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INVESTOR OBLIGATIONS AMID ARMED CONFLICT

Jure ZRILIČ*

1. Introduction

Foreign investors commonly conduct business in conflict-affected areas. While the presence of some companies in such countries precedes the outbreak of armed conflict,[1] others may be attracted to such areas due to business opportunities and higher gains associated with a higher risk,[2] yet some may be the actual cause of a violent conflict. From the perspective of legal accountability, foreign investors can play a twofold role in conflict-ridden states.[3] On the one hand, they can sustain economic and human losses as a victim of violence at the hands of either state or non-state forces. I have explored this aspect of investor protection law in a monograph.[4] On the other hand, conflict can emerge in response to an investor's activity, or investors can contribute to human rights abuses and other atrocities that are common in times of armed conflict either directly or, more commonly, by being complicit in commission of such violations by other actors.

Traditionally, foreign investors have paid little attention to the risk of their complicity in human rights abuses amid armed conflict. One reason for this is the state-centric nature of the international human rights law (IHRL), which does not impose enforceable obligations on corporations.[5] While there are ongoing negotiations at the United Nations (UN) level to adopt an international human rights instrument, which would bind business entities directly,[6] so far most global initiatives addressing specifically the role of corporations in conflict-related human rights

* Lecturer, University of Liverpool, School of Law and Social Justice. Email: j.zrilic@liverpool.ac.uk. I am grateful to Dr Jean Ho and Dr Mavluda Sattorova for their insightful comments on an earlier draft.

1 This chapter follows the definition of armed conflict articulated in international humanitarian law sources, most prominently by International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadić* case. According to the tribunal, an armed conflict exists whenever "there is resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State […]" *Prosecutor v Tadić* (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-T (2 October 1995) para 70. For different approaches to defining armed conflict, especially in investment law, see J Zrilič, *The Protection of Foreign Investment in Times of Armed Conflict* (Oxford University Press 2019) 7.

2 J Bennett, 'Multinational Corporations, Social Responsibility and Conflict' (2002) 55(2) *Journal of International Affairs* 393.

3 For a more detailed typology of different roles that business performs in war, see H Slim, 'Business Actors in Armed Conflict: Towards a New Humanitarian Agenda' (2012) 94(887) *International Review of the Red Cross* 903, 911.

4 Zrilič, *The Protection of Foreign Investment in Times of Armed Conflict*.

5 This view is contested by some academics. See for example, N Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Intersentia 2002); J Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press 2006); S Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (Routledge 2012).

6 Negotiations opened in 2015 following the resolution of the UN Human Rights Council (UNHRC), 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and other Business Enterprises with Respect to Human Rights' (14 July 2014) UN Doc A/HRC/RES/26/9.

violations have been developed at the level of soft law.[7] While those non-binding instruments elaborate on the responsibilities that corporations should exercise in the context of conflict, they often highlight that by not following the outlined recommendations, corporations could become legally liable for breaches of international obligations in the field of law specifically regulating conduct in armed conflict, namely international humanitarian law (IHL).

In contrast to IHRL, IHL obligations directly bind both state and non-state actors, including businesses.[8] Over the recent decades, the avenues to hold corporations accountable for their contribution to conflict-related abuses have been expanding. Investor misconduct can thus lead to criminal prosecution of corporations and/or individual staff members under domestic and international criminal law,[9] as well as give rise to litigation based on extraterritorial civil claims brought to domestic courts by the victims of the corporate abuse.[10] The past examples of such liabilities have importantly contributed to the evolution of the relevant standards of corporate accountability,[11] and further reaffirmed that prudent investors can no longer afford to pay nominal consideration to the adverse role their operations can play in the areas of conflict.

While this problematic aspect of economic activity in armed conflicts has been widely acknowledged and discussed within the framework of business and human rights,[12] up until recently the topic has not attracted much attention in investment law scholarship.[13] This can be explained by investment law's inherent focus on the responsibility of host states for injuries to foreign investors: the regime has been created with an aim to effectively protect foreign investors and provide them with remedies when a host state fails to meet relevant protection standards. Yet, some of the recent practices in investment treaty-making and case law have started to reflect awareness of the investors' negative impact in volatile times as well as a willingness to account for

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7 See Section 2.1.

8 International Committee of the Red Cross, 'Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law' (*ReliefWeb*, 1 December 2006) <https://reliefweb.int/sites/reliefweb.int/files/resources/543048595E265015C125723A003766EB-ICRC-Dec2006.pdf> accessed 31 December 2020.

9 For examples, see Section 2 and 3.

10 ibid.

11 ibid.

12 See for example, Slim; S Tripathi, 'Business in Armed Conflict Zones: How to Avoid Complicity and Comply with International Standards' (2010) 50(4) *Politorbis* 131; A Graf and A Iff, 'Respecting Human Rights in Conflict Regions: How to Avoid the "Conflict Spiral"' (2017) 2(1) *Business and Human Rights Journal* 109; N Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87(860) *International Review of the Red Cross* 737; D Olson, 'Corporate Complicity In Human Rights Violations Under International Criminal Law' (2015) 1(1) *DePaul International Human Rights Law Journal* article 5; Z Hassan, '"When Caterpillars® Kill": Holding US Corporations Accountable for Knowingly Selling Equipment to Countries for the Commission of Human Rights Abuses Abroad' (2004) 6(2) *San Diego International Law Journal* 341; J Oetzel and others, 'Business and Peace: Sketching the Terrain' (2009) 89(suppl 4) *Journal of Business Ethics* 351; A Ramasastry, 'Corporate Complicity: From Nuremberg to Rangoon - An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations' (2002) 20(1) *Berkeley Journal of International Law* 91.

13 For recent contributions, see D Davitti, *Investment and Human Rights in Armed Conflict: Charting an Elusive Intersection* (Hart 2019); J Gilbert, *Natural Resources and Human Rights: An Appraisal* (Oxford University Press 2018) Ch 4; P Ambach, 'International Criminal Responsibility of Transnational Corporate Actors in Doing Business in Zones of Armed Conflict' in F Baetens (ed), *Investment Law within International Law: Integrational Perspectives* (Cambridge University Press 2014); K Crow, 'Corporations and Crimes against Humanity: Financial Liability through ISDS?' in KF Gómez, A Gourgourinis, C Titi (eds), *International Investment Law and the Law of Armed Conflict* (Springer 2019) 459; L Vanhonnaeker, 'The Recourse to Private Military and Security Companies by Foreign Investors in Conflict-Affected Countries: Dangers, Opportunities and the Need to Regulate' in KF Gómez, A Gourgourinis, C Titi (eds), *International Investment Law and the Law of Armed Conflict* (Springer 2019) 487.

such investor misconduct within the investment treaty framework.[14] Overall, however, the progress has been slow and insufficient.

This chapter argues that for better understanding and further advancement of these developments, investment law should not be observed in isolation but in the context of wider regulatory efforts to hold corporations to account for their contributions to conflict-related violations. The standards of responsibility developed in voluntary codes of conduct and obligations codified in IHL, can thus become an important reference point in the negotiation of new, more balanced investment treaties, as well as in the pleadings of parties and in the reasoning of arbitral awards under the existent investment treaty framework. The embedding of mechanisms for investor accountability more firmly in the investment treaties and decision-making presents a necessary step towards a more symmetrical investment law, which would effectively discourage investors from contributing to abuses in armed conflict.

The chapter is structured as follows. Section 2 outlines IHL obligations binding investors and soft law obligations in voluntary initiatives specifically addressing corporate responsibility in times of conflict and explains how they relate. Section 3 provides an overview of avenues of investor accountability, especially in the sphere of international criminal law and domestic civil law. Lastly, Section 4 discusses the potential of investment law as a tool for enforcing IHL from the perspective of an investor as both a victim of, and a contributor to war crimes. It further identifies different ways in which investor misconduct in times of armed conflict can be taken into account in investment law. Drawing on examples from case law and treaty-making, it argues that investment law should engage better and more expressly with the legal frameworks addressing the role of business in conflict-affected areas. This, in turn, could incentivise investors to adjust more prudently the manner in which they conduct business in conflict-affected areas.

2. Do Investors Have Obligations in Armed Conflict?

A discussion about obligations investors have on the international plane inevitably starts with the question of whether corporations are capable of being bound by international law at all.[15] The traditional view that only states are subjects and addressees of international law has been increasingly contested in particular by human rights scholars,[16] who argued that given their significant economic power and influence, corporations too are capable of being holders of human rights obligations.[17] While this debate is far from settled, it becomes somewhat less problematic when it is centred on corporate misconduct in times of armed conflict, with both IHL and international criminal law (ICL) imposing obligations on non-state actors.

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14 See Section 4.

15 See for example A Clapham, *Human Rights Obligations of Non-state Actors* (Oxford University Press 2006) 25.

16 ibid; P Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2006); O De Schutter (ed), *Transnational Corporations and Human Rights* (Hart 2006).

17 See for example, Clapham, ibid 266-70; Jägers, 75-95; P Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press 2007) 520; D Weissbrodt and M Kruger, 'Current Developments: Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2013) 97(4) *American Journal of International Law* 901, 913; D Kinley and J Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44(4) *Virginia Journal of International Law* 931, 962.

