CHAPTER 1

International Law in Revolutionary Upheavals: On the Tension between International Investment Law and International Humanitarian Law

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1 Introduction

An investor’s production site was overrun by government forces in a counter-insurgency operation against suspected revolutionary powers. The site was destroyed, and managers and staff killed. From the perspective of international investment law, which arose in recent times mainly from bilateral investment treaty (BIT) practice, a state’s failure to exercise sufficient due diligence in such cases, ‘which requires undertaking all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destructions’,¹ may lead to a breach of a BIT and therefore trigger the host state’s obligation to compensate a foreign investor.

The destruction of the production site occurred, in this instance, in the course of a non-international armed conflict. Would therefore a different interpretation also be conceivable or even compelling? International humanitarian law arose – from the late nineteenth century onwards – essentially from multilateral treaty practice in response to international armed conflicts (the Hague and Geneva Rules, ie, the jus in bello). So, if it can also be considered to be applicable in a non-international armed conflict on the basis that ‘there [was] no doubt that the destruction of the [investment] took place during the hostilities’,² it would – as formulated in the dissenting opinion to the AAPL v Sri Lanka arbitral award – ‘take into account the national emergency and extraordinary conditions under which the government mounted a strategic and

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¹ Asian Agricultural Products Ltd (AAPL) v Sri Lanka, ICSID Case no ARB/87/3, Final Award (27 June 1992) para 85(d) (in the context of the full protection and security standard of the applicable Sri Lanka–UK BIT (1980)). President of the tribunal was Ahmed S El-Kosheri, arguably the doyen of international law and arbitration in the Arab world, whom the author had the opportunity to interview in Cairo and who passed away on 18 March 2019.

² ibid para 59.
highly sensitive security operation to regain its sovereign control’. Hence it would allow a state to take ‘all necessary security and military measures’, and therefore, such a ‘legitimate act of a sovereign government to regain control cannot be faulted merely because of incidental destruction of property’. If the destruction was ‘demanded by the necessities of war’, then the state action could be seen to be authorised by ‘military necessity’ and therefore lawful.

If, in such a scenario, international investment law possibly establishes a state’s liability for an action which, in turn, would be lawful under international humanitarian law of non-international armed conflicts, a normative conflict may possibly arise, in which each subfield, if one follows a broad understanding of norm conflicts, might ‘suggest different ways of dealing with a problem’. This leads to the overriding question of the relationship and interplay of international investment law with other subfields of international law, which have emerged essentially independently of each other and have very different institutional features, dispute resolution (if at all) and enforcement mechanisms. How can and should one deal with the particularistic reality of international law, consisting of international law’s specialised subfields and competing normative systems responsive to distinct stakeholders, with neither a hierarchy nor stated relationship to each other? How then should the

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3 *Aapl v Sri Lanka*, *ICSID* Case no ARB/87/3, Final Award, Dissenting Opinion of Samuel KB Asante (15 June 1993), (1991) *ICSID Rev* 574, 593 et seq. Interestingly, the dissenting opinion takes up arguments and concepts that could have been broadly borrowed from international humanitarian law applicable to non-international armed conflicts at the time.

4 ibid.

5 ibid.

6 The principle of ‘military necessity’ is, for instance, built in article 23(g) of the Regulations Respecting the Laws and Customs of War on Land, Annex to Convention (iv) Respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 205 CTS 277 (Hague Regulations), which, by virtue of its customary status, also applies to non-international armed conflicts: ‘[...] it is especially forbidden [...] To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war’ (emphasis added).

7 *ILC*, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission’ (2006) UN Doc A/cn.4/L.682, paras 21 et seq, which arguably follows a broad understanding of norm conflicts, according to which a norm conflict already exists when different (though not incompatible) balancing of interests is found in varying fields of international law.


9 However, the debate triggered by the *ILC* Fragmentation Report has lost some momentum in recent years. See Christopher Greenwood, ‘Unity and Diversity in International Law’ in Mads Andenas and Eirik Bjorge (eds), *A Farewell to Fragmentation: Reassertion and...*
interplay and tension between international investment law and international humanitarian law be conceptualised, last but not least, by investment arbitration tribunals?

It is, unfortunately, hardly an entirely new phenomenon in the history of international investment that revolutionary upheavals often escalate into non-international armed conflicts, as the period of revolutions and civil wars in many countries during the late nineteenth and early twentieth centuries has shown.\(^{10}\) Investments are especially vulnerable since they involve long term commitments and cannot thrive under conditions such as riots, revolutions and civil wars.\(^{11}\) Nevertheless, the related questions of international law, such as the interplay and relationship between international investment law and international humanitarian law of non-international armed conflicts have not yet been sufficiently clarified or even remain controversial. It has been generally identified that ‘[t]here is relatively little in fact, until recently, astonishingly little judicial or arbitral practice on normative conflicts’.\(^{12}\) Moreover, it is especially non-international armed conflicts rather than international armed conflicts that account for by far the largest number of all armed conflicts worldwide.\(^{13}\) Non-international armed conflicts ‘have become the most widespread, the most destructive, and the most characteristic form of organised human violence.’\(^{14}\) It is very likely that

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\(^{10}\) In those first awards of this time, on the one hand, no compensation was awarded, eg, for state actions ‘compelled by the imperious necessity of war’ (Bembelista Case (Netherlands/Venezuela) (1903) 10 RIAA 717) or for a ‘legitimate act of war’ (The Dunn Case (Chile/UK) (1895), quoted after ILC, ‘“Force majeure” and “Fortuitous Event” as Circumstances Precluding Wrongfulness: Survey of State Practice, International Judicial Decisions and Doctrine’ (1978) 11(1) YBILC 61, para 356). On the other hand, however, as arbitrator Huber held, ‘if the state is not responsible for the revolutionary events themselves, it could nevertheless be responsible for what the authorities do or not do to avert, to the extent possible, the consequence’, Spanish Zone of Morocco (Great Britain v Spain) (1925) 2 RIAA 615, 639, 642.

\(^{11}\) Christoph Schreuer, ‘War and Peace in International Investment Law’ in Katia Fach Gómez, Catharine Titi, and Anastasios Gourgourinis (eds), *International Investment Law and the Law of Armed Conflict* (Springer 2019) 2.

\(^{12}\) ILC, ‘Fragmentation of International Law’ (n 7) para 27.


issues resulting from such conflicts will come before international courts and arbitral tribunals much more frequently in the future.

The latest example of conflicts culminating in many countries in non-international armed conflicts is the revolutionary upheavals which became known – rightly or wrongly – as the ‘Arab Spring’. The act of desperation of a 26-year-old fruit vendor, Mohamed Bouazizi, who set himself on fire on 17 December 2010 in protest against his continuous ill-treatment and humiliation by the police in his hometown of Sidi Bouzid, Tunisia, triggered a wave of unprecedented revolutionary upheavals for ‘bread, freedom, social justice and human dignity’ in the Arab world. This marked the beginning of the end of the Middle East as we knew it. We have since witnessed the toppling of long-standing regimes, protracted civil wars, the political and violent escalation of frequently confessional tensions and the erosion of the state monopoly of the use of force.

