again highlights the function of investment treaties as mechanisms designed to insulate investors from harm at all times, including when violence and conflict may upend the functioning of an entire society. This choice of language reflects what Kathryn Greenman describes as 'international investment law's implication in a neoliberal project to entrench a particular vision of the strong but limited state'; the state, whose sole function is to ensure that the economic *status quo*, comprising the existing rights and privileges of foreign investors, is shielded from democratic or revolutionary contestation.[28] The FPS standard is designed to achieve this effect by placing host states under an obligation of due diligence in protecting foreign investment: 'full protection and security' means that the host state is expected to act diligently and take measures necessary in order to protect investors from forcible interference.[29]

In the investment treaty context, the contours of the FPS standard were first articulated in *Asian Agricultural Products Ltd. V. Sri Lanka,*[30] a landmark investment arbitration award based on the events that took place in January 1987. The opening pages of Zrilic's book provide a haunting reminder of the circumstances from which the case arose:

> Mahiladittivu is a small Tamil village, surrounded by paddy fields and a lagoon, on the eastern coast of Sri Lanka. The villagers recall that there was a prawn farm that used to be the source of the local livelihood. … On 28 January 1987, the Sri Lankan special task forces stormed into the village, besieging it from air, water, and land. Their target was the farm, where they rounded up the workers and the villagers who happened to be there, took them to the nearby road junction, and shot them. More than eighty Tamil civilians were killed, their bodies never to be retrieved. The farm was burnt to the ground.[31]

The investor who owned the farm brought a case against Sri Lanka, arguing that the host government breached its FPS obligation. In applying the FPS standard to conflict-caused losses, the most fundamental question was whether the diligent conduct should be measured against an objective standard or against the background of local host state conditions.[32] The spectrum of scholarly and jurisprudential takes on this question mirrors the long-standing tradition of construing international obligations of a state depending on whether it is a member of a group of civilized nations or belongs to the unruly periphery. To illustrate the point, some authorities espouse the view that, in determining whether a host state has fulfilled its due diligence obligation, its measures should be tested against the conduct of a modern, reasonably organized government under similar circumstances. The benchmark, in the words of the *Asian*

[28] Greenman, 'Protecting Foreign Investments in Revolution and Civil War: Critiquing the Contemporary Arbitral Practice', 9 *London Review of International Law* (2021) 293, at 314.

[29] Schreuer, 'War and Peace in International Investment Law', in Gómez *et al.*, *supra* note 24, 12.

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

[31] Zrilic, *supra* note 10, at 1.

[32] *Ibid.*, at 102.

Agricultural Products Ltd tribunal, is what a "well-administrated government" could do in like circumstances. All states, regardless of their individual circumstances, must adhere to this arguably objective benchmark.[33]

The modified version of this objective standard, as endorsed in the number of investment arbitration cases reflecting a shift towards what Zrilic describes as a more tempered approach, still requires the host state to exercise an objective minimum standard of due diligence,[34] but subject to a concession that the state's conduct is assessed against what could reasonably be expected of the state in the given circumstances and in the light of its resources.[35] Zrilic points to the award in *Pantechniki v. Albania*, where the arbitrator stressed the importance of accounting for local conditions: 'A failure of protection and security is … likely to arise in an unpredictable instance of civic disorder which could have been readily controlled by a powerful state but which overwhelms the limited capacities of one which is poor and fragile … it seems difficult to maintain that a government incurs international responsibility for failure to plan for unprecedented trouble or unprecedented magnitude in unprecedented places.'[36]

Ira Ryk-Lakhman endorses a broadly similar idea or a more tempered approach, this time by drawing parallels between the FPS and the customary international humanitarian law obligation to take precautionary measures against the effects of hostilities, in her chapter in the edited collection by Gómez, Gourgourinis and Titi.[37] She supports the view that the assessment of a host state's compliance with the FPS standard should turn on the particular circumstances of the host state, including its financial, technological and human resources.[38] At the other end of the spectrum are those individuals who, like Sébastien Manciaux in his contribution to the same volume, acknowledge that 'not all states are equal in terms of means at their disposal for complying with the due diligence commitment'.[39] Despite acknowledging the existence of inequality, these authors are unwilling to take it into account when determining the scope of state responsibility towards investors. '[I]t is certainly not desirable', argues Manciaux, 'to allow less developed states to take advantage of their situation in order to escape from the commitments they took in this respect under international law'.[40]

Irrespective of where one stands along this spectrum of views, the cost of due diligence can be staggering. Ryk-Lakhman's chapter supplies a powerful example: in 2007, Afghanistan awarded a 30-year contract to extract copper at Mes Aynak to Metallurgical Corporation of China (MCC). Between 2008 and 2014, the copper mine investment was subjected to constant attacks by the Taliban, with the government of