IHL is a branch of international law that regulates conduct during armed conflict with an aim to minimise the suffering that it causes. The rules of IHL apply only once a violent situation crosses the threshold of armed conflict as defined by the IHL sources.[18] Regardless of which set of IHL rules applies, depending on the characteristics of the conflict (international or non-international),[19] IHL must be respected not only by states, but also by non-state actors such as organized armed groups and other entities, including companies and individuals whose actions are closely associated with armed conflict.[20] The International Committee of the Red Cross (ICRC) recognised that determining "which activities are closely linked to an armed conflict" may be complicated (a clear example would be providing direct support to a party to the hostilities), however, companies operating in zones of armed conflict should exercise great caution to avoid their involvement in IHL violations.[21]

The fact that some IHL prohibitions are binding on business actors has already been indicated by the post-World War II criminal tribunals,[22] and in domestic civil law cases,[23] asserted in scholarship,[24] and even acknowledged by the Special Representative on Business and Human Rights, John Ruggie, who observed that while the main human rights instruments do not seem to impose direct responsibilities on companies,[25] there are certain international obligations that indeed are directly binding on corporate actors, notably prohibitions of war crimes and crimes against humanity.[26] Recently, an investment tribunal in *Urbaser v Argentina* made a similar pronouncement that investors have an obligation to abstain from violations of general international law (including IHL),[27] and that "[s]uch an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties."[28] As indicated by the

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18 See Prosecutor v Tadić, para 70; Zrilič, *The Protection of Foreign Investment in Times of Armed Conflict*, 7.

19 International conflicts (including struggles for national liberation against "alien occupation" or "colonial domination") are governed by the Hague Regulations, the four Geneva Conventions and Additional Protocol I, while non-international armed conflicts are regulated by Common Article 3 to the four Geneva Conventions (regarding less-intense conflicts) and Additional Protocol II (regarding high-intensity conflicts).

20 International Committee of the Red Cross, 'Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law', 11, 13-14. This means that serious IHL violations like war crimes can be committed without involvement of state agents or agents of any other belligerent party. See *Prosecutor v Akayesu*, ICTR-96-4, Judgment (1 June 2001) 425.

21 ibid 14.

22 International Military Tribunal at Nuremberg prosecuted German businessmen for their complicity with the Nazi regime. While those cases focused on individual criminal liability, some judgments show how closely intertwined that was with the liability of corporations. See for example, 'The Farben Case' in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (United States Government Printing Office 1952) volumes VII and VIII. See also K Priemel, 'Tales of Totalitarianism: Conflicting Narratives in the Industrialist Cases at Nuremberg', in K Priemel and A Stiller (eds), *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography* (Berghahn Books 2012) 170.

23 See for example, In re Agent Orange Product Liability Litigation, 373 F Supp.2d 7 (EDNY 2005), 59; Presbyterian Church of Sudan v Talisman Energy, Inc, 244 F Supp.2d 289 (SDNY 2003), 305–14.

24 See for example, V Nerlich, 'Core Crimes and Transnational Business Corporations' (2010) 8(3) *Journal of International Criminal Justice* 895, 899; Ramasastry, 100–18; S Ratner, 'Corporations and Human Rights: A Theory of Corporate Responsibility' (2001) 111(3) *Yale Law Journal* 443, 504.

25 UNHRC 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts: Report of the Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (9 February 2007) UN Doc A/HRC/4/035, 44.

26 UNHRC 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (22 February 2006) UN Doc E/CN.4/2006/97, 60.

27 *Urbaser SA v The Argentine Republic*, ICSID Case No. ARB/07/26, Award (8 December 2016), para 1210.

28 ibid.

tribunal, this would be the case in particular when the investor was involved in *jus cogens* violations, such as war crimes.[29] War crimes are serious violations of IHL (conventional and customary) that incur direct criminal responsibility under international law (such as murder, inhuman treatment and torture, pillage, the unlawful transfer of civilians during armed conflict, intentionally directing attack against civilian population or civilian property, etc.), and are identified in the IHL treaties,[30] the ICL treaties,[31] and international customary law.[32] Practice, legislation and case law confirm that war crimes can be committed not only by members of armed forces, but also by any other person, including civilians.[33]

Investors can contribute to grave violations of IHL in different ways. For example, an investor's acquisition of assets (natural resources, property, shares, etc.), which is based on "threats, intimidation, pressure, or a position of power derived from the surrounding armed conflict",[34] can constitute pillage which is prohibited under IHL.[35] Furthermore, if the investment acquired during armed conflict or occupation results in the forceful eviction of residents by the belligerent forces (*eg*, with a view to secure land or resources for investment), this can amount to the violations of the IHL prohibition against the displacement of civilians.[36] For example, internal conflict in Colombia was characterised by land usurpation and forcible displacement of the local community, with some land subsequently resold or rented out to investors.[37] A similar situation transpired recently in Myanmar, where the Rohingya people were forcibly displaced, which was preceded by land grabbing at the hands of the military forces, with the land often being sold off to foreign investors for their development projects.[38] Should the armed conflict threshold in these

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29 ibid footnote 446 (citing the ATCA case *Filartiga v Pena-IRala*, 630 F.2d 876 (2nd Cir. 1980).

30 See for example, Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (signed 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV), art 147; Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (signed 12 December 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I), art 85.

31 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 8.

32 J-M Henckaerts and L Doswald-Beck, *International Committee of the Red Cross, Customary International Humanitarian Law, vol II, Rules* (Cambridge University Press 2005) Rule 156, Volume II, Chapter 44, Section A.

33 ibid, referring to the military manuals of Australia, United Kingdom, United States, New Zealand and Ecuador, among others.

34 International Committee of the Red Cross, 'Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law' 22.

35 GC IV, art 33; AP II, art 4.2; 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 (Hague Regulations) (signed 18 October 1907, entry into force 26 January 1910), arts 28 and 47.

36 Under IHL, civilians cannot be forcibly relocated unless "security of the population or imperative military reasons so demand". GC IV, art 49; AP II, art 17(1).

37 See for example, Inter-American Commission on Human Rights, Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia (31 December 2013) OEA/Series L/V/II. Doc. 49/13; Oxfam, *Divide and Purchase, How Land Ownership is Being Concentrated in Colombia* (Oxfam Research Report 2013); MA Velasquez-Ruiz, 'Foreign Investment-Induced Migration in Colombia: Rethinking the Legal Schemes of Protection and Accountability' (2013) 22 *International Law: Revista Colombiana Derecho Internacional Bogotá (Colombia)* 147; R Tamayo-Alvarez, 'Colombia's Land Restitution Programme and International Investment Law: Normative Tensions and Possible Convergences Concerning Investor Diligence' (2018) 15(1) *Manchester Journal of International Economic Law* 114.

38 See S Sassen, 'Is Rohingya Persecution Caused by Business Interests Rather than Religion?' (*The Guardian*, 4 January 2017) <https://www.theguardian.com/global-development-professionals-network/2017/jan/04/is-rohingya-persecution-caused-by-business-interests-rather-than-religion> accessed 31 December 2020. On response of corporations to being called out for complicity in the Rohingya crisis, see Business and Human Rights Resource Centre, 'Myanmar: Business and Investor Responses to the Rohingya Crisis' <https://www.business-

situations be met, foreign investors benefitting from violence and forcible displacement could be potentially implicated in grave violations of IHL.

Investors benefitting from the labour of civilians and prisoners of war that does not meet the standards laid down by the IHL,[39] or investors supplying the warring parties with weapons and tools to inflict harm also run risks of contributing to violations of IHL.[40] The former scenario factually transpired in *Unocal* case, in which the Myanmar military used forced labour from local villagers to provide support for construction of the foreign investor's pipeline.[41] The latter situation, on the other hand, was at the heart of the *Van Anraat* case, in which the Dutch criminal court found the Dutch investor criminally liable for aiding and abetting war crimes by supplying Saddam Hussein with chemicals that were instrumental for the production of mustard gas, which was used for the murder of the Kurdish minority in Iraq.[42]

The risk of liability is particularly high when investors contract security services to protect their personnel and assets,[43] and the hired security forces violate IHL while engaging in hostilities (for example, by committing torture or murder of local residents and activists protesting the investment).[44] As stressed by the ICRC, this could give rise to legal liability of investors, "even if they did not intend the violations to occur and if the offences were not perpetrated on their behalf."[45] Investors could incur liability by relying either on state or non-state security providers. For example, in *Wiwa v Shell*, Royal Dutch/Shell was accused of working with Nigerian military to suppress demonstrations carried out against the investor's oil activities that were causing environmental damage in the Niger Delta.[46] In the analogous case, *Bowoto v Chevron*,[47] the investor allegedly paid the Nigerian military to intervene against the protestors, which resulted in the killing of civilians and the destruction of villages. Similar violations have occurred when investors procured security from non-state actors. For example, a Dutch businessman, Guus Kouwenhoven,

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humanrights.org/en/latest-news/myanmar-business-investor-responses-to-the-rohingya-crisis/> accessed 31 December 2020.

39 GC IV, arts 40, 51, 95; GC III, arts 49–55; AP II, art 5(1)(e).

40 International Committee of the Red Cross, 'Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law', 25.

41 *Doe v Unocal Corp*, 395 F.3d 932 (9th Cir. 2002) (*Unocal*), 940.

42 See judgment of the Hague District Court: *Public Prosecutor v Van Anraat* (2005) LJN AU8685, para 14; appealed to the Hague Court of Appeal: (2007) LJN BA6734, 2200050906-2. For a civil law case involving investor complicity through supply of provisions to the military regime, see for example, *In re South African Apartheid Litigation*, 3 Civ. 4524 (SDNY 2009), 57 (in this case, several corporations were accused of aiding and abetting human rights abuses committed by the apartheid regime by supplying weapons, vehicles with specific military equipment and computer systems designed to implement a racist passport system and segregation).