These profound revolutionary upheavals have not only made a deep impact on political and social life, but also inevitably on economic life, with far-reaching repercussions for the interests of many public and private commercial entities. Civil war, revolution, state of emergency, revolt, insurrection,

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15 The term used to describe these upheavals, ‘Arab Spring’, was coined by Marc Lynch, ‘Obama’s ‘Arab Spring’?’ (Foreign Policy, 6 January 2011) <http://foreignpolicy.com/2011/01/06/obamas-arab-spring/> accessed 19 January 2020. However, vis-à-vis this – rather Western – narrative and attribution, the Arab world’s main description of choice was ‘Arab Revolutions’, or ‘al-Thawrat al-Arabiya’. Later, Lynch published his analysis in Marc Lynch, The New Arab Wars: Uprisings and Anarchy in the Middle East (Public Affairs 2016); Marc Lynch, ‘New Arab World Order’ (Foreign Affairs, 16 August 2018) <www.foreignaffairs.com/articles/middle-east/2018-08-13/new-arab-order> accessed 19 January 2020. At the time of writing, in early 2020, a ‘second wave’ of Arab Spring can be observed in Algeria, Iraq, Lebanon, and Sudan. This time the call is ‘we are a people’, which has already prompted a comparison to the ‘Arab Spring'; see Marwan Muasher, ‘Is this the Arab Spring 2.0?’ (Carnegie, 30 October 2019) <https://carnegieendowment.org/2019/10/30/is-this-arab-spring-2-0-pub-80220> accessed 19 January 2020; Sarah J Feuer and Carmit Valensi, ‘Arab Spring 2.0? Making Sense of the Protests Sweeping the Region’ (1 December 2019) Institute for National Security Studies Insight no 1235 <www.inss.org.il/publication/arab-spring-2-0-making-sense-of-the-protests-sweeping-the-region/> accessed 19 January 2020.

16 For the historic development, see David Fromkin, A Peace to End All Peace: The Fall of the Ottoman Empire and the Creation of the Modern Middle East (20th ed, Macmillan 2009); James Barr, A Line in the Sand: Britain, France and the Struggle That Shaped the Middle East (Simon & Schuster 2011).

riot\textsuperscript{18} and pre-existing armed conflicts during these revolutionary upheavals have also all left their mark on foreign investors’ production facilities. Many of these facilities have had to be closed, with many investors forced to withdraw and evacuate, and facilities – whether accidentally or intentionally – have also been completely destroyed. Above all, foreign investors with investments in the construction, energy and hospitality sectors that have been affected by this dynamic have claimed that the damage caused during the revolutionary upheavals amounts to a breach of obligations under \textit{BITs}, especially those of Egypt\textsuperscript{19} and Libya.\textsuperscript{20}

In the present constellation, there is an inherent tension between the investor’s and the respondent state’s interests, which forms a \textit{leitmotiv} that runs through almost all questions of international law concerning possible compensation following a revolutionary upheaval. From the investor’s point of view, having invested personnel, operations and capital in the host state, the destruction of this investment means that the precise political risk which the \textit{BIT} provides protection for has materialised. From the respondent \textit{host state’s} point of view, however, the revolutionary upheaval originated in a political crisis which the state is neither responsible for nor the cause of. When revolutionary upheavals culminate in non-international armed conflicts, the state authority generally sees itself required to use all possible force at its disposal.

\textsuperscript{18} See this enumeration in Pakistan–Philippines \textit{BIT} (1999) art 5.

\textsuperscript{19} A large number of arbitral actions were filed at \textit{ICSID} against Egypt following the Egyptian revolutions in the aftermath of the 25 January 2011 revolution. See World Bank Group, ‘International Centre for Settlement of Investment Disputes – Cases’ <https://icsid.worldbank.org/en/Pages/cases/AdvancedSearch.aspx> accessed 19 January 2020 (search for Egypt as respondent). Moreover, several non-\textit{ICSID} investment arbitration proceedings have been commenced against Egypt with a clear upsurge from 2011 onwards. See ‘Egypt has faced $14 bn worth of cases from investors since 2011’ (<\textit{Ahram Online}, 22 April 2014) <http://english.ahram.org.eg/NewsContent/3/12/99606/Business/Economy/Egypt-has-faced--bn-worth-of-cases-from-investors-.aspx> accessed 19 January 2020. Remarkably, although faced with this unprecedented number of investment claims, Egypt did not terminate any of its \textit{BITs} and stayed in \textit{ICSID} (which it had joined in 1972), apparently to signal an open and transparent legal framework for investment.

\textsuperscript{20} Numerous investment treaty claims that relate to disputes following the first Libyan Civil War have been raised by Turkish construction companies under the Turkey–Libya \textit{BIT} (2009), as Turkey and Libya enjoyed particularly close economic relations. These claims have, however, \textit{inter alia}, to deal with the fact that Turkey failed to ratify the treaty until 22 April 2011, some two months after the civic revolt began and long after the security situation had deteriorated precipitously.
This contribution focuses on the particularly interesting section of questions of international law which arise here, ie the interaction and tension between international investment law and international humanitarian law applicable in non-international armed conflicts. Are international humanitarian law and international investment law at all applicable to these constellations? When such a normative overlap does indeed lead to a genuine normative conflict, one possible method of conflict resolution could be the principle of *lex specialis*. Are rules of international humanitarian law *lex specialis* as they constitute ‘intransgressible’21 principles of customary international law – or should international investment law be considered as *lex specialis* for the treatment of investments in times of conflict as this provides the individual’s property with more specific and more favourable protection (section 2)?

Yet, is there really a normative conflict between international humanitarian law and international investment law? Should there be reservations concerning a *lex specialis* approach and should instead a more *informative approach* be taken, in which international humanitarian law’s rules and concepts would inform the interpretation of BIT norms, and vice versa (section 3.1)? Is it useful and advisable, for example, to interpret the term ‘necessity of the situation’ in so-called extended war clauses in the light of humanitarian law’s principle of ‘military necessity’? Or, are there compelling arguments for an *autonomous* treaty interpretation on its own terms (sections 3.2 and 3.3)? Finally, should the burden of proof really remain on the investor, not only in cases of extended war clauses (section 4)?22


22 This contribution examines in the context of investment treaty claims for damages after revolutionary upheavals only the interplay and relationship between international investment law and international humanitarian law. There remains the additional question of the use of other possible interpretative tools, such as (1) disregarding the loss of profit in situations of political crises and armed conflicts, (2) considering the country risk also when determining the level of compensation, (3) finding equitable solutions derived from the applicable law at the level of enforcement, (4) assigning a corresponding quota to the instrument permitting enforcement (such as the non-enforcement order imposed by the UN Security Council on Iraq’s creditors by virtue of UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483), (5) a fund solution where an affected state would establish a structured multi-stage process for settling damages of predominantly similar claims of foreign investors, or (6) establishing mass claims commissions when there is an overriding international interest.
2 Relationship between International Investment Law and International Humanitarian Law of Non-International Armed Conflicts

2.1 Fundamental Applicability of Both Regimes

2.1.1 International Investment Law

Even after revolutionary upheavals and radical changes of government, the state’s international obligations such as those arising from BITs remain valid as ‘nations do not die when there is a change of their rulers or in their forms of government. [...] “The king is dead; long live the king!” has typified this thought for ages. [...] and that responsibility continues through all changing forms of government.’23 That means when the new government is formed by a revolutionary movement, this insurrectional government will be held responsible for acts of the pre-revolutionary government and for all of the acts committed during the revolution.24 The essential justification for this generally recognised *retroactive* attribution is that ‘[t]he basis for the attribution of conduct of a successful insurrectional or other movement to the state under international law lies in the continuity between the movement and the eventual government’.25 If the government is – still – the pre-revolutionary government, it will not be held responsible for damages caused by the unsuccessful revolutionary movement as ‘governments are responsible, as a general principle, [only] for the acts of those they control’.26 Therefore, in this constellation, the government merely remains responsible for the actions of its own forces.