[33] *Ibid.*, at 103.
[34] *Ibid.*, at 104, quoting A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties* (2009), at 504.
[35] Zrilic, *supra* note 10, at 104.
[36] *Ibid.*, at 104, citing ICSID, *Pantechniki SA Contractors and Engineers v. Albania – Award*, 28 July 2009 ICSID Case no. ARB/07/21, para. 77.
[37] Ryk-Lakhman, 'Protection of Foreign Investments Against the Effects of Hostilities: A Framework for Assessing Compliance with Full Protection and Security', in Gómez *et al.*, *supra* note 24, 259.
[38] *Ibid.*, at 279.
[39] Manciaux, 'The Full Protection and Security Standard in Investment Law: A Specific Obligation?', in Gómez *et al.*, *supra* note 24, 217, at 223.
[40] *Ibid.*, at 224.

Afghanistan having to take costly measures to protect the MCC's investment. Armed forces were deployed to guard the investment, workers were supplied with armed vehicles, bunkers and shelters were built on site, all to the tune of over US $210 million.[41] These measures notwithstanding, the investment project incurred significant economic harm due to the attacks. Ryk-Lakhman argues that, with due regard given to the plight of Afghanistan, as one of the world's poorest and most conflict-ridden countries, the measures taken by the Afghan government to protect the MCC's operations met the standard of what is practicable in the prevailing circumstances under international humanitarian law, yet would likely fall short of the due diligence standard under the FPS provisions in investment treaty law.[42] While foreign investors may indeed be frequent victims of conflict in developing states, they are also beneficiaries of the rules through which international investment law holds such states to often unattainable standards.

4 The Corporation as a Victim of Conflict: Investors versus Aggressor Host States

One way in which the edited volume by Gómez, Gourgourinis and Titi makes a valuable contribution to the (largely doctrinal) literature on the subject is by casting light on the sites of recent conflicts and novel legal issues that such conflicts have raised. Prominent among these accounts are those elucidating the legal issues concerning the status of foreign investment in areas under Russian control in the aftermath of the annexation of Crimea and in Eastern Ukraine. A number of disputes have been initiated by investors claiming redress for the illegal use and expropriation of their investments. For instance, the dispute in *Belbek v. Russia* arose from the seizure of Belbek airport by armed men and a subsequently issued Russian decree confirming that the airport would be operated by pro-Russian authorities. In *Naftogaz and Others v. Russia*, the investors contended that Russia had undertaken a nationalization of the company's assets in Crimea, ultimately transferring them to a Russian state-owned company.[43]

In these cases, foreign investors are as much the victims of illegal occupation as the host states that have lost control over their territory. Yet the protection of foreign investment in such circumstances raises important questions about the role that international investment law plays in legitimizing occupation. Tobias Ackerman's chapter highlights this tension. First, he explores the legal bases for the territorial application of the Russia-Ukraine bilateral investment treaty (BIT)[44] to disputes concerning

41 Ryk-Lakhman, *supra* note 37, at 275.

42 *Ibid.*, at 278.

43 Rees-Evans, 'Litigating the Use of Force: Reflections on the Interaction between Investor-State Dispute Settlement and Other Forms of International Dispute Settlement in the Context of the Conflict in Ukraine', in Gómez *et al.*, *supra* note 24, 192.

44 Agreement between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments (27 November 1998).

foreign investment in Crimea. The key questions are: has Russia, through its annexation of Crimea, incurred responsibility for Ukrainian treaty obligations; is Russia bound by its own treaty obligations by virtue of its control over Crimean territory; can an investment tribunal exercise jurisdiction *ratione loci* with regard to investments made in occupied territory and, importantly, what could be the broader overarching consequences of such an exercise?[45]

Similar questions arise in relation to investments in Eastern Ukraine in Donetsk and Lugansk, discussed by Laura Rees-Evans in her chapter. Both authors concur that, although Ukrainian investment treaties continue to form part of the laws in force in the occupied territory, the occupying state – Russia – is not directly bound by them. It is Russia's own BITs that investors in Crimea have so far been able to draw on to bring their claims within the jurisdiction of arbitral tribunals. While the willingness of arbitral tribunals to accept de facto control by Russia over Crimea as a basis for exercising jurisdiction under the Russia-Ukraine BIT has served the interests of aggrieved investors, Ackerman sounds a note of caution against using the occupant's own treaties to the occupied territory: albeit well-intentioned, such an interpretation of the territorial scope of investment treaties 'threatens to normalise and thus prolong occupation or even contribute to the de facto legitimisation of illegal annexation'.[46] The issue is of particular significance in the wake of Russia's invasion of Ukraine: can international investment law be complicit in legitimizing illegal occupation in the name of protecting foreign commercial interests?