43 Investors who have funded public or private military companies to ensure security of their facilities and pipelines include Shell, Chevron and British Petroleum. See D Avant, 'The Privatization of Security and Change in the Control of Force' (2004) 5(2) *International Studies Perspective* 153, 154; S Percy, 'Regulating the Private Security Industry: a Story of Regulating the Last War' (2012) 94(887) *International Review of the Red Cross* 941; Vanhonnaeker.

44 Arbitrary killings of environmental activists resisting investment projects in natural resources area has been in particular common. For an overview, see Gilbert, 108; UNHRC 'Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association' (28 April 2015) UN Doc A/HRC/29/25.

45 International Committee of the Red Cross, 'Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law', 21.

46 *Wiwa v Royal Dutch Petroleum*, 96 Civ. 8386 (SDNY 2002); *Wiwa v Anderson,* 1 Civ. 1909 (SDNY 2002); *Wiwa v Shell, Petroleum Development Company,* 4 Civ. 2665 (SDNY 2009). For an overview, see Center for Constitutional Rights, *Wiwa v Royal Dutch Petroleum*, <https://ccrjustice.org/home/what-we-do/our-cases/wiwa-et-al-v-royal-dutch-petroleum-et-al> accessed 31 December 2020.

47 *Bowoto v Chevron*, 312 F Supp.2d 1229 (ND Cal. 2006). For a factually similar case, see also pending *Doe v Exxon Mobile Corp* (a lawsuit brought to the US federal court by Indonesian villagers alleging that the investor was complicit in human rights abuses at the hands of the government security forces).

whose timber companies made an investment in Liberia, was convicted for aiding and abetting war crimes by hiring Liberian militias (and supplying them with weapons), which then participated in the massacre of civilians.[48]

While all the discussed IHL violations are defined in the IHL and ICL instruments, there is nonetheless a lack of clarity as to what the content of such obligations with respect to investors is. In other words, while it is clear how state forces and organized armed groups can commit murder, torture, destruction of civilian property and pillaging, it is less clear how such prohibitions can be operationalized with respect to corporate conduct. To an extent, this gap has been filled by the voluntary initiatives that emerged in response to the increasing involvement of corporations in conflict-related atrocities. The next section turns the focus to them.

2.1 Investor Obligations under Soft Law

Most corporate social responsibility (CSR) initiatives that specify soft obligations that corporations hold in volatile contexts, started developing at the beginning of the 21st century, and reached a peak with the official adoption of the UN Guiding Principles on Business and Human Rights (UNGP) in 2011.[49] What is common to these initiatives is that they highlight that companies should adjust the manner in which they conduct business to the conflict-sensitive environment by, for example, carrying out continued and enhanced due diligence in order to avoid or mitigate negative impacts of their operation on human rights, or by promoting positive impacts on the society affected by their operation.[50]

Broadly speaking, these initiatives have focused on two types of overlapping businesses most likely to contribute to conflicts and be involved in large scale abuses of human rights: extractive industries, and private military and security companies. The former mostly aims to prevent corporations from fuelling conflict and conflict-related atrocities through trade of minerals,[51] or to prevent and mitigate natural resources-related conflicts with local communities.[52] The latter, on the other hand, emerged in response to the growing number of cases in which

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48 *The Public Prosecutor v Guus Kouwenhoven* (2017) ECLI:NL:GHSHE:2017:1760 (Dutch Court of Appeal). For civil law cases involving complicity in violence at the hands of security providers, see *Doe v Chiquita Brands International* (alleging that American investor made payments to the paramilitary organisation, which murdered hundreds of civilians, especially trade unionist and social activists working at the investor's plantations. The case was settled); *Saleh v Titan* (concerning allegation of torture at the hands of a security provider hired by the US Government to provide services at detention facilities in Iraq. The case was dismissed).

49 Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, A/HRC/17/31 (UNGP).

50 See Graf and Iff, 119 (distinguishing between two approaches followed in the CSR initiatives: human rights due diligence and conflict sensitivity); Tripathi, 139 (summarizing responsibilities of companies operating in armed conflict zones).

51 See for example, Kimberley Process (2003) <www.kimberleyprocess.com/en/what-kp> accessed 31 December 2020; the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, (2nd edn, OECD Guidance on Conflict Minerals 2013) available on <www.oecd.org/daf/inv/mne/mining.htm> accessed 31 December 2020.

52 See United Nations' and European Union's Toolkit and Guidance for Preventing Conflict and Managing Land and Natural Resources Conflicts, available at: <www.un.org/en/land-natural-resources-conflict/pdfs/Resource%20Rich%20Economies.pdf> accessed 31 December 2020; International Council on Mining & Metals (ICMM) Guidance, available at: <https://guidance.miningwithprinciples.com/>; IPIECA (the oil and gas industry association for environmental and social issues) Guidelines, available at: <www.ipieca.org/our-work/social/indigenous-peoples/> accessed 31 December 2020. See also, United Nations Declaration on Indigenous People (adopted 13 September 2007) UN Doc No. A/61/295, art 10; International Labour Conference (76th Session) Convention C169: Indigenous and Tribal Peoples Convention (Geneva 7 June 1989), art 6.

atrocities were committed by the investors' public and private security providers.[53] These voluntary codes articulate standards that assist governments and private companies in implementing their IHL and human rights obligations, with a view to prevent, mitigate and efficiently respond to human rights abuses.

The fact that most of the relevant voluntary initiatives adopted human rights as the main reference framework, rather than IHL and ICL, is not surprising. It is widely accepted that international human rights law continues to apply during armed conflict.[54] Most of the time, this will not be problematic as human rights law is similar in its objective, values and terminology to IHL and ICL and, in the context of armed conflict, purports to prevent and minimise the suffering of innocent people.[55] There are, however, advantages to adopting a human rights approach in voluntary initiatives, reflecting the reality in which corporate misconduct often takes place. First, IHL and ICL are rather narrow and rigid in its scope: the conduct will amount to war crimes only if it was committed in the context of armed conflict, with ICL extending its scope of application to other core crimes: genocide, crimes against humanity, and the crime of aggression.[56] In contrast, IHRL is broader in its scope and addresses violations of civil, political, economic, social, cultural, and group rights.[57]

Second, the IHRL's area of application is much wider as it also applies outside the narrow IHL definition of armed conflict, including violent situations that are expressly excluded from the IHL and the ICL sources, namely "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature".[58] As such it has greater potential to effectively address corporate misconduct in volatile situations. The CSR initiatives have recognised that by expressly extending their application beyond the IHL definition of armed conflict so as to encompass other types of violent situations.[59] This is important because it is notoriously difficult to ascertain whether the threshold for application of the IHL rules has been met, especially with regard to non-international armed conflicts. This is due to the difficulties in determining the beginning or the end of an armed conflict, the fluctuating nature of a conflict's characteristics, and the fact that states often downplay the intensity of conflicts in order to avoid the application of IHL rules, as this would impose on a belligerent state certain obligations, confer on rebels certain rights, and potentially invite interventions from foreign forces.[60] Constraining the debate on

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53 Most important initiatives are The Montreux Document On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict (2008), <www.icrc.org/en/download/file/135841/montreux_document_en.pdf> accessed 31 December 2020, and International Code of Conduct for Private Security Service Providers, available at: <https://icoca.ch/the-code/> accessed 31 December 2020. See also, *The Voluntary Principles on Security and Human Rights*, <www.voluntaryprinciples.org/what-are-the-voluntary-principles> accessed 31 December 2020.

54 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, 178. The relationship between two bodies of law has been subject to much doctrinal discussion, see for example, O Ben-Naftali (ed), *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011).

55 *Kunarac and others*, IT-96-23-T, Judgment (22 February 2001), para 467.

56 In contrast to war crimes, the contextual element of armed conflict is not required for other core crimes.

57 L van der Herik and JL Černič, 'Regulating Corporations under International Law: From Human Rights to International Criminal Law and Back Again' (2010) 8(3) *Journal of International Criminal Justice* 725, 741.

58 Rome Statute of the International Criminal Court, art 8(2)(f).

59 See for example, UNGP (Commentary to Principle 7) 10; Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: A Resource for Companies and Investors, A Joint UN Global Compact – PRI Publication (2010) 7; OECD Guidance on Conflict Minerals, 13.

60 Zrilič, *The Protection of Foreign Investment in Times of Armed Conflict*, 182; A Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010); W Abresch, 'A Human Rights Law of

corporate responsibilities to IHL-defined armed conflicts would thus create unnecessary, and indeed, harmful limitations in designing and applying incentives for investors' responsible conduct as well as sanctions for investor misconduct. Overcoming these definitional boundaries does not only bring more clarity to investors' expectations as to how they should act in volatile contexts, but also prevents potential strategic limitations in taking necessary measures in only certain arbitrarily created categories of conflict.

Having explained the advantages of the human rights approach, the question that needs to be answered next is what the relationship is between the human rights-based soft obligations and IHL and ICL hard prohibitions. The answer can be found in the UNGP, which operationalised the "Protect, Respect and Remedy" Framework developed under the leadership of John Ruggie, and which states that companies are under a responsibility to respect human rights, *ie*, to undertake "human rights due diligence" to identify, prevent, mitigate and account for adverse impacts on human rights.[61] Crucially, in conflict-affected areas companies are expected to exercise greater care. The UNGP stresses that in situations when abuses of human rights are gross (Principles 7, 23) and human rights impact is severe (Principle 14, 17),[62] which is likelier in conflict-affected areas, the companies' response should be quicker, and more pro-active and attentive (Principles 14, 24).[63] The UNGP also emphasise that companies' contributions to gross human rights abuses could be penalized under relevant national and international rules. Thus, Principle 23 recommends to "[t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate".[64] In other words, the UNGP highlights the complementary nature of the relevant legal frameworks: adhering to the human rights due diligence could help investors avoid the risk of legal liability, including that arising from the violations of the IHL and ICL rules.[65] Since the CSR instruments are voluntary and impose no sanctions for non-compliance, the synergy with binding obligations will be successful only if there are effective avenues for enforcing them. The next section looks into the relevant accountability mechanisms.