This question must be distinguished from that of the applicability of BITs during international armed conflicts. This is rightly the conclusion of a variety of arguments: First, there are already standards contained in BITs in the form

25 Spanish Zone of Morocco (n 10) 642; Sylvania Technical Systems Inc v Iran (1985) 8 IUSCCTR 298, 310.
26 Sambiaggio Case (Italy/Venezuela) (1903) 10 RIAA 499, 513. Responsibility arises, however, if it can be shown that the government of that state was negligent in the use of, or in the failure to use, the forces at its disposal for the prevention or suppression of the insurrection. Ian Brownlie, *System of the Law of Nations: State Responsibility, Part I* (OUP 1986) 452 et seq; Danielle Morris, ‘Revolutionary Movements and De Facto Governments – Implications of the “Arab Spring” for International Investors’ (2012) 28 Arb Int’l 721.
of extended war clauses, which explicitly provide protection in times of armed conflict and war. Secondly, article 3 of the International Law Commission’s (ILC) 2011 Draft Articles on the Effects of Armed Conflicts on Treaties clearly states that ‘the existence of an armed conflict does not ipso facto terminate or suspend the operation of the treaty’, thus affirming legal stability and continuity. Finally, those treaties mentioned in the annex to article 7 of the 2011 ILC Draft Articles also clearly include reciprocal BITs as they grant private entities third-party beneficiary rights.

2.1.2 International Humanitarian Law of Non-International Armed Conflict

When revolutionary upheavals culminate in non-international armed conflicts such as civil wars, the application of international humanitarian law to such non-international armed conflicts is much more complicated. In principle, the applicability of international humanitarian law is known to depend on whether these revolutionary upheavals go beyond mere ‘internal disturbances and tensions’ and culminate in armed conflicts. As article 1(2) of Additional Protocol II to the Geneva Conventions makes clear, the law of armed conflicts ‘shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts’. The existence of a non-international armed conflict – as the de facto trigger for applicability – in turn requires both, a minimum of

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30 See Geneva Conventions (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (Geneva Conventions) common art 3: ‘In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties [...]’. As is well-known, there are two distinct thresholds for non-international armed conflicts, to which partially different sets of rules apply: On the one hand, there is common article 3 of the Geneva Conventions with a lower threshold of applicability and, on the other, there is the Additional Protocol II with a higher one.
organisation\textsuperscript{31} of the non-state armed group (which, however, must not reach the level of a well-organised state army) as well as a minimum of intensity\textsuperscript{32} of the armed conflict, which generally requires the use of (military) force on each side.

The precise demarcation required for applicability between the poles of internal disturbances and tensions – which includes riots, spontaneous uprisings of populations, looting leading to large-scale arrests, disappearances and emergency legislation, on the one hand, and intense armed conflicts, on the other hand, is not always easy. Very often, ‘there is a gradual escalation of internal disturbances and no hard and fast line could be taken lock, stock and barrel.’\textsuperscript{33} Yet, a prime example of such a possible applicability of international humanitarian law of non-international armed conflicts originating from revolutionary upheavals would very likely be the circumstances underlying the award presented at the outset of this analysis – \textit{AAPL v Sri Lanka}.

Depending on the circumstances, the following differentiation must be made regarding the applicability of international humanitarian law of non-international armed conflicts (in the following: international humanitarian law): If the internal disturbances and tensions accompanying a revolutionary upheaval do not exceed the required threshold of armed conflict, then international humanitarian law is not applicable to those situations and international investment law is exclusively applicable.\textsuperscript{35} When, in fact, the threshold of armed conflict\textsuperscript{36} is crossed, then international humanitarian law is applicable.

\textsuperscript{31} The factors demonstrating the existence of a sufficient degree of organization are very well summarised in \textit{Prosecutor v Boškoski}, (Judgment) IT-04-82-T (10 July 2008) paras 199 et seq.

\textsuperscript{32} On the factors required for this, see ibid para 190.

\textsuperscript{33} Robert Kolb, \textit{International Humanitarian Law} (Cheltenham 2014) 104.

\textsuperscript{34} \textit{AAPL v Sri Lanka}, Final Award (n 1) para 59.

\textsuperscript{35} However, even in situations that are still below the threshold of ‘armed conflict’, for example, due to a lack of sufficient organization of the revolutionary forces or non-state armed groups – as is typical in the case of flowing transitions between internal disturbances and tensions – massive use of force and destruction regularly occurs. The so-called ‘Turku Declaration of Minimum Humanitarian Standards’ (adopted 2 December 1990), which was developed for this constellation and formulates minimum humanitarian standards, has so far been discussed within the UN without any significant progress having been made towards a binding treaty. See Emily Crawford, ‘Road to Nowhere? The Future for a Declaration on Fundamental Standards of Humanity’ (2012) 3 J Int’l Human Legal Stud 43; Tilman Rodenhäuser, ‘Fundamental Standards of Humanity: How International Law Regulates Internal Strife’ (2013) JILPAC 121.

\textsuperscript{36} Geneva Conventions common art 3.
including the principle of military necessity, which gives states greater leeway to have recourse to the use of force than in times of peace.

2.2 A Normative Conflict?

Investment law’s full protection and security standard and humanitarian law’s military necessity can both be applicable to the same factual situation. However, international investment law and international humanitarian law seem to balance property interests differently. International investment law protects as ‘a necessary element alongside the overall aim of encouraging foreign investment’ the investor’s ownership interest in compensation for its investment damaged by an unlawful act. In contrast, international humanitarian law’s property protection is primarily designed to protect the use of civilian property to assure the survival of civilians and mitigate human suffering. Moreover, international humanitarian law balances the principle of humanity and the principle of military necessity, while international investment law balances the protection of foreign investors’ rights vis-à-vis the state’s regulatory power. With these very different objectives and values, it is not surprising that they attach different consequences to the same action. One can see that ‘to comply with one rule only by thereby failing to comply with another rule’ could produce conflicting results.

International investment law’s full protection and security standard, which ‘applies essentially when the foreign investment has been affected by civil strife and physical violence’, requires states ‘to protect more specifically the physical integrity of an investment against interference by use of force.’ States are obliged to exercise due diligence, that is, to take reasonable measures of vigilance to protect investors from forcible interference of both non-state and

37 This is also the case as a matter of customary international law. See Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law, vol 2 (ICRC and CUP 2005) 1000 et seq; Kolb (n 33) 86 et seq. Generally, the near universal acceptance of the Geneva Conventions has allowed them to become accepted as customary international law, see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136, para 92; Armed Activities on the Territory of the Congo (DRC v Uganda) [2005] ICJ Rep 168, para 218. On analogies, see Marco Sassòli, International Humanitarian Law (Edward Elgar 2019) 224.