5 The Corporation as a Contributor to Conflict: Foreign Investors and Fuelling Socio-economic Discontent

The third category in Zrilic's taxonomy of conflict is collective protests, including riots and violent demonstrations. This species of conflict comprises violent clashes involving a large group of people opposed to unpopular economic or social policies.[47] A major question is who should be responsible for the loss occasioned during such events, especially since investment arbitration jurisprudence reveals that foreign investors are not always victims or innocent bystanders and may on occasion be directly implicated in the origins or effects of disputed economic or social measures at the root of the unrest. For instance, in *Bear Creek v. Peru*, the investor did not directly suffer from the effects of violence (the project had not started), but its conduct significantly contributed to the outbreak of protests and violent clashes. The dispute in *Bear Creek* involved a Canadian investor's mining licence in Peru. From the outset, the investor's projected mining operations engendered strong opposition among the local population.[48] The project encompassed the lands traditionally occupied by the

[45] Ackermann, 'Investments under Occupation: The Application of Investment Treaties to Occupied Territory', in Gómez *et al.*, *supra* note 24, 67, at 68.

[46] *Ibid.*, at 89.

[47] Zrilic, *supra* note 10, at 11.

[48] ICSID, *Bear Creek Mining v. Peru – Award,* 30 November 2017, ICSID Case no. ARB/14/21, para. 152.

Aymara people, a group of interconnected indigenous communities.[49] These communities expressed concerns over the project's environmental impact on their lands. Significant concerns were voiced in relation to the economic benefits of the project as well as whether the investor's promised social support commitments extended to all affected indigenous groups. While the investor was made aware of these grievances as early as 2008, by 2011, the members of the excluded communities manifested their opposition to the project by rejecting it at a public hearing, followed by a series of protests demanding the cancellation of the mining concessions.[50] The protests subsequently escalated into the blockading of major roads and violent clashes with police, with the government of Peru having to bring in armed forces to contain the unrest.[51] To resolve the situation, the government announced a number of measures, including a decree revoking legal instruments constituting the basis of the investor's mining rights.[52] The investor disputed this decision and was awarded damages for the actions, which the tribunal found to constitute an unlawful expropriation and a breach of fair and equitable treatment.

Was the corporation in this case a victim of conflict or, rather, a perpetrator/contributor? The tribunal was split, and the disagreement between the majority and the dissenting arbitrator is emblematic of a growing unease about how investment treaty law apportions responsibility in the aftermath of conflicts involving investors, aggrieved local communities and host states. Who should bear the economic costs of internal clashes prompted by a disagreement over the location, nature and socio-economic impacts of an investment project? The *Bear Creek* majority expressly acknowledged that some local communities, including those likely to face the project's negative effects on water and other natural resources, were not brought into the process and offered work or other forms of recompense.[53] However, it denied the existence of a causal link between such failure on the part of the investor and the subsequent social unrest.[54] By contrast, the dissenting arbitrator found the majority's conclusion to be at odds with the totality of evidence heard by the panel as well as the majority's earlier finding that the investor 'did not do all it could have done to engage with all the affected communities'.[55] In the view of the dissenting arbitrator, the investor's contribution to the events culminating in the protests was significant and warranted the reduction of the amount of damages due.[56] For the majority, the investor was a victim of the government's failure to prevent the social unrest and of national laws that could have better implemented the International Labour Organization's Convention No 169[57] principles concerning social licence to operate. In the dissenting arbitrator's

[49] See *ibid.*, paras 150–174; see also Dissenting Opinion of Phillipe Sands, paras 16–18.
[50] *Ibid.*, paras 172–201.
[51] *Ibid.*, paras 189–198.
[52] *Ibid.*, paras 201–202.
[53] *Ibid.*, para. 406.
[54] *Ibid.*, para. 411.
[55] *Ibid.*, para. 35.
[56] *Ibid.*, paras 38–39.
[57] International Labour Organization, 'Convention Concerning Indigenous and Tribal Peoples in Independent Countries' (ILO No.169), 72 ILO OFFICIAL BULL. 59., reprinted in 28 I.L.M. 1382 (1989).

opinion, the investor should have borne at least some responsibility for its contribution to the social unrest. Merryl Lawry-White's chapter in the edited collection makes a brief reference to the principle of contributory fault – and a broader notion of responsible corporate conduct – as part of her analysis of the broader framework of binding and non-binding rules governing foreign investment.[58] Despite her finding of 'increasing emphasis on an expectation that corporations act as responsible "global citizens"', cases such as *Bear Creek* show that investment treaties still lack concrete mechanisms to hold corporations to their promises and that it is the host states rather than investors that are expected 'to facilitate a culture of and commitment to human rights, environmental and labour norms'.[59]