3. How Can Investors be Held to Account?

In the previous section, it has been argued that international law imposes certain substantive obligations on investors in times of armed conflict, for example, an obligation to abstain from violating IHL rules that give rise to international crimes. A separate question is whether and where such obligations can be enforced against investors who participated in violations. Pursuing a claim before municipal courts in host states, where such violations typically occur, does not inspire confidence, as such states, which are still immersed in, or emerging from conflict, often lack institutional infrastructure and resources needed for an efficient trial and investigation. In addition,

International Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16(4) European Journal of International Law 741, 756.

61 UNGP, Principle 15. See also, IRHB and Shift, 'Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights, European Commission' (*IRHB*, 2013); R Mares, 'Corporate and State Responsibilities in Conflict-Affected Areas' (2014) 83(3) *Nordic Journal of International Law* 293.

62 For example, Ruggie linked gross abuses to international crimes. SRSG, *Recommendations on Follow-Up to the Mandate*, 11 February 2011.

63 UN Office of the High Commissioner for Human Rights, 'The Corporate Responsibility to Respect Human Rights – An Interpretive Guide' (2012) HR/PUB/12/02, 80.

64 UNGP, Principle 23.

65 ibid 26 (see in particular the commentary).

in situations where a foreign investor was complicit in the atrocities committed by a government itself, the impartiality of a host state's prosecutorial and judicial institutions is questionable. Alternatively, investor accountability could be sought in the investor's home states or, at the international level and inasmuch as investors are natural persons, before the International Criminal Court (ICC). Both of these options, however, are fraught with legal and practical obstacles, some of which are outlined below.

3.1 Accountability under International Criminal Law

Under IHL, states are obliged to criminalize grave violations of IHL, and investigate and prosecute war crimes regardless of the location of the offences or who the perpetrators are.[66] War crimes have thus become part of national legislation of most countries and some jurisdictions even provide for the option to hold corporations, rather than only natural persons (*eg*, managers), responsible for the commission of, and complicity in, war crimes.[67] Corporate officials and investor employees have thus been prosecuted for their complicity in war crimes before courts in investors' home as well host states.[68]

The latter example transpired in the case involving an Australian corporation, Anvil Mining, accused of providing logistical assistance to Congolese military forces in a violent reprisal resulting in murder, rape, torture of civilians, pillaging and other atrocities.[69] While Anvil argued that their support to the military operation was in compliance with the Congolese law, the pressure from the NGOs and general public resulted in a criminal trial against military commanders as well as three Anvil employees for, among others, aiding and abetting war crimes and other violations of the IHL.[70] The Congolese military court acquitted all defendants, finding that the investor's employees provided support under duress and were thus not liable. Interestingly, investigations against Anvil also commenced in Australia, the investor's home state, but was ultimately discontinued due to insufficient evidence.[71] Had it proceeded, the outcome of the proceedings would have been much more interesting and potentially set an important precedent, since Australian criminal law enables the prosecution of corporations, rather than just individuals, for such international crimes.

At the international level, an investor's involvement in international crimes could potentially be adjudicated by the ICC. While the Court, or any other international criminal tribunal, does not have jurisdiction to prosecute corporations,[72] this does not mean that an investor's

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66 See for example, GC I, art 49; Rome Statute of the International Criminal Court, Preamble; J-M Henckaerts and L Doswald-Beck, Rule 158, Volume II, Chapter 44, Section C.

67 International Committee of the Red Cross, 'Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law', 26; Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, Vol II (2008) 57 (ICJ Panel Report). Some municipal jurisdictions provide for corporate criminal liability, for example, Australia, the Netherlands, France, Belgium, Switzerland.

68 For criminal cases in home states, see for example, *Public Prosecutor v Guus Kouwenhoven*; *Public Prosecutor v Van Anraat*.

69 See Business & Human Rights Resource Centre, Anvil Mining Lawsuit, available on <https://www.business-humanrights.org/en/latest-news/anvil-mining-lawsuit-re-dem-rep-of-congo/> accessed 31 December 2020; A McBeth, 'Crushed by Anvil: A Case Study on Responsibility for Human Rights in the Extractive Sector' (2008) 11(1) *Yale Human Rights and Development Law Journal* 127.

70 ibid.

71 ibid 150.

72 Rome Statute of the International Criminal Court, art 25(1). While during the negotiation of the Rome Statute, the French delegation proposed to expand the jurisdiction of the ICC so as to cover corporate criminal liability, the

activities are outside the realm of international criminal law. As the Nuremberg Trials have shown, investors who are natural persons and corporate officials who, in the course of their business activities, become involved in war crimes perpetrated by a belligerent party, can be prosecuted and held criminally accountable.[73] In the aftermath of World War II, a number of German industrialists were tried for conducting business with the Nazi regime and being complicit in the Nazi slave labouring system.[74]

So far, however, the ICC has yet to decide to prosecute officials with respect to business-related crimes. This could be explained by the fact that in view of the Court's limited capacity, priority is given to the prosecution of direct perpetrators, namely those who bear the greatest responsibility for the crimes,[75] and whose criminal responsibility is easier to prove.[76] Although criminal responsibility of aiders and abettors (which is the most likely mode of responsibility for investors), is possible under the Rome Statute,[77] the prosecutor is required to be selective in starting investigations and prosecutions.[78] Despite these limitations, the 2016 Policy Paper of the ICC Office of the Prosecutor (OTP) may signal a wind of change in the ICC's willingness to prosecute business-related crimes. The Paper states that the OTP "will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in […] the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land".[79] As mentioned in the previous section, pillage of natural resources and land grabbing accompanied with dispossession of marginalised communities, have been highlighted by the ICRC as the crimes where the risk of corporate complicity is particularly high.[80] It is thus not surprising that human rights NGOs and academics have welcomed the Policy Paper as a step towards effective prosecution of business-related abuses of human rights.[81] Recently authorised investigations of the ICC into the situation of Myanmar, involving forcible displacement of Rohingya people, could provide the first opportunity to scrutinise the complicity

proposal gained little political support and was deemed to dilute the core goals of the Rome conference. See 1995 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, 58. See also DE Stoitchkova, *Towards Corporate Liability in International Criminal Law* (Intersentia, 2010) 16–7.

73 ICJ Panel Report, 6.

74 See for example, 'The Farben Case', 'The Flick Case' and 'The Krupp Case' in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (United States Government Printing Office 1952) volumes VI and IX.

75 Understanding the International Criminal Court (*International Criminal Court*), <www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf> accessed 31 December 2020, 5.

76 N Bernaz, 'An Analysis of the ICC Office of the Prosecutor's Policy Paper on Case Selection and Prioritization from the Perspective of Business and Human Rights' (2017) 15(3) *Journal of International Criminal Justice* 527, 533; Tripathi.

77 Rome Statute of the International Criminal Court, art 25(3)(c).

78 Office of the Prosecutor (OTP), *Prosecutorial Strategy: 2009-2012* (1 February 2010) 19 <www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> accessed 31 December 2020.

79 OTP, *Policy Paper on Case Selection and Prioritisation* (15 September 2016) 41 <www.icc-cpi.int/itemsdocuments/20160915_otp-policy_case-selection_eng.pdf> accessed 31 December 2020.

80 See also Gilbert, 106 (discussing how pillage of natural resources can amount to international crimes).

81 See Press Release, 'Company Executives Could Now Be Tried for Land Grabs and Environmental Destruction' (*Global Witness*, 15 September 2016) <https://www.globalwitness.org/en/press-releases/company-executives-could-now-be-tried-land-grabbing-and-environmentaldestruction-historic-move-international-criminal-court-prosecutor/> accessed 31 December 2020; Bernaz, 533, 542; Gilbert, 106.

of corporate actors in alleged crimes.[82] However, given the ongoing backlash the Court has been experiencing,[83] and in view of the general reticence regarding the investigation of business-related crimes, the expectations about the ICC becoming an effective avenue for holding investors to account, are best kept low.

3.2 Accountability under Civil Law

In view of the challenges concerning the criminal liability of companies and the paucity in prosecution of business officials in international criminal fora, other accountability mechanisms may present a viable and more appealing route for addressing investors' involvement in war crimes and gross human rights violations in conflicts. In particular, victims of the investors' wrongdoing can seek damages from domestic courts on the basis of the domestic law of tort in common law systems and the law of non-contractual obligations in civil law jurisdictions.[84] On the one hand, civil prosecution gives victims more control over the process as the commencement of proceedings no longer depends on the discretion of public authorities like in criminal cases. On the other hand, establishing civil liability is met with various legal obstacles, not least by complex corporate structures and separate legal personalities of companies forming multinational enterprise, and jurisdictional problems related to extraterritoriality.