38 Saluka Investments BV v Czech Republic, Partial Award (17 March 2006) para 300.


40 ILJC, ‘Fragmentation of International Law’ (n 7) para 24.

41 Saluka v Czech Republic (n 38) paras 483 et seq.

42 ibid. See also, on the standard and its scope, Emily Sipiorski, chapter 3 in this volume.
state actors. The due diligence obligation, as already our initial award *AapL v Sri Lanka* held, ‘requires undertaking all possible measures that could be *reasonably* expected’. Therefore, arbitral tribunals increasingly examine the underlying situation, in particular regarding the impact of what constitutes the standard’s due diligence effort of protection, and formulate a ‘sliding scale of liability’. Such an approach also takes the situation of the host state into account as ‘a failure of protection and security is […] likely to arise in an unpredictable instance of civic disorder which could have been readily controlled by a powerful state but which overwhelms the limited capacities of one which is poor and fragile’. Even if one takes such an adapted due diligence standard as a basis, as the tribunal in the first ‘Arab Spring’ related award in *Ampal v Egypt* did, there remains the test of whether possible and *reasonable* ‘security measures were not taken and implemented’.

Let us return to the facts described in the initial case cited, namely *AapL v Sri Lanka*. How, in comparison, would international humanitarian law assess such a situation?

Certainly, international humanitarian law’s principle of military necessity requires belligerents to *distinguish* between civilian objects and military

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43 *Biwater Gauff (Tanzania) Ltd v Tanzania*, ICSID Case no ARB/05/22, Award (24 July 2008) para 730 (‘The Arbitral Tribunal also does not consider that the “full security” standard is limited to a State’s failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself.’). However, the tribunal in *AapL v Sri Lanka* carefully avoided the question of attribution of state’s acts altogether – an approach that was followed by many subsequent tribunals. See, eg, *American Manufacturing & Trading Inc v Zaire*, ICSID Case no ARB/93/1, Award (21 February 1997) para 6.10.
44 *AapL v Sri Lanka*, Final Award (n 1) para 85(d).
45 ibid para 26.
46 *Pantechniki SA Contractors & Engineers (Greece) v Albania*, ICSID Case no ARB/07/21, Award (30 July 2009) para 77. These impulses were taken up in subsequent cases dealing with the full protection and security standard. See, eg, *Joseph Houben v Burundi*, ICSID Case no ARB/13/7, Award (12 January 2016) paras 160 et seq.
47 *Ampal-American Israel Corp v Egypt*, ICSID Case no ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017) para 284: ‘the tribunal acknowledges that the circumstances in the North Sinai Egypt were difficult in the wake of the Arab Spring Revolution. Armed militant groups took advantage of the political instability, security deterioration and general lawlessness […]’.
48 ibid. The tribunal held, even under consideration of these circumstances, that given the failure to make sufficient efforts to prevent further attacks after the ‘warning’ of an initial four attacks, Egypt had not sufficiently fulfilled its due diligence and, therefore, breached its full protection and security obligation.
49 In the framework of this contribution, only a woodcut summary can be given of the principles, prohibitions, and obligations under (First) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International
objectives as well as between civilians and combatants (ie objects and persons), to take precautions against ‘collateral damage’ to civilian objects, and to respect the principle of proportionality relative to the concrete military advantage. Yet civilian protection of property is lost comparatively quickly under international humanitarian law if, and as soon as, a civilian object qualifies as a military objective, when its destruction offers an – even only indirect – effective contribution to the military action (and in the case of mistaken target identification even in good faith).

Finally, an attack directed at a specific military objective but expected to incidentally cause damage to civilian objects (for example, those of an investor) is unlawful only in the case that such ‘collateral damage’ to civilian objects is excessive in relation to the concrete and direct military advantage anticipated.

Furthermore, the principle of military necessity can also be found directly expressed in certain norms of international humanitarian law. These prescribe the conditions for a lawful exemption or deviation, for example towards

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The prohibition of indiscriminate attacks includes the prohibition of attacks, which may be expected to cause incidental civilian loss or destruction, which would be excessive in relation to the concrete and direct military advantage anticipated.

In our initial case, *AAPL v Sri Lanka*, the tribunal did not, however, classify the respondent state’s submission as credible. See *AAPL v Sri Lanka*, Final Award (n 1) para 85(c): ‘the Respondent’s version of the events has to be considered lacking convincing evidence with regard to the allegation that the farm became a “terrorist facility” which “violently resisted the Special Task Force” through an “Intense combat action” that “occurred at the Farm”. Apparently, the officers’ version of the events, which are not substantiated with any credible evidence, and which are contradicted by the Affidavits submitted by eye-witnesses, were intended to cover up their liability to prevent the destruction of the farm.’

Two-pronged test pursuant to article 52(2) Additional Protocol I assesses (1) whether the object in question makes an effective contribution to military action and (2) whether its destruction offers a definite military advantage. See, in depth, Ira Ryk-Lakhman, ‘Foreign Investments as Non-Human Targets’ in Björnstjern Baade, Linus Mührel, and Anton O Petrov (eds), *International Humanitarian Law in Areas of Limited Statehood: Adaptable and Legitimate or Rigid and Unreasonable?* (Nomos 2018) 184 (‘In sum, the definition of “military objective” is broad and ambiguous enough to allow in practice for the classification of varied economic assets as military objectives, which may be subject to direct attack.’). See also Ira Ryk-Lakhman, chapter 2 in this volume.
property, for reasons of military necessity. For example, article 23(g) of the Hague Regulations forbids to ‘destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war’. That means, in accordance with the respective provisions, as applicable, if and because the destruction of civilian objects is necessary from the military standpoint, such a destruction by state forces may be lawful. As a result, our initial question can be answered as follows: If the breach of international investment law’s full protection and security standard (due to lack of due diligence) establishes a state’s liability for an action which, in turn, would be lawful under international humanitarian law, then there may be a normative conflict.

2.3 *Lex Specialis?*

In such a constellation of a normative conflict, one possible method to resolve the conflict could be the application of the (increasingly contested) principle of *lex specialis*, according to which the norm prevails ‘which is “special”, that is, the rule with a more precisely delimited scope of application’.

So, should international humanitarian law be considered *lex specialis* both in terms of its subject matter, its greater normative attachment to the object of regulation ‘armed conflict’, and its universal reach addressing all parties affected, state actors, non-state actors, including civilians in (also non-international) armed conflicts? Furthermore, it could be argued that international humanitarian law is ‘to be observed by all States whether or not they have ratified the conventions that contain them, because [these fundamental rules] constitute intransgressible principles of international customary law’. As a result, the ‘widespread accession of States to the four Geneva Conventions […] suggests that these constitute customary international law norms that can only be derogated from with express, clear, and unequivocal terms’.

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53 Hague Regulations art 23(g). See also Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (Geneva Convention IV) art 53 (‘Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons […] is prohibited, except where such destruction is rendered absolutely necessary by military operations’), art 147 (‘Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: […] extensive destruction and appropriation of property, not justified by military necessity […]’).

54 *ILC, ‘Fragmentation of International Law’* (n 7) para 57.