6 The Corporation as a Beneficiary of Conflict

In Davitti's analysis of international investment law and its intersection with international human rights law (IHRL), the corporation is not only an occasional perpetrator of socio-economic injustices that fuel internal conflict but also a beneficiary of conflict, and international investment law is an enabler thereof. Davitti acknowledges that corporations are often attributed the powers of transforming armed conflict and building peace through their economic activities and corporate social responsibility.[60] Yet corporations can also be potential 'spoilers of peace'.[61] In particular, foreign investors in the extractive sector can be seen as often fuelling armed conflict because they benefit from a weakened state capacity and/or willingness to protect the interests of the people. Such companies may end up participating in war economies that revolve around the exploitation of natural resources and create 'new opportunities for the elites of competing factions to pursue their economic agenda'.[62]

Foreign investors may also be attracted by conflict because, despite the perils of instability, legal frameworks in conflict-ridden states are frequently not so sophisticated as to subject the investor to stringent environmental protection and taxation.[63] For instance, one of the most controversial foreign investment projects in recent times, Mes Aynak, remained largely inaccessible to public scrutiny for years.[64] No *ex ante* environmental impact assessments and/or human rights impact assessments were undertaken to identify and address the negative impacts that copper extraction could have on the environment and local communities.[65] This is despite the fact that the Mes

[58] Lawry-White, 'International Investment Arbitration and Non-binding Standards Applicable in Conflict: Parallel or Merging Worlds?', in Gómez *et al.*, *supra* note 24, 411.

[59] *Ibid.*, at 436

[60] D. Davitti, *Investment and Human Rights in Armed Conflict: Charting an Elusive Intersection* (2019), at 20, citing Subedi, 'Pro-peace Entrepreneur or Conflict Profiteer? Critical Perspective on the Private Sector and Peacebuilding in Nepal', 38 *Peace and Change* (2013) 181, at 182.

[61] Davitti, *supra* note 60, at 21.

[62] *Ibid.*, quoting M. Berdal and D.M. Malone (eds), *Greed and Grievance: Economic Agendas in Civil Wars* (2000), at 3.

[63] Davitti, *supra* note 60, at 49.

[64] *Ibid.*, at 98.

[65] *Ibid.*, at 99.

Aynak deposit straddles the two main aquifers serving not only the Afghan capital Kabul and its over 3.5 million inhabitants but also the regions that stretch eastwards towards the border with Pakistan.[66]

To Davitti, the characterization of extractive companies as 'pro-peace entrepreneurs' or as predatory 'conflict profiteers' does not always reflect the practical situation on the ground. While admitting that extractive companies often play both positive and negative roles,[67] Davitti questions the role of international law and international organizations in encouraging unbridled investment and supporting the relevant regulatory and market restructuring without paying due regard to the negative impacts large-scale investment projects can have for already fragile and destabilized areas. Foreign investor-led projects in the extractive sector may lead to further conflicts for access to, and control over, land and resources, causing displacement of local communities; irreversible contamination of freshwater sources; damage to human and animal health; and increased corruption and armed violence.[68] Davitti seeks to highlight 'the tension between, on the one hand, the need for a conflict country to ensure financial resources to stabilise and reconstruct its systems and infrastructures and, on the other hand, the need to ensure that natural resources extraction does not further exacerbate the situation in which the civilian population finds itself in the midst of armed conflict'.[69] International investment law, she argues, operates in a manner that does not resolve this tension but, rather, enables business practices that fuel conflict.

Indeed, irrespective of where one stands on the spectrum of views ranging from a full condemnation to unwavering support of the investment treaty regime, it is now widely acknowledged that investor responsibilities towards local communities have long been seen as an issue falling outside the scope of investment treaties and the jurisdiction of investment tribunals. Investment treaties grant protection to investors and investments regardless of what one may regard as their controversial origins, dubious aims and harmful effects. The built-in indifference of the investment treaty regime to the quality of investment projects, coupled with foreign investment being seen by poor and conflict-ridden countries as a panacea for aid shortages, leads to what Davitti describes as 'the liberal management of vulnerability', whereby 'the conditions of local inhabitants become of secondary importance and their vulnerability, rather than being something that needs overcoming, becomes something that needs to be efficiently administered'.[70]

Foreign investors might also benefit from conflict in more direct and concrete ways. After all, as Gathii reminds us, war is as much a business as the secretive trade in high-end resources.[71] Just like the chartered trading corporations of the 18th century, which waged wars to access resources and gain control over new territories, war and violence in the contemporary world have increasingly become commercialized. One

66 *Ibid.*
67 *Ibid.*, at 21.
68 *Ibid.*, at 20.
69 *Ibid.*, at 18.
70 *Ibid.*, at 8–9.
71 See Gathii, *supra* note 7, ch. 6.

example of this commercialization of conflict is the outsourcing of several military-related functions in the conduct of recent interstate wars by the military of developed states. These usually range from basic support functions, such as laundry services, catering, maintenance of military vehicles and aircrafts, to conducting combat.[72] Another example of a private business actor whose aim is to directly profit from conflict is a private military and security company. The consumers of this 'private market for security provisioning and warriors' are large multinational corporations as well as non-governmental and intergovernmental organizations, especially those operating in conflict zones in developing countries: 'Investors and states buy the services of paramilitary and other groups like they would buy other inputs to enable them to do what they do.'[73]