The most important contribution to the development of legal standards for civil liability of businesses has been made by the claims for violations of international law brought against multinational corporations in the United States under the 1789 Alien Tort Claims Act (ATCA), considered in more detail in Chapter 9 of this volume by Lucas Roorda and Julian Ku.[85] ATCA provides non-US nationals with an opportunity for a civil tort suit before the US federal courts for actions "committed in violation of the law of nations and the treaties of the US",[86] which includes the most egregious human rights violations, war crimes, crimes against humanity, etc.[87] Although no claim has been successful on the merits, the cases brought public attention to corporate involvement in human rights abuses and atrocities.[88] ATCA used to be celebrated by human rights lawyers for its extensive extraterritorial application – for American courts to hear civil claims it used to suffice for the sued corporation to have a form of business activity or financial holdings

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82 Press Release, 'ICC judges authorise opening of an investigation into the situation in Bangladesh/Myanmar' (*International Criminal Court*, 14 November 2019) <https://www.icc-cpi.int/Pages/item.aspx?name=pr1495> accessed 31 December 2020.

83 L Helfer and A Showalter, 'Opposing International Justice: Kenya's Integrated Backlash Strategy against the ICC' (2017) 17(1) *International Criminal Law Review* 1.

84 ICJ Panel Report, 6; International Committee of the Red Cross, 'Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law', 26.

85 Alien Tort Claims Act, 28 USC § 1350.

86 ibid.

87 *Sarei v Rio Tinto*, 487 F.3d 1193, 1202 (9th Cir. 2007). As cited above, many claims were brought on the ground that corporations were complicit in war crimes, crimes against humanity and human rights abuses by military regimes. See for example, *Unocal*; *Presbyterian Church of Sudan* (the claim concerned alleged corporate aiding and abetting to acts of genocide of the president of Sudan); *In Re South African Apartheid Litigation*; *Khulumani v BarclayNat Bank ltd*, 509 F.3d (2nd Cir. 2007).

88 Bernaz, 537; MD Goldhaber, 'Corporate Human Rights Litigation in Non-US Courts - A Comparative Scorecard', (2013) 3 *University of California Irvine Law Review* 127, 129.

in the US.[89] Recent decisions, however, have tightened the jurisdictional threshold,[90] signalling the decline of ATCA's popularity.

Most national legal systems require the company to be domiciled or incorporated in the jurisdiction where the claim is brought.[91] While in some common law jurisdictions, courts may exercise discretion to refuse jurisdiction on the basis that there is a more appropriate forum for adjudicating the case elsewhere (*forum non conveniens*),[92] this is no longer an option for national courts in the European Union (EU), which must permit proceedings to commence against companies domiciled in EU,[93] even if the harm occurred outside the EU,[94] or the victim seeking civil remedies is not an EU resident or national.[95] Rather than contemplating a European version of ATCA, the focus in the EU has been on strengthening the direct liability of the parent company and the establishment of a duty of vigilance.[96]

It is thus unsurprising that, following the CSR initiatives outlined in the preceding section, some countries have taken further steps to specifically legislate the companies' duty of vigilance. While some domestic laws, like the UK Modern Slavery Act,[97] limit such a duty to a disclosure and reporting stage only, the recently adopted French Due Diligence Law requires the companies[98] to develop and implement mechanisms for the prevention of human rights abuses throughout their chain of production, including their subsidiaries, companies under its control, suppliers and subcontractors.[99] If the company's failure to establish and implement their due diligence plan results in harm (*eg*, in the form of contribution to a war crime), the company can be liable to pay

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89 See B Stephens, *US Litigation Against Companies for Gross Violations of Human Rights*, written in 2007 for the ICJ Expert Legal Panel on Corporate Complicity in International Crimes.

90 ATCA's potential has been undermined in light of the US Supreme Court decisions in *Kiobel v Royal Dutch Petroleum Co.*, 569 US 108 (2013) (which limited its extraterritorial reach and decided that claims brought under ATCA must "touch and concern the territory of the United States … with sufficient force to displace the presumption against extraterritorial application"), and *Jesner v Arab Bank, plc*, 138 S. Ct. 1386 (2018) (deciding that foreign corporations cannot be sued under ATCA).

91 ICJ Panel Report, Civil Remedies, Vol III, 49. Outside the US, victims are increasingly bringing claims on the ground of corporate complicity in human rights violations abroad. For an overview of recent cases, see Business and Human Rights Resource Centre, *Briefing Note: Latin America Briefing Focus on Human Rights Defenders under Threat & Attack* (January 2017).

92 ICJ Expert Panel Report, Civil Remedies, Volume III, 51; International Law Association Conference Committee on International Civil and Commercial Litigation Third Interim Report: Declining and Referring Jurisdiction in International Litigation (London 2000).

93 Regulation (EU) No 1215/2012 of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (adopted 12 December 2012, entered into force 10 January 2015) OJ L 351, Art 4.

94 Case C-281/02 *Andrew Owusu v NB Jackson* [2005] ECR I-1445.

95 Case C-412/98 *Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC)* [2000] ECR I-5925.

96 See W Kaleck and M Saage-Mass, 'Corporate Accountability for Human Rights Violations Amounting to International Crimes: The Status Quo and Its Challenges' (2010) 8(3) *Journal of International Criminal Justice* 699, 723; referring to F Gregor and H Ellis, 'Fair Law: Legal Proposals to Improve Corporate Accountability for Environmental and Human Rights Violations, European Coalition for Corporate Justice' (*Ritimo*, May 2008) <https://www.ritimo.org/Fair-law-legal-proposals-to-improve-corporate-accountability-for-environmental> accessed 31 December 2020.

97 Modern Slavery Act 2015 (UK), c 30. For similar duty of vigilance with respect to reporting see also the *California Transparency in Supply Chains Act*, SB 657 § 2 (2010); and Section 1502 of the *Dodd-Frank Act of 2010*, Pub L 111-203, 124 Stat 1376 (concerning trade in conflict minerals).

98 The law covers large companies headquartered in France and foreign companies headquartered outside France with French subsidiaries that employ at least 5,000 employees in France.

99 Available at <www.assemblee-nationale.fr/14/ta/ta0924.asp> accessed 31 December 2020.

damages for corporate negligence.[100] More specifically to the context of companies operating in conflict-affected and high-risk areas, the EU recently adopted Regulation 2017/821 laying down supply chain due diligence obligations for EU importers of conflict minerals.[101] While the EU Regulation closely follows the due diligence measures enumerated in the OECD Guidance on Conflict Minerals, it has transformed the hortatory language of "recommendations" into binding "obligations", the breach of which can result in remedial action as defined by the EU Member States.[102]

These developments are reflective of the UNGP regime which addresses the conflict-affected zones within the state's duty to protect human rights. More specifically, the UNGP in Principle 7 recommends that home states and neighbouring states have responsibilities to ensure that companies operating in such volatile contexts are not involved in gross human rights abuses, by providing requisite assistance to companies, denying access to public support and services to companies that are engaged in such abuses or refuse to cooperate, and ensuring that their regulatory and enforcement framework is effective in dealing with such situations.[103] This drafting innovation was driven by two considerations: first, the acknowledgment that most voluntary initiatives that address the role of businesses in conflict-affected zone focus only on the due diligence responsibility for business but fail to provide any guidance for states;[104] and second, the recognition that host states "may be unable to protect human rights adequately due to the lack of effective control."[105] In view of the heightened risk of gross human rights abuses, the burden thus shifts to home states who are advised to act "at the earliest stage possible" and, in addition, explore avenues for "civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses."[106] This shows that while the voluntary initiatives like the UNGP may assist investors in complying with the relevant obligations and thereby minimise the risk of legal liability, they can be also used as a source of inspiration for domestic legislators, as seen in France with regard to the Due Diligence Law, and in the EU with regard to the Regulation 2017/821.

Despite the progress described above, the reality remains that the mechanisms for implementing obligations against investors are deeply flawed, especially on the international level with only the ICC having some unutilised capacity to scrutinize investor misconduct. It is clear that a more proactive approach is needed in developing an effective enforcement framework. Could international investment law provide an alternative accountability venue? The next section takes a closer look at this question.

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[100] ibid. A similar initiative making the human rights due diligence mandatory for Swiss companies, has been proposed, but ultimately rejected, in Switzerland. See E Umlas, 'Human Rights Due Diligence: Swiss Civil Society Pushes the Envelope' (*Business & Human Rights Resource Centre*, 13 March 2015) <www.business-humanrights.org/en/human-rights-due-diligence-swiss-civil-society-pushes-the-envelope> accessed 31 December 2020.

[101] Council Regulation (EU) 2017/821 of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas OJ L130, 19.5.2017.

[102] Council Regulation (EU) 2017/821, art 16.

[103] UNGP, Principle 7.

[104] UNHRC 'Business and human rights in conflict-affected regions: challenges and option towards State responses, Companion report' (27 May 2011) UN Doc A/HRC/17/32, paras 7-8.

[105] UNGP, Principle 7 and its accompanying commentary, 9.

[106] ibid 10.

4. Investor Obligations under Investment Law: Limitations, Opportunities and Strategies

It is widely accepted that investment protection law can be applied in the context of armed conflict.[107] This is not surprising as the international customary law on the protection of aliens, which has importantly influenced modern international investment law and continues to be applied by investment tribunals, was often clarified in the jurisprudence of post-conflict arbitrations and mixed claims commissions in the late 19th and early 20th century.[108] While throughout the 20th century such conflict-related cases became less common due to the popularity of other remedial regimes,[109] the expansion of the modern investment treaty regime in the 1990s has been followed by a number of investment arbitrations emerging from violent conflicts.[110] At the centre of those cases has been the determination of state responsibility for mistreating investors or not providing them with adequate protections in conflict situations, rather than the accountability of investors for the consequences of their own misconduct. This is a corollary of the in-built asymmetry of international investment law, one of its most criticised features.[111] In the words of one investment tribunal, an investment treaty "imposes no obligations on investors, only on contracting States".[112] In addition, only investors are empowered to pursue procedural remedies under investment law; host states can do so only under very limited conditions,[113] while other actors (such as local communities affected adversely by investment) have no right at present to initiate proceedings against investors.[114]

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[107] See for example, C Schreuer, 'The Protection of Investments in Armed Conflicts' and G Hernández, 'The Interaction between Investment Law and the Law of Armed Conflict in the Interpretation of Full Protection and Security Clauses' in F Baetens (ed), *Investment Law Within International Law: Integrationist Perspectives* (Cambridge University Press 2013); Zrilič, *The Protection of Foreign Investment in Times of Armed Conflict*.