55 *Nuclear Weapons* (n 21) para 79.

which is not discernible from BITs. A further consideration could be derived from the structure of international humanitarian law, given that it contains ‘absolute’, as opposed to reciprocal, obligations under international law.\textsuperscript{57} This then also means, however, that the conflict rules of the Vienna Convention on the Law of Treaties (\textit{vclt}),\textsuperscript{58} which are essentially \textit{lex specialis} and \textit{lex posterior}, cannot be applied. On that basis, it could be concluded that, if humanitarian conventions apply between two states, a BIT that is also applicable between these states cannot be \textit{lex specialis} to the humanitarian conventions.

Alternatively, should international investment law be considered as \textit{lex specialis} for the treatment of investments as it addresses specific groups of subjects, investors and states? It provides, compared to international humanitarian law, unambiguously the more specific and most favourable protection\textsuperscript{59} to the investor’s property, and thus offers investors an inherently more specific protection.\textsuperscript{60} Also, BITs as well as investment arbitration offer numerous parameters in order to also address the challenges that may be associated with

\textsuperscript{57} Prosecutor \textit{v} Kupre\v{s}ki\v{c} \textit{et al} (Judgment) IT-95-16-T (14 January 2000) paras 517 et seq.

\textsuperscript{58} Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 \textit{unts }331 (\textit{vclt}). The interpretive rules in article 31 \textit{vclt} are generally accepted as reflecting customary international law. See \textit{Avena and Other Mexican Nationals (Mexico \textit{v} USA) (Judgment) [2004]} \textit{icj }Rep 12, 37 et seq.

\textsuperscript{59} According to the principle of most-favoured-nation treatment, preference is given to a better treatment also in international humanitarian law. See, \textit{eg}, Additional Protocol i art 75(8): ‘No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law [...]’.

\textsuperscript{60} See, also with respect to human rights, \textit{Spyridon Roussalis \textit{v} Romania, icsid Case no ARB/06/1, Award (1 December 2011) para 322 ( [...] given the higher and more specific level of protection offered by the BIT to the investors compared to the more general protections offered to them by the human rights instruments [...]’).
non-international armed conflicts, for example (as we have already seen) by considering the factual situation of revolutionary upheavals and armed conflicts in the interpretation of the full protection and security standard's due diligence requirements. Furthermore, essential security exceptions clauses in BITs exempt the defending state from its treaty obligations if important national interests are at stake, or possibilities of defence under the customary international law of state responsibility such as *force majeure* to excuse the defending state's non-performance exist.

Apart from this, an overarching legal thought could be inferred from the wording of article 38 of Geneva Convention IV, applicable (however exclusively) in international armed conflict, according to which 'the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace'. This means that international humanitarian law does not *per se* exclude such regulations. BITs' extended war clauses, which offer compensation for investments demonstrably destroyed by state organs in cases in which the destruction was not required by the necessity


63 However, a distinction must be made here: (1) The question of whether there is a conflict to be resolved possibly by means of *lex specialis* concerns the primary rules of international humanitarian law and international investment law which define the content and extent of the actual obligations in international law. This needs to be distinguished from (2) the (further) question of whether certain justifications under the system of state responsibility can be put forward for the non-fulfilment of the primary rule which concerns the secondary rules that would, here, refer to armed conflicts. See Gabčíkovo-Nagymaros Project (Hungary v Slovakia) [1997] I.C.J Rep 7, para 47; CMS Gas Transmission Co v Argentina, ICSID Case no ARB/03/8, Annulment Decision (25 September 2007) para 134.

64 Geneva Convention IV art 38: ‘With the exception of special measures authorized by the present Convention, in particular by Articles 27 and 41 thereof, the situation of protected persons shall continue to be regulated, in principle, by the provisions concerning aliens in time of peace.’
of the situation,\textsuperscript{65} show, in accordance with the intention of the contracting states, that BITs should also apply in times of upheavals and armed conflicts. Finally, the \textit{lex specialis} argument could still be enhanced by the \textit{lex posterior} priority rule in article 30 VCLT, as BITs are likely to be the much more recent treaties.\textsuperscript{66}

Yet, it seems questionable overall whether the tension between different specialised branches of international law, which frequently have their own features and rules, can indeed be resolved by the \textit{lex specialis} approach. Displacing the entire body of the respective other law is a far-reaching consequence. Such a step can hardly be assumed to be implicitly intended by the states and, in case of doubt, would probably require an \textit{explicit} expression of the intent of the states affected.\textsuperscript{67} Moreover, if, for example, international humanitarian law were considered \textit{lex specialis} and, as a result, international investment law were superseded by international humanitarian law in situations in which investments may be most in need of protection, the question arises whether it would be within an investment arbitration tribunal’s jurisdiction and competence to interpret such a hierarchical relationship.\textsuperscript{68} And, if international humanitarian law were in fact to override international investment law, should it then also take precedence over other subfields of law such as human rights law? Is there any neutral perspective from which it would be possible to identify unambiguously which subfield is now the more relevant?\textsuperscript{69} Is and can there be

\textsuperscript{65} Eg Austria–Libya BIT (2004) art 5(2): ‘An investor of a Contracting Party who […] suffers loss resulting from: […] or (b) destruction of its investment or part thereof by the forces or authorities of the other Contracting Party, which was not required by the necessity of the situation, shall in any case be accorded by the latter Contracting Party restitution or compensation […].’

\textsuperscript{66} Further arguments may also be derived from the existence, as here, of a non-international armed conflict: One may question to what extent international humanitarian rules applicable to such conflicts which are often derived by analogy to those applicable to international armed conflicts (or as customary law) prevail as \textit{lex specialis}. See Sassoli (n 37) 441.

\textsuperscript{67} Elettronica Sicula SpA (\textit{elsi}) (USA v Italy) (Judgment) [1989] ICJ Rep 15, para 50.

\textsuperscript{68} As defined by the contracting treaty parties, the states, and, if available, the applicable law; for arbitral proceedings based on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention), if there is no applicable law clause, article 42 of the Convention applies. According to article 52(1)(a) of the ICSID Convention, a disputing party could demand annulment of the award if the tribunal manifestly exceeded its powers, namely by deciding the dispute by applying a legal rule it was not empowered to apply, or conversely, by not applying a legal rule it was under duty to apply.

for any given situation only one expression of state consent or intent as to how that situation is to be regulated?\textsuperscript{70}

Finally, the International Court of Justice (ICJ) itself progressively abandoned the \textit{lex specialis} maxim in \textit{Armed Activities on the Territory of the Congo} and concluded, as already stated in its previous \textit{Wall} opinion,\textsuperscript{71} ‘that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration.’\textsuperscript{72} However, as the ICJ (as is well known) decided once more in this case not to describe humanitarian law as \textit{lex specialis} in relation to human rights law, this could also apply \textit{a fortiori} here, so that both international humanitarian law and international investment law would have to be taken into consideration.