Private military companies can be classified as investors in their own right as well as forming a crucial part of the infrastructure on which other investors – often large multinational corporations – rely when investing in conflict countries. The recent rise in the use of private military and security companies thus reveals the multiple and shifting roles the corporation can play in times of conflict: from the consumer of military services to the supplier thereof. Unsurprisingly, the lack of binding international rules and remedies to govern this dark corner of the market is perhaps reversely proportionate to the breadth and strength of protections afforded to private actors under international investment law. As Lukas Vanhonnaeker notes in his chapter in the edited collection, the absence of a comprehensive international regulatory framework can lead to instances of human rights violations left unpunished without mechanisms to hold such companies accountable.[74] When read as a whole, the edited collection by Gómez, Gourgourinis and Titi casts a startling light on the long-criticized asymmetry between the degree of protection that investors enjoy under international law in times of conflict and the lack of accountability for their actions contributing to conflict or benefiting thereof.

7 The Corporation as a Perpetrator and Accomplice

The growing recourse to the services of private military and security companies – and other forms of commercialization of violence – highlights the fact that corporations may at times find themselves straddling the boundary between profiting from conflict and perpetrating it. Historical examples are not limited to the chartered trading corporations of lore. Textbook cases for business and human rights scholars include Shell's involvement in human rights atrocities in Nigeria and Unocal's partnership with the Burmese military regime to build the Yadana natural gas pipeline, resulting in mass instances of forced labour, displacement, torture and rape. More recently, in a

[72] *Ibid.*, at 227.
[73] *Ibid.*, at 224.
[74] Vanhonnaeker, 'The Recourse to Private Military and Security Companies by Foreign Investors in Conflict-affected Countries: Dangers, Opportunities and the Need to Regulate', in Gómez *et al.*, *supra* note 24, 487, at 503.

case brought against the cement giant Lafarge, a French appeals court upheld charges of financing terrorism and endangering the lives of others during Syria's civil war.[75] Against the relative shortage of investment law scholarship addressing the commission of, and complicity in, violence by corporate actors,[76] Kevin Crow's chapter in Gómez, Gourgourinis and Titi's volume offers a much welcome overview of the key legal issues surrounding corporate participation in mass atrocities and human rights violations in times of conflict.[77] His 'hypothetical' case studies include Monsanto's role in producing and supplying Agent Orange, one of the herbicides used by the USA during its war in Vietnam that caused mass casualties among the civilian population. Another such hypothetical case scenario involves Northrop Grumman, the USA's largest producer of drone-related communications and navigations technologies, which were deployed during the war in Afghanistan. Crow concludes that, while it would be 'desirable to incentivize corporations to double-check the effect of the military products they are contracted to manufacture or the services they are contracted to provide', the fundamental question is how international legal subjectivity is designed to shield corporations from liability and then to identify and critique the factors that motivated that design.[78] Crow observes that individuals increasingly incur obligations to the international community through treaties, such as the Rome Statute of the International Criminal Court.[79]

Yet the subjectivity of corporations to international law on the basis of their status as 'organs of society' is certainly a question that warrants further discussion.[80] Others argue that the regulation of corporate entities involved in supplying military services or otherwise involved in committing violence 'would ideally include the conduct of both these suppliers of violence, as well as the consumers who pay for it'.[81]Crow's reasoning echoes Gathii's early writings on the subject where he argued that the solution is to identify the individual behind a corporate disguise: 'Incorporation ought not to be used as a disguise for the conduct of individuals.'[82] There is a number of precedents where international courts and tribunals, including the ICC and ad hoc criminal tribunals – from Rwanda to Sierra Leone and Cambodia – were charged with seeking individual criminal responsibility.[83] At the same time, there 'have been few, if any, instances in which the often clandestine activities of the corporations involved in

[75] 'French Court Upholds Syria "Complicity in Crimes Against Humanity" Charge against Lafarge', *France24*, 18 May 2022, available at www.france24.com/en/live-news/20220518-paris-court-upholds-charges-of-complicity-in-crimes-against-humanity-linked-to-lafarge-s-cement-plant-in-syria.

[76] The notable exception is D. Lustig, *Veiled Power: International Law and the Private Corporation, 1886–1981* (2020), which elucidates the *Industrialists* trials at Nuremberg and their contribution to shaping international rules on corporate accountability.

[77] Crow, 'Corporations and Crimes against Humanity: Financial Liability through ISDS?', in Gómez *et al.*, *supra* note 24, 459.

[78] *Ibid.*, at 484.

[79] *Ibid.*, at 465; Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

[80] Crow, *supra* note 77, at 485.

[81] Gathii, *supra* note 7, at 229–230.

[82] *Ibid.*, at 238.