[108] For these developments, see Zrilič, *The Protection of Foreign Investment in Times of Armed Conflict*, Ch 2.

[109] ibid Ch 7.

[110] While initially, such cases have been sporadic, the number has increased over the past few years in light of the conflicts in North Africa and Ukraine. See for example, *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka,* ICSID Case No. ARB/87/3, Award (21 June 1990); *American Manufacturing & Trading, Inc (AMT) v Republic of Zaire*, ICSID Case No. ARB/93/1, Award (21 February 1997); *Patrick Mitchell v Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Award (9 February 2004); *LESI SpA and ASTALDI SpA v People's Democratic Republic of Algeria*, ICSID Case No. ARB/05/3, Award (12 November 2008); *Ampal v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017); *Aeroport Belbek LLC and Kolomoisky v Russian Federation,* UNCITRAL, PCA Case No. 2015-07 (pending); *JSC CB PrivatBank and Finilon LLC v Russian Federation*, UNCITRAL, PCA Case No. 2015-21 (pending); *Strabag SE v Libya*, ICSID Case No ARB(AF)/15/1, Award (29 June 2020); *Cengiz Sanayi v Libya*, ICC Case No 21537/ZF/AYZ, Award (7 November 2018); *Oztas Construction v Libya*, ICC Case No 21603/ZF/AYZ, Award (14 June 2018).

[111] See for example, A Arcuri, 'The Great Asymmetry and the Rule of Law in International Investment Arbitration' in L Sachs, L Johnson & J Coleman (eds), *Yearbook on International Investment Law and Policy 2018* (Oxford University Press 2019).

[112] *Spyridion Roussalis v Romania*, ICSID Case No. ARB/06/1, Award (7 December 2011), para 871.

[113] In a few cases, tribunals have confirmed they have jurisdiction to hear counterclaims. See for example, *Occidental Petroleum Corp v Republic of Ecuador*, ICSID Case No. ARB/06/11, Award (5 October 2012); *Antoine Goetz & Consorts v Burundi*, ICSID Case No ARB/01/2, Award (21 June 2012); *Burlington Resources Inc. v Republic of Ecuador,* ICSID Case No ARB/08/5, Decision on Ecuador's Counterclaims (7 February 2017); *Perenco Ecuador Ltd v Republic of Ecuador*, ICSID Case No ARB/08/6, Award (27 September 2019).

[114] The prospect of and ways to enable local community representation in investor-state dispute settlement proceedings is given fuller treatment in J Ho, 'International Law's Opportunities for Investor Accountability', Chapter 1 of this volume, and L Cotula and N Perrone, 'Investors' International Law and its Asymmetries: The Case of Local Communities', Chapter 3 of this volume.

This does not mean that investor misconduct has never been accounted for in conflict-related cases, or moreover, that investment law does not provide for legal options for arbitral tribunals to inspect investor's diligence amidst armed conflict and factor that into their decisions. While investment treaties do not create an independent avenue in establishing investors' liability for their complicity in conflict-related violations of international law, such investors' contribution could be a legal basis for presenting a counterclaim and thus a finding of financial liability or, more commonly, a justification for depriving investors of procedural and substantive privileges they enjoy under investment treaties.[115]

The major disadvantage of these accountability avenues is obvious: the legal scrutiny of investor misconduct and determination of its consequences will depend on the action within investors' control, namely their decision to initiate arbitration under the relevant investment treaty. In other words, an investor would have to sustain losses as a consequence of a host state's measure which could qualify as a breach of the investment treaty provision (*eg*, full protection and security, expropriation, fair and equitable standard). Such state measures could, for example, target investors due to their involvement in the conflict and complicity in atrocities committed by the opposite party in the conflict (*eg*, rebels or terrorists). On the other hand, the room for accounting investor misconduct will be significantly limited if investors are "partnering" with a host state in commission of conflict-related abuses. In such cases, the investment treaty framework could come into play if the new government (especially in the context of transition) "penalises" investors for their complicity in abuses committed by the previous regimes or attempts to restore the situation that existed before such abuses had occurred (*eg*, by redistributing "pillaged" assets from investors to original owners).[116] Beyond these examples, investors will have no need to avail themselves of investment law protections and thus the potential of investment treaties as an avenue for addressing conflict-related investor misconduct will be diminished.

These limitations notwithstanding, the legal risk of losing investment treaty protections or even incurring financial liability as a result of an investor's actions or omissions in the context of armed conflict, creates an additional incentive for investors to avoid or minimise their contribution to conflicts and related adverse impact on human rights. In addition, investors could be discouraged from bringing a claim against a host state due to the risk that their alleged complicity in gross human rights violations or conflict-related atrocities will be discussed in increasingly transparent investment proceedings, exposed to the wider public and thus result in reputational damage.[117] As often highlighted by the business and human rights lawyers and illustrated by the ATCA cases,[118] the impact of bringing details of such investor misconduct to the public fora should not be neglected.

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[115] See Section 4.2.

[116] Arguably, a similar situation transpired in Egypt in 2011, with national courts ordering the post-revolution Government to renationalise natural resources that were sold to foreign investors by Mubarak administration in conditions of corruption. See J Bonnitcha, 'Investment Treaties and Transition from Authoritarian Rule' (2015) 15(5) *Journal of World Investment & Trade* 965; J Zrilič, 'International Investment Law in the Context of Jus Post Bellum: Are Investment Treaties Likely to Facilitate or Hinder the Transition to Peace?' (2015) 16(4) *Journal of World Investment & Trade* 604.

[117] The "deterring" potential that a risk of reputational damage bears will depend on a number of factors, including the degree of transparency of arbitration, the nature and type of alleged investor misconduct, as well as the tribunal's willingness to account for such misconduct. See below, Section 4.2.

[118] See Bernaz; Kaleck and Saage-Mass, 724.

The following sections investigates what happens when investment claims emerging from war crimes and similar conflict-related violations reach investment arbitrations. Should tribunals start applying IHL and would that affect the outcome of a case? This question can be observed from two perspectives: first, when an investor bringing a claim is a victim of a war crime or similar atrocity; and second, when the investor was implicated in such a crime or contributed to violent conflict.

4.1 Investor as a Victim of War Crimes

Foreign investors and their property, qualifying as civilians and civilian objects, enjoy certain protections under IHL.[119] Such protections are not limitless, however. Investors and their property can be lawfully attacked by parties to the conflict if they have directly participated in hostilities or their property has been used for military purposes.[120] For example, investors' premises that accommodate the troops of a belligerent party or investor oil pipeline that carries oil mainly used by the military, can become legitimate military targets.[121] By getting directly involved in armed conflict, investors thus run a risk of sustaining lawful losses that cannot be remedied. Similarly, they cannot expect to be compensated when the losses are incurred during the combat and are due to military necessity.[122]

While investors enjoy protections in IHL as well as IHRL, they will prefer to litigate their conflict-related losses before investment tribunals, since investment treaties grant them direct access to justice and have been traditionally interpreted in investors' favour.[123] When such claims are made, normative intuition would dictate respondent states to invoke IHL to justify their actions that inflicted injuries on investors. In one case emerging from a violent situation that had arguably met the threshold of IHL definition of armed conflict, *AAPL v Sri Lanka*,[124] the host state did not do so. Instead, it defended its actions by relying on the provisions of investment treaties. While this strategic litigation choice may not be ideal for clarifying the relationship between IHL and investment law, it can be explained by two reasons. First, and as mentioned above, states experiencing internal conflicts tend to be apprehensive about invoking IHL and thereby acknowledging that they are in a civil war, as that could have unwanted political and legal repercussions.[125] Second, investment treaties are capable of being applied and interpreted in the same way as IHL. Many investment treaties include defences mirroring IHL language, namely so-called armed conflict clauses and general security exceptions.[126] Even in the absence of such

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[119] International Committee of the Red Cross, *Commentary on the Additional Protocols* (Kluwer 1987) 1909. See also Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd edn, Cambridge University Press 2016) 142; I Henderson, *The Contemporary Law of Targeting* (Martinus Nijhoff 2009) 227–9.

[120] See AP I, arts 51(3) and 52(2).

[121] International Committee of the Red Cross, *Commentary on the Additional Protocols* (Kluwer 1987) 632, 636, paras 2021–3.

[122] See for example, Hague Convention IV Respecting the Laws and Customs of War on Land (signed 18 October 1907, entered into force 26 January 1910) 187 Consol T S 227, art 23(g).

[123] Zrilič, *The Protection of Foreign Investment in Times of Armed Conflict*, Chs 1 and 7.

[124] *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*.

[125] Zrilič, *The Protection of Foreign Investment in Times of Armed Conflict*, 182; A Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010); W Abresch, 'A Human Rights Law of International Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16(4) European Journal of International Law 741, 756.

[126] Zrilič, *The Protection of Foreign Investment in Times of Armed Conflict*, Chs 4 and 5.

exceptions, the provisions can still be interpreted in line with the IHL and its values. Have they been in that case?