3 Informing Extended War Clauses or Autonomous Treaty Interpretation?

3.1 An Informative Approach

Let us return to a situation in which revolutionary upheavals lead to a non-international armed conflict, a situation in which international investment law as well as international humanitarian law are, in principle, equally applicable. Does such a normative overlap necessarily lead to a ‘genuine’\textsuperscript{73} normative conflict in which the norms are incompatible and for whose resolution one would depend on the aforementioned principle of \textit{lex specialis}? Essentially, a conflict of laws exists only if the norm addressee cannot simultaneously comply with two differing standards, because the legal consequences of both standards are mutually exclusive. Observance of one standard would necessarily lead to an infringement of the other standard. This narrow understanding of conflicts of norms was questioned in the course of the ‘fragmentation’ debate and a broader understanding of conflicts of norms was called for. According to this broader understanding, a conflict of norms already exists when differing (though not irreconcilable) balancing of interests is found in various fields of international law.

Let us take a closer look again at the claims of concrete standards which both BIT’s full protection and security standard and humanitarian law’s principle


\textsuperscript{71} \textit{Construction of a Wall} (n 37) para 106.

\textsuperscript{72} \textit{Armed Activities} (n 37) para 216.

\textsuperscript{73} Pauwelyn, \textit{Conflict of Norms} (n 70) 240 et seq. 272.
of ‘military necessity’ impose. International investment law obliges the state to protect investments with sufficient due diligence – while international humanitarian law, in addition to its restrictive nature, substantially enhances the state’s authority to employ force and allows greater emphasis on the sovereign prerogative to handle situations of armed conflicts. Put differently, while international investment law limits the use of force to a measure of last resort, under international humanitarian law, military force can be used in the first instance in accordance with its specific rules. However, although humanitarian law authorises\textsuperscript{74} the state to use force to destroy property in accordance with its specific rules, it does not necessarily oblige the state to do so.\textsuperscript{75} Therefore, there may indeed be a normative overlap here, but not necessarily a normative conflict in a strict legal sense.

So, if there is no normative conflict in a strict legal sense, should there be reservations concerning a \textit{lex specialis} approach and should instead a more \textit{informative approach} be taken? Such an approach would be consistent at least with the presumption that subfields are not necessarily in conflict with each other.\textsuperscript{76} This approach would be in line with article 31(3)(c) VCLT, which directs that there ‘shall be taken into account, together with the context […] any relevant rules of international law applicable in the relations between the parties’. Such an \textit{informative approach} would also be much more appropriate for arbitrators in an investment arbitral tribunal because this approach allows the sufficient taking into account of the possibilities and limits of the relevant jurisdictional scope of the BIT. Since the arbitral tribunal is appointed to interpret and apply the standards of that treaty, depending on the scope of arbitration clause, in principle, only the violation of such a treaty may serve as a normative point of reference when issuing the arbitral award.\textsuperscript{77} Normatively,

\textsuperscript{74} On ‘authorisations’ in humanitarian law, see Sassóli (n 37) 490.

\textsuperscript{75} Not to mention the use of human rights law in order to complement and possibly restrict the applicable rules of humanitarian law. See, \textit{eg}, \textit{Public Committee against Torture in Israel et al v Government of Israel et al} [2006] HCJ 769/02, para 40 (Supreme Court of Israel sitting as the High Court of Justice).

\textsuperscript{76} \textit{Right of Passage over Indian Territory (Portugal v India)} (Preliminary Objections) [1957] ICJ Rep 125, 142. See, however, \textit{Electrabel SA v Hungary}, ICSID Case no ARB/07/19, Decision on Jurisdiction, Applicable Law, and Liability (30 November 2012) para 4.173, holding that ‘there is no general principle under international law compelling the harmonious interpretation of all existing legal rules’.

\textsuperscript{77} \textit{Grand River Enterprises Six Nations Ltd et al v USA}, Award (12 January 2011) para 71; \textit{Achmea BV (formerly Eureko BV) v Slovakia}, PCA Case no 2008–13, Award on Jurisdiction, Arbitrability, and Suspension (26 October 2010) para 290.
an investor’s claim for damages against the host state would therefore always be derived from a BIT.

According to the ‘principle of systemic integration’, this means that ‘although a tribunal may only have jurisdiction in regard to a particular instrument, it must always interpret and apply that instrument in its relationship to its normative environment – that is to say “other” international law.’ Therefore, investment arbitrators must distinguish between, on the one hand, the possible consideration of rules from that ‘other’ international law that may be ‘taken into account’ as interpretive guidance for the relevant treaty term – and, on the other hand, a de facto application of the rules of this other law, which is hardly likely to be covered by the specific consent of the parties. Equally, tribunals should appreciate the contexts, similarities and differences contained in such subfields because, basically, these differing fields and concepts can, and should, benefit from each other. However, these subfields may be substantially different – in their formation, their actual effects, their specific institutional context, their specialised expertise and methodology and their specific dispute resolution mechanism. These features may also have their reasons and merits. Elements of these, and lessons learnt from one subfield, can inform another subfield after careful adaption while taking into consideration their systemic and structural contexts as well as their differences.

The prerequisite for such an approach is that bits are open to such informative interpretations. This leads to the fundamental question of whether international investment law should be understood as a self-contained regime, in which general international law and its subfields play no additional role in the interpretation of its norms, or whether it is instead to be understood as part of general international law with the result that norms of international investment law can indeed be interpreted in the light of general international law including its subfields. Certainly, the procedural formation of investor-state arbitration, for example within the framework of the ICSID Convention, displays a characteristic of lex specialis. However, international investment law overall cannot be understood as a self-contained regime but rather as a part

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78 ILC, ‘Fragmentation of International Law’ (n 7) para 90.
79 The term was coined by the Permanent Court of International Justice in SS ‘Wimbledon’ (Great Britain et al v German) PCJ Series A no 1, 23, 24. See also United States Diplomatic and Consular Staff in Tehran (USA v Iran) [1980] ICJ Rep 3, para 86.
80 Waste Management Inc v Mexico, ICSID Case no ARB(AF)/00/2, Final Award (29 April 2004) para 85.
of general international law. Hence, a basic principle applies which was formulated already in the arbitral award that precedes this analysis – in the first award based on a BIT, *AAPL v Sri Lanka*, the tribunal found:

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

3.2 Informing Extended War Clauses?
Under such an informative approach, specific assessments of humanitarian law could, possibly, be used to inform the interpretation of BIT norms and vice versa. For example, extensive extended war clauses offer compensation for investments demonstrably destroyed by state organs in cases in which the destruction was not required by the necessity of the situation. For instance, article 5(2) of the Austria–Libya BIT, entitled ‘Compensation for Losses’, provides:

An investor of a Contracting Party who [...] suffers loss resulting from: [...] 
(b) destruction of its investment or part thereof by the forces or authorities of the other Contracting Party, which was not required by the necessity of the situation, shall in any case be accorded by the latter Contracting Party restitution or compensation [...].