[83] *Ibid.*

arms dealing and the purchase of conflict resources … have been charged with international criminal responsibility for their conduct'.[84]

8 Corporate Accountability: Seeking Solutions within and outside International Investment Law

While corporate involvement in perpetrating violence and conflict has received much attention elsewhere in international legal scholarship,[85] Davitti is concerned about international investment law and its own complicity in enabling and condoning corporate transgressions in conflict zones. With investment treaties famously providing for investor protections but not investor obligations, there has been little progress in investment jurisprudence. The exception is *Urbaser v. Argentina*, which, despite having nothing to do with conflict, is considered as a breakthrough case owing to its engagement with issues of corporate accountability for human rights breaches.[86] The claimant, Urbaser, held shares in a concessionaire that supplied water and sanitation services in Buenos Aires. The dispute concerned emergency measures adopted by Argentina in the wake of its 2001–2002 financial crisis, which, according to the investor, breached several provisions of the Spain-Argentina BIT.[87] For its part, Argentina brought a counterclaim arguing that the concessionaire breached the human right to water through its failure to adequately invest in the concession. In a groundbreaking fashion, the tribunal accepted jurisdiction over the counterclaim. To establish the legal basis of corporate obligations *vis-à-vis* the human right to water, the tribunal drew on the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights.[88] In the tribunal's view, these instruments were addressed not only to states but also to corporations.

While acknowledging that *Urbaser* has been groundbreaking in its willingness to open up legal avenues for corporate accountability in investment arbitration, Davitti points to a significant weakness in the position adopted by the tribunal – in particular, the tribunal's view that, in international law, 'the human right to water entails an obligation of compliance on the part of the state, but does not contain an obligation for performance on part of any company providing the contractually required service'.[89] The tribunal held that, if the host state wanted to hold investors to legally binding obligations, these should be introduced in the legal framework applicable to the investor at the time of the investment – for instance, in the concession

[84] *Ibid.*, at 239.

[85] See, e.g., D. Lustig, *Veiled Power: International Law and the Private Corporation*, 1886–1981 (2020), ch. 5; I. Bannon and P. Collier (eds), *Natural Resources and Violent Conflict: Options and Actions* (2003).

[86] ICSID, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic – Final Award*, 8 December 2016, ICSID Case no. ARB/07/26.

[87] Agreement between the Argentine Republic and the Kingdom of Spain on the Reciprocal Promotion and Protection of Investments (3 October 1991).

[88] Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948; International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3.

[89] *Urbaser*, *supra* note 86, para. 1208.

agreement and/or domestic law.[90] In his assessment of the case, Crow also applauds the tribunal's willingness to affirm international legal subjectivity for the corporation: '[W]hile past tribunals considered that corporations are not subjects of international law and therefore not duty holders under international law, *Urbaser* found that this approach had "lost impact and relevance" in the present IIL [international investment law] landscape.'[91] However, while detecting some hope in investment jurisprudence, Crow regrets that *Urbaser* affirms subjectivity for corporations but leaves open the characteristics of this subjectivity.[92]

Those who are concerned by the lack of corporate accountability for conflict-related breaches of human rights – as well as for other forms of corporate behaviour that directly or indirectly contributes to or exacerbates the pain and devastation of conflict – can be divided into two camps: those who believe in, and those who are sceptical of, the redeeming powers of international investment law in balancing investment protections with the need to correct and prevent corporate misconduct. Both Davitti and Zrilic appear to be in agreement that IIL's focus on investment protection reduces the state's capacity to address the negative impacts of a conflict. Yet whether solutions to this problem can be found within the investment treaty and arbitration regime is contested. Zrilic appeals to the possibilities offered by general international law, which, he argues, supplies the means for a harmonious interpretation of IIL and IHL obligations. Amongst these, he refers to the general principle of good faith, the principle of proportionality and the police powers doctrine and the principle of systemic integration under Article 31(3)(C) of the Vienna Convention on the Law of Treaties.[93] Another important means of minimizing normative tensions between international investment law, human rights and IHL is for states to incorporate 'appropriately drafted security exceptions, advanced armed conflict clauses and express and precise demarcation of substantive standards'.[94] Still, one can detect his doubt about the ultimate effectiveness of the proposed solutions: Zrilic admits that these interpretive techniques and treaty amendments can be problematic as they endow tribunals with tremendous discretion, potentially resulting in differing interpretations.[95] In the end, he concedes, it is up to arbitrators how they will address the normative tensions, if at all.[96]

By contrast, Davitti is profoundly unconvinced of any possibility of resolving the clash between the protection of investments and the safeguarding of human rights of the vulnerable. Here, she sides with Bruno Simma who argued that easing tension between international investment law and IHRL is like aiming at two moving targets, the problem being that 'the present architecture of international dispute settlement cannot adequately respond to this challenge'.[97] Simma admitted that the