In *AAPL v Sri Lanka*, the state security forces launched the military attack against the investor's prawn farm on the ground that the investor's facility was used by the Tamil terrorists.[127] The attack resulted in the death of more than 20 staff working on the farm, the destruction of the property, as well as the death of the nearby villagers. Although IHL was never invoked or relied on in that case, the investor's claim, the state's defence and the tribunal's reasoning were permeated with the IHL terminology. While the investor argued that the state forces committed wanton destruction and murder (war crimes) and thus violated investment treaty standard full protection and security,[128] the state argued that the investor facility was the base of the enemy forces (thus a military target) and tried to justify the losses by relying on the necessity exception in the armed conflict clause of the investment treaty (military necessity).[129] The tribunal found the state responsible for breaching its due diligence duty for not taking precautions in the military attack, which could have prevented death of innocent civilians and destruction of the property.[130]

The award has been criticised by the dissenting arbitrator and in scholarship for interfering with the state's prerogative to protect its security interests and for applying standards not appropriate for armed conflict.[131] Some commentators suggested that applying IHL in that case would have led to a different outcome.[132] As I have argued in greater detail elsewhere,[133] a close reading of the award does not withstand this claim. The tribunal's reasoning is evocative of the IHL obligation to take precautions in military attack, which is measured against a due diligence standard,[134] and has been reaffirmed by regional human rights courts many years later.[135] The tribunal applied investment treaty standards in line with the IHL values and reached the same conclusion it would have had, had it applied IHL directly.

The case demonstrates how investment arbitration could potentially be used to effectively enforce IHL obligations in limited circumstances, namely when victims of war crimes are investors. This could have a spill-over beneficial effect on other victims of state war crimes. For example, in the *AAPL* case, the benefits for the local Tamil community were twofold. First, the arbitration established the international responsibility of the state for the atrocities against the villagers. In this way, it filled the enforcement gap that exists in IHL and IHRL.[136] Second, the investor was also said to share its award with the affected victims, thus generating some material benefits for them.[137]

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127 *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*.

128 ibid paras 28, 79.

129 ibid para 82.

130 ibid para 85(b).

131 *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, Dissenting Opinion of S Asante (15 June 1990), 590; O Mayorga, 'Arbitrating War: Military Necessity as a Defence to the Breach of Investment Treaty Obligations' (*Harvard University Program on Humanitarian Policy and Conflict Research Policy Brief*, August 2013) <www.hpcrresearch.org/sites/default/files/publications/081213%20ARBITRATING%20WAR%20%28final%29.pdf> accessed 31 December 2020; J Gathii, 'War's Legacy in International Investment Law' (2009) 11(4) *International Community Law Review* 353, 370.

132 ibid.

133 Zrilič, *The Protection of Foreign Investment in Times of Armed Conflict*, Ch 6.

134 AP I, art 57(1). See also Dinstein, 165; W Boothby, *The Law of Targeting* (Oxford University Press 2012) 122, 177.

135 See for example, *McCann and Others v The United Kingdom* App no 18984/ 91 (ECtHR, 27 September 1995); *Isayeva v Russia* App no 57950/00 (ECtHR, 24 February 2005).

136 There is no regional human rights court in Asia.

137 M Trawick, 'Lessons from Kokkadichcholai' (*Tamilnation*, 21-22 May 1999) <https://tamilnation.org/conferences/tamil_eelam/99_canada/trawick.html> accessed 31 December 2020.

This is not to suggest that investment arbitration provides a systemic solution for inadequate enforcement mechanisms in IHL. There is no guarantee that tribunals will interpret and apply investment treaty standards in line with the IHL, and in fact, in some other cases they have arguably not.[138] Similarly, sharing the awarded damages with those who do not have similar access to justice is not based on any international obligation but merely on investors' good will. Moreover, the enforcement potential of investment arbitration is hampered when investors are actually complicit in war crimes. If in such cases they decide to pursue a claim against a state, investor misconduct can still be accounted for. The next section explains how.

4.2 Investor as a Contributor to War Crimes

When an investor bringing an arbitration claim was implicated in a war crime or other atrocity (*eg*, perpetrated it directly through its private security service, or aided and abetted the rebel forces or the previous regime), respondent states should not shy away from invoking the above-discussed IHL obligations and voluntary codes in structuring their defence. This would not only compel tribunals to engage better with IHL sources and clarify obligations investors have amid armed conflict, but could potentially provide for an investor accountability mechanism inasmuch as a state would initiate a counterclaim. To my knowledge, a case emerging from armed conflict where this could have been an option, has not yet been arbitrated. Many other cases, however, suggest that tribunals have considered investor misconduct on four different levels of an investment dispute: counterclaims, jurisdiction and admissibility, merits, and quantum.[139]

First, a state could file a counterclaim and base it on the investor's violation of IHL.[140] The *Urbaser* case is particularly instructive because of the tribunal's recognition that investors have certain obligations under international law and the suggestion that that the company's compliance with the CSR standards could potentially serve as a measure for assessing an investor's misconduct.[141] States would thus be encouraged to rely in their pleadings not only on relevant international law obligations, but also on soft law obligations specified in voluntary codes, and draw on civil law and criminal law cases in which standards for corporate complicity, and aiding and abetting liability have been applied.[142]

Second, an investor's contribution to conflict-related abuses can be a basis for precluding the tribunal to entertain the claim on jurisdictional and admissibility grounds, provided that such violations of international law were made at the stage of acquiring the investment.[143] So far, this

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[138] Patrick Mitchell v Democratic Republic of Congo. See also Section 4.2.

[139] See for example, JE Viñuales, 'Investor Diligence in Investor Arbitration: Sources and Arguments' (2017) 32(2) *ICSID Review – Foreign Investment Law Journal* 346; P Muchlinski, 'Caveat Investor? The Relevance of the Conduct of the Investor under the Fair & Equitable Treatment Standard' (2006) 55(3) *International & Comparative Law Quarterly* 527.

[140] For more on counterclaims, see T Ishikawa, 'Counterclaims in Investment Arbitration: Is the Host State the Right Claimant?', Chapter 8 of this volume.

[141] *Urbaser v Argentina*, para 1195. See also K Crow and LL Escobar, 'International Corporate Obligations and the Urbaser Standard: Breaking New Ground?' (2018) 36(1) *Boston University International Law Journal* 87.

[142] ATCA cases and judgment of international criminal tribunals could provide helpful source for inspiration and analogies. See Crow; ICJ Panel Report, Vol I, 21-22.

[143] See generally, S Schill, 'Illegal Investments' (2012) 11(2) *The Law and Practice of International Courts and Tribunals* 281; A Newcombe, 'Investor Misconduct: Jurisdiction, Admissibility, or Merits?' in C Brown and K Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 187–200.

line of defence, based on legality requirements and a clean hands doctrine, was mostly used with respect to investor's involvement in fraud and corruption.[144] In the context of armed conflict, the illegality of investments could be invoked in order to bar jurisdiction when investors acquire assets (*eg*, land rights, natural resources) without genuine consent from the title holders. As mentioned above, such acquisitions constitute pillage which is prohibited under IHL. One could argue that such a defence would be available, even when the rights were obtained through ostensibly legal channels, if such acquisitions were accompanied by violent practices such as the forceful displacement of the local community that the investor actively participated in (*eg*, through the contracted security agents),[145] or was or should have been aware of.

Third, investors' failure to abide by IHL norms could contextualize state measures and inform the determination of state (non)-liability at the merits stage.[146] Relying on IHL provisions could help the tribunal better contextualize a state's actions against an investor acting in bad faith. The state could thus invoke investor's contribution to the conflict-related atrocity (either deliberate or due to investor's lack of diligence) to justify its intervention and to argue that its measures were reasonable or that the investor's legitimate expectations were not breached.[147] For example, in *Mitchell v Congo*, the government seized the investor's property and detained its employees for allegedly assisting the rebels in wartime.[148] The tribunal paid little deference to the state's decision-making in volatile times and decided in favour of the investor. Had the IHL rules been applied, notably the standard of military necessity assessed in view of information available to the military commander at the time when the state measures had been taken,[149] the outcome would have likely been different.

Lastly, the host state can argue that the investor misconduct was a contributing factor to its injury and should thus result in reduced quantum of awarded damages.[150] The principle of contributory fault has been invoked when the investor's contribution was in the form of their lack of caution that should be reasonably exercised in conditions of hostilities,[151] or their indirect,[152] or

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144 See for example, *World Duty Free Company Limited v Republic of Kenya*, ICSID Case No. ARB/00/7, Award (4 October 2006), paras 148, 157; *Liman Caspian Oil BV and NCL Dutch Investment BV v Republic of Kazakhstan*, ICSID Case No. ARB/07/14, Award (22 June 2010), para 194; *Hesham Talaat M Al-Warraq v Republic of Indonesia*, UNCITRAL, Award (15 December 2014), para 647.

145 See the decision of the Colombian tribunal in *Resguardo Indigena Embera Katio de Alto Andagueda*, Tribunal Superior, Judgment. No 1007 (23 September 2014) (arguing that the investor should have been aware of the violence that prompted forcible displacement of the indigenous community from the concession area) cited and analysed in Tamayo-Alvarez and Velasquez-Ruiz.

146 See for example, *Fraport AG Frankfurt Airport Services Worldwide v Republic of Philippines*, ICSID Case No. ARB/03/25 Award (16 August 2007), para 354.

147 Vinuales 361; Zrilič, *The Protection of Foreign Investment in Times of Armed Conflict*, 188.

148 *Patrick Mitchell v Democratic Republic of Congo*. Ultimately, the award was annulled and holds little precedential value.