Is it advisable and necessary to interpret the term ‘necessity of the situation’ in light of humanitarian law’s ‘military necessity’ and the specific rules of customary international law applicable in non-international armed conflict, such as the principle of differentiation, the prohibition of excesses and the

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83 *AAPL v Sri Lanka*, Final Award (n 1) para 21. But see also ibid para 42 (‘The construction of the Treaty’s comprehensive system governing all aspects related to the extent of the special protection conferred upon the investors in question would permit the evaluation of the Treaty’s effective contribution in this respect; ie in view of determining with regard to each issue whether the Sri Lanka/U.K. Treaty intended, merely, to consolidate the pre-existing rules of international law, or, on the contrary, it tended to innovate [...].’); *Phoenix Action Ltd v Czech Republic*, ICSID Case no ARB/06/5, Award (15 April 2009) para 78 (‘international investment law cannot be read and interpreted in isolation from public international law, and its general principles’).
obligation to take precautionary measures? The meaning of which rule would then come into play under article 31(3)(c) VCLT,\(^8\) when ‘(a) the treaty rule is unclear or open-textured [and yet] (b) the terms used in the treaty have a recognized meaning in customary international law’.\(^8\) In favour of such an interpretation,\(^8\) it has been argued that the ‘[necessity of the situation] follows a pattern long established in practice […] that these destructions were compelled by the imperious necessity of war’,\(^8\) so that this interpretation would correspond to the situation under traditional customary international law.\(^8\)

This would mean, for example, that if the investor's property were indeed assessed as a military objective, its destruction would be lawful, if no excessive incidental civilian damage was to be expected and if the necessary precautions in attack have been taken. If an investor's property were a civilian object and were destroyed as a result of an attack on a military objective, then it would depend on whether such ‘collateral damage’ was excessive in relation to the concrete and direct military advantage anticipated.\(^9\) The result would be that

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\(^8\) Certainly, sometimes it is not easy to distinguish an interpretation in light of general international law according to article 31(3)(c) VCLT from a direct application of customary international law and general principles of law.\(^8\)


\(^8\) However, in order to be ‘relevant’ for purposes of interpretation in the sense of article 31(3)(c) VCLT, a similarity is required between the subject matter of the treaty to be interpreted and that of the rules of international law which is to be taken into account. US – Anti-Dumping and Countervailing Duties (China) (11 March 2011) WT/DS379/AB/R, para 308. Subject matter of a BIT is the promotion and protection of investments, while subject matter of international humanitarian law is the conduct of war (jus in bello). It could appear questionable whether there is sufficient similarity of the subject matter, not least because – as has been stressed in a different context – ‘Article 31, paragraph 3 [VCLT] requires “the context” to be taken into account: and “the context” is clearly that of an economic and commercial treaty’; Oil Platforms (Iran v USA) (Merits, Separate Opinion of Rosalyn Higgins) [2003] ICJ Rep 225, para 46.

\(^8\) AAPl v Sri Lanka, Final Award (n 1) para 63. However, in the absence of sufficient evidence whether the farm was a terrorist facility and who finally was responsible for the effective destruction of the farm premises, the tribunal in AAPl v Sri Lanka did not analyse, as such, the notion of ‘the necessity of the situation’. See ibid para 64: ‘Under these circumstances, it would be extremely difficult to determine whether the destruction and losses were caused as an inevitable result of the “necessity of the situation” […]’.

\(^8\) Christoph Schreuer, ‘The Protection of Investments in Armed Conflict’ in Freya Baetens (ed), Investment Law within International Law (CUP 2013) 14.

\(^9\) Prosecutor v Hadzihasanovic and Kubura (Trial Judgment) IT-01-47-T (15 March 2006) para 45: ‘The Chamber finds that collateral damage to civilian property may be justified by military necessity and may be an exception to the principles of protection of civilian property.’
a militarily necessary destruction of an investor’s property, if lawful under international humanitarian law, would not render the state liable for compensation under international investment law.

3.3 An Autonomous Treaty Interpretation

Are there, however, compelling arguments that speak for an autonomous treaty interpretation, and against a (mere) reference to customary law? The thesis that such an understanding is essentially an incorporation of custom into treaty can be countered in principle by the fact that, historically, international investment law certainly had its origins in customary international law. However, the procedural unpredictability of state-centred diplomatic protection in customary international law, being mainly tailored for intergovernmental relations, and the uncertainty of the material standards of general international law, led in the late 1950s and 1960s to an increasing desire to develop new specific forms of protection and arbitration. This desire was equally true for non-state economic actors and states themselves. As a consequence, a dynamic system was created based predominantly on bilateral international treaties starting with the Germany–Pakistan BIT in 1959. The treaty’s aim was to develop new tailor-made forms of protection for international investment relations. This was achieved, firstly, through the independent ‘treatyfied’ concretization of standards of treatment promoting the rule of law – as many of these rights, such as the standard of national treatment, compensation for

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91 This may apply to the full protection and security standard being informed by customary law, or, eg, where states have explicitly limited the scope of this standard to the international minimum standard under customary international law. See Mondev International Ltd v USA, ICSID Case no ARB(AF)/99/2, Award (11 October 2002) para 120. But see also the disputes about the scope of treaty rules of full protection and security, Saluka v Czech Republic (n 38) paras 483 et seq.


93 Martins Paparinskis, ‘Investment Arbitration and the Law of Countermeasures’ (2008) Brit YB Int’l L 264, 265: ‘The results of the more recent efforts of law-making sometimes accept and incorporate the classic rules; sometimes clarify the classic ambiguities or replace the unsatisfactory solutions; sometimes permit different approaches in parallel; and quite often maintain constructive ambiguity regarding the precise relationship between different rules.’ This investment treaty-making process was most likely, arguably counterintuitively, also supported by the ICJ jurisprudence in Barcelona Traction, Light and Power Co, Ltd (Belgium v Spain) (2nd Phase) [1970] ICJ Rep 3; Elsiz (n 67); Ahmadou Sadio Diallo (Guinea v DRC) (Merits) [2010] ICJ Rep 639. See, generally, Christoph Schreuer, ‘Shareholder Protection in International Investment Law’ in Pierre-Marie Dupuy and others (eds), Common Values in International Law: Festschrift Christian Tomuschat (Engel 2006) 606.
expropriation and the guarantee of free transfer were not necessarily part of the customary international law of diplomatic protection or the law relating to the protection of aliens, and, finally, through the provision of a party-driven dispute settlement mechanism in BITs.94 Certainly, there may be other narratives,95 but what follows from this, at least basically, is that the thesis of an incorporation or mere replication of (humanitarian) customary law into (investment) treaty law is, in any case, difficult to maintain consistently and must be examined very carefully in each individual case.

In our particular case, it is striking to say the least that the text of extended war clauses – as ‘the starting point of interpretation’96 (and against the background of the paramount importance of its ordinary meaning under article 31(1) VCLT)97 uses the phrase ‘necessity of the situation’, which is not congruent with ‘military necessity’. Furthermore, the terminology contained in extended war clauses concerning the ‘necessity of the situation’ conceptualises the category of ‘conflicts’ in much wider terms – in contrast to, and well below, the threshold for ‘non-international armed conflicts’ in international humanitarian law. The reason for this is that international investment law’s extended war clauses cover not only ‘armed conflicts’ as understood in international humanitarian law but also lesser instances of civil unrest, such as internal disturbances and tensions. They are invariably formulated in a broader fashion with open-ended formulations such as ‘or other similar events’ or ‘other armed conflicts’.98 Some BITs employ terms that may fall significantly short of armed conflict, such as ‘rebellion’,99 ‘revolt’,100 ‘mutiny’101 or ‘riot’.102

94 Starting with the Italy–Chad BIT (1969) art 7, but the 1990 arbitral award in AAPL v Sri Lanka was the first investment arbitral award on the basis of an investor-state dispute resolution clause in a BIT.
97 Wintershall v Argentina, ICSID Case no ARB/04/14, Award (8 December 2008) para 78; Methanex Corp v USA, Final Award (3 August 2005) pt 1 ch B paras 22, 37; ADF Group Inc v USA, ICSID Case no ARB(AF)/00/1, Award (9 January 2003) para 147; Sempra Energy International v Argentina, ICSID Case no ARB/02/16, Decision on Annulment (29 June 2010) para 188.
If it were desirable to apply the understanding of ‘military necessity’ – also – to such situations, this would possibly undermine the recognised threshold for the applicability of international humanitarian law of non-international armed conflicts. By such an extension of the understanding of ‘necessity of the situation’ to ‘military necessity’ also in these situations, protection under international investment law would very probably be significantly reduced. It seems doubtful whether the contracting parties to a BIT would have intended such a consequence.