[90] *Ibid.*, para. 1210; Davitti, *supra* note 60, at 165.
[91] Crow, *supra* note 77, at 464, citing *Urbaser*, *supra* note 83, para. 1194.
[92] Crow, *supra* note 77, at 466–467.
[93] Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331.
[94] Zrilic, *supra* note 10, at 184.
[95] *Ibid.*, at 184–185.
[96] *Ibid.*, at 185.
[97] Davitti, *supra* note 60, at 177, citing Simma, 'Foreign Investment Arbitration: A Place for Human Rights?', 60 *International Comparative Law Quarterly* (2011) 573, at 579.

harmonization of competing host states' obligations 'will always be a difficult exercise and sometimes compliance with both sets of obligations will be virtually impossible'.[98] Davitti is equally scathing about the use of proportionality, which is often invoked as a means of balancing the protection of investors with human rights. She quotes a 2013 judgment by the Supreme Court of the United Kingdom, where Lord Reed acknowledged that '[a]n assessment of proportionality inevitably involves a value judgment at the stage at which a balance has to be struck between the importance of the objective pursued and the value of the right intruded upon'.[99] What Davitti proposes instead is to reorientate the debate by focusing on the home state obligations enshrined in Principle 7 of the UN Guiding Principles, which provides for heightened human rights obligations of home states of companies investing in conflict host states.[100] She concurs with Kate Miles that 'the law of capital-exporting states enables their multinational corporations to pursue economic activities globally but disengages when called upon to protect the local communities and environments within which those companies operate'.[101]

To Davitti, the crux of the matter is the notion of the legal separation between a parent company and its subsidiaries. This is a loophole that, she argues, could be closed through access to the courts of the home state.[102] While remaining critical of the work of John Ruggie as special representative of the UN Secretary-General – in particular, his decision not to frame the responsibility of companies in terms of legal obligations that was seen by many as a missed opportunity to ensure legal accountability for corporate violations[103] – Davitti contends that this framing does not automatically exclude binding legal duties emerging under the framework. She pins her hopes on Pillar 1 of the Framework for Business and Human Rights and its focus on the state's capacity to induce the establishment of a corporate culture 'in which respecting rights is an integral part of doing business'.[104] In Davitti's view, to close the accountability gap, a parent/core company should be placed under 'an obligation to comply with certain norms wherever they operate (ie even if they operate in other countries), or an obligation to impose compliance with such norms on the different entities they control (their subsidiaries, or even in certain cases their business partners)'.[105] Drawing support from the right to water where the Committee on Economic, Social and Cultural Rights comments on the right to water, she points to 'a positive duty to adopt a legal

[98] Simma, *supra* note 97, at 591.

[99] Davitti, *supra* note 60, at 181, citing *Bank Mellat v. HM Treasury*, [2013] UKSC 39, para. 72.

[100] Davitti, *supra* note 60, at 190; Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Doc. A/HRC/17/31, 21 March 2011.

[101] Davitti, *supra* note 60, at 169, citing K. Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (2013), at 39–40.

[102] Davitti, *supra* note 60, at 231.

[103] *Ibid.*, at 198.

[104] *Ibid.*, at 204, citing UN Human Rights Council, Protect, Respect and Remedy: A Framework for Business and Human Rights, UN Doc. A/HRC/8/5, 7 April 2008, at 29.

[105] Davitti, *supra* note 60, at 212, citing Commentary to Maastricht Principle 25, in De Schutter *et al.*, 'Commentary to Maastricht Principles on Extra-Territorial Obligations of States in the Area of Economic, Social and Cultural Rights', 34 *Human Rights Quarterly* (2012) 1084.

framework requiring business entities to exercise human rights due diligence in order to identify, prevent and mitigate the risks of violations of Covenant rights, to avoid such rights being abused'.[106] In this manner, 'the due diligence principle is a crucial link between the first two pillars of the Framework, whereby companies – once subject to the legally binding regulation of home and host states – will find themselves unable to avoid compliance with their responsibility to respect human rights, irrespective of where they carry out their activities'.[107] In Davitti's view, UN Guiding Principles 7 and 23 provide a solid basis for a home state obligation 'to introduce, in its domestic legal framework, a requirement for compulsory HRDD [human rights due diligence] for companies domiciled in its territory and or under its jurisdiction; access to the courts of the home state for those who have suffered human rights abuse because of a breach of these domestic obligations; and the imposition of meaningful compensation for such breaches'.[108]

In the final chapter of Davitti's sobering but impassioned account, the extraterritorial application of HRDD obligations emerges as a key solution to address the long-standing asymmetries in a world where corporations enjoy powerful legal privileges without corresponding safeguards for local communities and the war-torn host governments lack the capacity to regulate how and on what terms foreign investment should be allowed to operate within their territories. The consequences of maintaining a *status quo* are dire: '[M]arginalised Afghans who already are unable to access clean water will find it even more difficult to meet their most basic needs, as their interests will be weighed against the competing water demands of extractive companies',[109] whilst 'powerful warlords are already vying to gain control over resource rich areas and access routes to extractive sites'.[110]

9 Corporations and Wars: Setting a Future Research Agenda

In the period following the publication of the books reviewed in this review essay, Russia's invasion of Ukraine took a tragic turn, flames of conflict continue to flare in Afghanistan in the aftermath of the withdrawal of Western armed forces and the governments of war-torn Algeria, Libya and Syria continue to face a growing number of adverse awards for losses incurred by investors in the course of the recent civil wars.[111]

[106] Davitti, *supra* note 60, at 116, citing Committee on Economic, Social and Cultural Rights, General Comment no. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24, 10 August 2017, para. 15.