149 See for example, Hague Regulations, art 23(g); Zrilič, *The Protection of Foreign Investment in Times of Armed Conflict*, 42, 128.

150 UNGA 'Articles on Responsibility of State for Internationally Wrongful Acts' UN GAOR 53rd Session Supp No 10 UN Doc A/RES56/83 (2001), art 39. For the limitations of the doctrine of contributory fault as a marker of and penalty for investor wrongdoing, see JD Amado, JS Kern & MD Rodriguez, 'Elevating Corruption to an International Tort', Chapter 12 of this volume.

151 See *Lillie Kling v Mexico* (1930) RIAA Volume IV 575, 585.

152 In *Bear Creek* case, the respondent (ultimately unsuccessfully) argued that the investor contributed to the social unrest by failing to conduct responsible community outreach: *Bear Creek Mining Corporation v Peru*, ICSID Case No. ARB/14/21, Award (30 November 2017), paras 560, 569; Dissenting Opinion, para 39. For a similar case, with a different outcome see *KWP v Kenya*, ICC Award (the tribunal held that the investor's insufficient outreach efforts was at the root of the violent protests and thus investor could not rely on the investment protections), reported in D Charlotin, 'Investigation: Newly-Unearthed ICC Award Analyses whether Local Community Opposition to

direct contribution to a violent conflict.[153] The latter example transpired in the *Copper Mesa* case where the mining company planned and induced violent acts (by recruiting and using armed men) against the local residents who opposed the investment, which exacerbated the conflict situation.[154] Had those events occurred amid armed conflict, the government could have argued that the investor violated relevant IHL prohibitions,[155] which could then present a basis for one of the defence options listed above. Beyond IHL, states should also substantiate their arguments by referencing relevant voluntary codes concerning private and military security and CSR initiatives on prevention of conflict in natural resources, which recommend procedures for investors' early and authentic cooperation with the affected communities.[156]

The success of these defence strategies will depend on the wording of applicable investment treaties as well as a tribunal's willingness to account investor misconduct under available rules of international law. Since different interpretations of the above principles have yielded different outcomes in different cases,[157] respondent states should be careful in selecting an arbitrator, who has good knowledge of IHL and other relevant fields of international law and is more likely to engage with them in the interpretation and application of investment treaty standards.[158] Such a task is made easier if the mandate to do so is spelt out expressly in investment treaties. How this can be achieved is explained in the next section.

4.3 Changes in Investment Treaties

The previous section has outlined how tribunals can account investors' involvement in, or contribution to the conflict situation when deciding whether and to what extent they are entitled to investment treaty protections. In view of the inconsistent jurisprudence and fragmented nature of investment arbitration, the approach more conducive to certainty would be to introduce requisite changes in the text of investment treaties, reasserting the consequences of the investor misconduct in explicit terms. The rebalancing of investment law would be achieved most optimally if investment treaties stipulated enforceable investor obligations in investment treaties, including the right of victims of investor misconduct to bring claims against them. As commendable as this normative objective is, it still does not seem to be politically viable, notwithstanding the ongoing backlash against the investment treaty regime. Thus, none of the reforms currently being undertaken by the UNCITRAL and the ICSID contemplate such changes.[159]

Project is a Political Risk for which African State had Pledged to Indemnify Investors' (*IA Reporter*, 30 November 2018) <https://www.iareporter.com/articles/investigation-newly-unearthed-icc-award-analyses-whether-local-community-opposition-to-project-is-a-political-risk-for-which-african-state-had-pledged-to-indemnify-investors> accessed 31 December 2020.

153 *Copper Mesa Mining v Republic of Ecuador*, PCA No. 2012-2, Award (15 March 2016), paras 6.99-6.102.

154 ibid.

155 See Section 2.

156 *Bear Creek Mining Corporation v Peru*, paras 258 (see specifically footnote 296 which makes a reference to standards like ILO Convention 196, ICMM Good Practice Guide, *etc*). See Section 2.1.

157 For example, in *Copper Mesa*, the tribunal treated the principle of contributory fault and the clean hands doctrine as the same, while in *Bear Creek* case, disagreement existed between arbitrators as to the applicability of the principle of contributory fault. *Copper Mesa v Ecuador*, para 6.84; *Bear Creek v Peru*, Dissenting Opinion, para 39.

158 Tribunals can engage with the IHL sources on the basis of the applicable law clauses and rules on treaty interpretation. See *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, para 12; Zrilič, *The Protection of Foreign Investment in Times of Armed Conflict*, 184.

159 The ongoing reforms at UNCITRAL and ICSID are mostly focusing on procedural aspects.

Regardless, some model investment treaties have started including investor obligations in investment treaties,[160] sometimes expressly referencing conflict situations. For example, closely mirroring Ruggie's framework, article 15(1) of the 2012 SADC Model BIT states that:

> Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments *shall not assist* in, or be *complicit* in, the violation of the human rights by others in the Host State, including by public authorities or *during civil strife*.[161]

The explicit reference to complicity of investors, either with private actors (for example, private security companies, rebel groups, etc.) or public authorities in violent conflicts, leaves little doubt that such activity can give rise to an investment treaty violation. While the model treaty limits the consequences of such investor contribution only to the merits of the claim and damages,[162] it also provides for the obligation of the investor home state to "ensure that their legal systems […] allow for […] the bringing of court actions on their merits before domestic courts relating to the civil liability of investors […]" stemming from investor misconduct on the territory of the host state.[163]

Other textual changes can concern the loosening of the conditions under which counterclaims can be brought against investors,[164] and references to voluntary initiatives,[165] giving tribunals an explicit mandate to consider the compliance with the CSR standards when applying investment treaties. For example, the 2019 Dutch Model BIT stipulates that the investor's non-compliance with the UNGP will be taken into account when deciding the amount of compensation.[166] Even more specific is the 2017 Colombian Model BIT, which stipulates that the government's measures in compliance with the Peace Agreements between the government and armed groups does not constitute a breach of the investment treaty, and that investors must participate in "successful implementation of the Peace Agreements and the achievement of full reparation to victims affected by the Colombia Armed Conflict".[167] Following this addendum, the Colombian Land Restitution programme involving the forfeiture of investors' land rights over a property previously taken from the victims of armed conflict, could not give rise to successful investment treaty claims.

Such drafting solutions affirm that investors should exercise heightened due diligence in turbulent times, as they could otherwise run the risk of losing legal protections and potentially sustain considerable financial losses. Future drafting innovations could see strengthening the obligation of home states to create effective avenues for holding investors to account and introducing similar situation-specific provisions like that in the Colombia Model BIT.

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[160] See 2015 Indian Model Bilateral Investment Treaty (BIT), art 12; 2012 SADC Model BIT, art 15; 2016 Nigeria-Morocco BIT, arts 18-20.

[161] 2012 SADC Model BIT, art 15.1 (emphasis added).

[162] ibid art 17.1.

[163] 2012 SADC Model BIT, art 17.2. For similar provision see 2015 Indian Model BIT 2015, art 13.2; 2016 Nigeria-Morocco BIT, art 20.

[164] 2012 SADC Model BIT, art 19.2; 2015 Indian Model BIT, art 14.11(i).

[165] See for example, Canada-Cameroon BIT (signed 3 March 2014, entry into force 16 December 2016), art 15(2); Canada-Senegal BIT (signed 27 November 2014, entry into force 5 August 2016), art 16; 2013 Canada-Panama FTA (signed 14 May 2010, entry into force 1 April 2013), art 9(17); 2015 Norway Model BIT, art 31.

[166] 2019 Dutch Model BIT, art 23.

[167] 2017 Colombia Model BIT, Annex 6.

Furthermore, they could extend the provisions dealing with investor behaviour as to encompass other sector- or issue-specific CSR initiatives, such as guides on prevention of natural resources conflicts and principles addressing conduct of private security service providers, as well as extend the consequences of non-compliance beyond the quantum stage. While such voluntary codes are largely based on human rights framework and thus also applicable outside of armed conflict, adhering to them will help investors avoid IHL violations. Arguably, this could incentivise corporations to plan and implement measures required from them in these instruments, and consequently improve their compliance with international obligations in times of armed conflict.

5. Conclusion

This chapter has set out to review investor responsibilities and obligations amid armed conflict. It has argued that certain IHL rules are directly binding on investors and this is becoming increasingly accepted in doctrine and case law. It has been further observed that the most notable progress in detailing investor responsibilities in conflict-affected zones has occurred in the CSR sphere. While soft law initiatives largely draw on the human rights framework, which transcends the narrow area of IHL application, they aim to help corporations bring their operations in line with international obligations and thus minimise the risk of legal liability.

So far, investor accountability for violation of IHL obligations has been mostly sought in domestic criminal and civil fora, with the CSR initiatives advancing development in this area. On the international level, despite ICL being capable of prosecuting business-related crimes, the enforcement potential is small since the ICC only has jurisdiction over individuals and is generally reluctant to investigate corporate crimes. Given its limited capacity, the ongoing backlash and the general preference to prosecute direct perpetrators of the most serious crimes, the Court is unlikely to become a productive avenue for holding investors to account.

The chapter's main argument was that investment law presents another, underutilised and unexplored mechanism for enforcing IHL obligations. Due to the asymmetric nature of the investment regime, the enforcement potential is stronger when investors are victims of violence than when they participate in it. Despite this limitation, the chapter has outlined strategies, highlighting the potential of investment treaties to financially sanction investors involved in conflict-related violations, by either permitting claims for damages against them, or by depriving them of investment treaty protections. It has been argued that maximising this potential would require changes in investment treaties and the establishment of a clearer connection with the legal frameworks that address the interplay between business and conflict.