[107] Davitti, *supra* note 60, at 216.

[108] *Ibid.*, at 220–221.

[109] *Ibid.*, at 228.

[110] *Ibid.*

[111] See, e.g., L. Bohmer, 'Investigation: In Confidential Award, Syria Is Held Liable for Foreign Investor's War Losses, after Tribunal Majority Imports a More Generous War-Losses Protection via BIT's MFN Clause', *IA Reporter*, 19 October 2020; L.E. Peterson, 'Revealed: In Cengiz v. Libya BIT Award, ICC Tribunal Saw Dual-faceted Failure of State to Provide Basic Security during War, but Frowned on Bid for Lost Profits', *Investment Arbitration Reporter*, 9 September 2019; see Howse and Yacoub, 'Litigating Terror in the Sinai after the Egyptian Spring Revolution: Should States Be Liable to Foreign Investors for Failure to Prevent Terrorist Attacks?', 43 *Michigan Journal of International Law* (2022) 595.

A picture emerging from the recent wave of investment arbitration cases confirms the major strands of arguments advanced in the books under review. What Davitti, Zrilic and the contributors to Gómez, Gourgourinis and Titi's volume have collectively revealed, from different angles, is that international investment law affords commercial actors strong and far-reaching protections in times of war and civil disturbance. The protective force of international law is not suspended during conflict, and host states remain under an obligation of due diligence to ensure foreign investors are shielded from the destructive and destabilizing effects of hostilities and unrest.

Yet to establish a similarly effective obligation of due diligence on the part of corporations, one needs to go beyond international investment law and rely upon a complex and convoluted combination of norms and principles scattered across human rights and international humanitarian law instruments and soft law. Contrary to the orthodoxy behind much of the traditional literature on international investment law, investors are not just generators of wealth, prosperity and economic growth. Corporations have also been known to fan the flames of conflict, benefit from it, support the perpetrators of violence, side with aggressor states and otherwise participate in war economies in a manner that raises questions about their entitlement to international legal privileges and protections. The contributions reviewed in this essay have, explicitly or implicitly, unveiled some of the implications of a Janus-faced corporation and the role that international law may play in inadvertently rewarding the darker aspects of corporate behaviour and, certainly, in shielding corporations from responsibility for the harm they cause in conflict settings.

The wars of today, however, raise even more urgent issues about the future of international investment law and the role of the corporation as its principal beneficiary in times of conflict: what will future tribunals make of investors from aggressor states using corporate nationality to challenge sanctions and other fallouts from conflicts such as the Russia-Ukraine war? Can investment tribunals turn a blind eye to the fact that certain investments are simply a form of ill-gotten gains tainted by war? Should governments of countries ravaged by war continue to be subjected to the pain of damages awards in favour of investors in cases where the civilian population is devastated by death, displacement and starvation?[112] Can foreign investment – and international investment law as a guardian thereof – serve as a facilitator of the transition to peace? Just as the different roles of the corporation in armed conflict warrant further research, so does the role of international investment law and investment tribunals in creating and reinforcing rules variously rewarding or penalizing investors as victims, perpetrators, accomplices and beneficiaries of conflict. This reviewer hopes that future research into international investment law and armed conflict moves beyond the time-honoured habit of analysing the field exclusively through a narrow lens of a relationship between investors and governments of developing host states. The promises

[112] In Al-Kharafi v. Libya, the case initiated against the Libyan government during the civil war in 2011, the tribunal ordered Libya to pay almost US $1 billion, one of the largest-ever compensation awards in the history of investment treaty arbitration. *Cairo Regional Centre for International Commercial Arbitration, Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya and others*, Final Arbitral Award, 22 March 2013.

and failures of international investment law go well beyond the confines of investor-state interactions. Rather, at the heart of violence flaring in Afghanistan and Ukraine and smouldering throughout other conflict-ridden parts of the globe are 'relationships of power between militarily powerful and less powerful States; between occupying and occupied states; between private military companies and weak and poor states; between countries on the center and on the periphery of the world system; … between lawless bandits and a myriad of other non-state actors'[113] and between international norms and institutions and those international law is designed to sanction and protect.

[113] Gathii, *supra* note 7, at xiii.