The question still remains whether an interpretation in accordance with the understanding of international humanitarian law of non-international armed conflicts should apply to situations that clearly cross the threshold of armed conflict. This can possibly be contradicted by the fact that the contracting states have agreed on an autonomous standard of an extended war clause to create an absolute form of protection also for armed conflicts. Thereby, they have expressed their intention that international investment law remains applicable also in such situations. These extended war clauses are part of BITs which are ‘regulating a particular area of the relations between one party and the other,’ where ‘a bargain is a reciprocal bargain,’ in which ‘the parties must be held to what they agreed to, but not more, or less.’ Certainly, this is a very pronounced description, but it draws attention to the fact that those BITs can, basically, (still) be characterised by reciprocity and individual enforcement of the obligations – characteristics which distinguish them from multilateral humanitarian law treaties which, on the other hand, are characterised by ‘absolute’ non-reciprocity and collective enforcement.

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103 RosInvest Co UK Ltd v Russia, SCC Case no V079/2005, Award on Jurisdiction (5 October 2007) para 40, differentiating between human rights treaties vis-à-vis investment treaties.
104 ibid.
105 ibid.
106 See, generally, Christoph Schreuer and Ursula Kriebaum, ‘From Individual to Community Interest in International Investment Law’ in Ulrich Fastenrath and others (eds), From Bilateralism to Community Interest: Essays in Honour of Bruno Simma (OUP 2011) 1079.
107 Certainly, there may be tendencies towards a ‘multilateralization’ of international investment law as impressively demonstrated by Stephan W Schill, The Multilateralization of International Investment Law (OUP 2009). However, it is not yet apparent that BITs would be completely exempt from the reciprocity principle.
108 Prosecutor v Kupreškić et al (n 57) paras 517 et seq, contrasting the absolute nature of international humanitarian law treaties with reciprocal commercial treaty norms: ‘[...] the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity. [...] Unlike other international norms, such as those of commercial treaties which can legitimately be based on the protection of reciprocal interests of States, compliance with humanitarian rules could not be
It can then be concluded from these structural distinctions that notions – to paraphrase the International Criminal Tribunal for the former Yugoslavia in Prosecutor v Kunarac – developed in the field of humanitarian law can be transposed to international investment law only if they take into consideration the specificities of the latter body of law. However, this essentially reciprocal bargain would be significantly thrown out of balance if the regime-specific assessments of humanitarian law’s principle of ‘military necessity’ were to be adopted for the interpretation of the term ‘necessity of the situation’ contained in investment treaties’ extended war clauses. This is due to the fact, as evidenced by the clear wording, that states have provided through these extended war clauses – at least in the given situation – that ‘unnecessary’ damages to investments must be compensated for. Thereby, these clauses provide some protection for investments specifically in violent and particularly dangerous exceptional situations. Furthermore, the wording (‘which was not required by the necessity of the situation’) clearly demonstrates as the main source of the parties’ intention that destroyed investments are not entirely considered to be a case of ‘collateral damages’ in armed conflicts for which investors are usually neither responsible nor the cause. A comparable assessment can also be found in the law of state responsibility, namely the ILC’s article 27, which deals with the obligation for a possible compensation for acts which, although contrary to international law, are precluded from responsibility. The underlying principle of article 27 is that there is no reason for which the party harmed by an act should be required to suffer loss in the interests of the injuring state if it did not contribute to, let alone cause, the situation.

Finally, the wording of extended war clauses show that investors should not, in principle, bear the full economic consequences of armed conflicts and civil disturbances, and thus it expresses a certain concept of risk allocation. This

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109 Prosecutor v Kunarac et al (Judgment) IT-96-23-T, IT-96-23/1-T (22 February 2001) para 471: ‘The Trial Chamber is therefore wary not to embrace too quickly and too easily concepts and notions developed in a different legal context. [...] notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law’.

110 ILC, ‘Articles on Responsibility of States for Internationally Wrongful Acts’ (n 24) art 27: ‘The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: [...] (b) the question of compensation for any material loss caused by the act in question.’

wording, as the expression of what the contracting states of bit(s) intended, indicates that such a compensation under certain conditions then goes just beyond and supersedes the assessments of customary international law.\textsuperscript{112} Therefore, the clear treaty terms of extended war clauses (and in particular the ‘necessity of the situation’, such as in revolutionary upheavals and civil wars, as ‘the text and the drafters’ intention, which this manifests)\textsuperscript{113} shows that it should be carefully interpreted\textsuperscript{114} on its own terms and not just exclusively from a purely military perspective.

Following on from the view represented here of an autonomous treaty interpretation, the fact remains, however, that the mere existence of a ‘non-international armed conflict’ automatically triggers the application of international humanitarian law, according to which a different decision would possibly be made on the basis of the applicable legal rules. Thus, in this case, both subfields – investment law and humanitarian law – are applicable in parallel. Yet, as has been established, there is not necessarily a norm conflict between international investment law and international humanitarian law in a strict legal sense: international humanitarian law may authorize (but not necessarily oblige) a state to destroy private property in times of war to the extent necessary for military purposes, while the same state would possibly be held liable for this under international investment law. Nevertheless, the state can – in principle – comply with both legal regimes. For example, if it adheres to the narrower regime, \textit{ie} international investment law, this does not force it to violate international humanitarian law.

Regardless of this, the applicability of both legal subfields does not change the obligation to decide on the legality of state actions in those institutions of the respective subfields. The longest-standing regional human rights court,

\textsuperscript{112} That treaty provisions may validly derogate from previously existing rules of international law has been recognised in \textit{Acquisition of Polish Nationality} (Advisory Opinion) [1923] \textit{PCIJ} Series B no 7, 15 et seq; \textit{North Sea Continental Shelf} (\textit{Germany v Denmark, Germany v Netherlands}) [1969] ICJ Rep 3, para 72.
\textsuperscript{113} \textit{Methanex v USA} (n 97) pt IV ch B para 37.
\textsuperscript{114} Certainly, in practice, a tribunal may have the burden of justification for the intention of the parties departing from customary rules and the harmonizing principles of article 31 VCLT, but this latter rule of treaty interpretation may, in turn, also be read as providing enough flexibility for a tribunal to ‘develop the written terms [of the rule] in a different direction than the customary rule’. Mark E Villiger, \textit{Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources} (Springer 1997) 265, 422. See also \textit{iLC}, ‘Conclusions of the Work of the Study Group’ (n 86) conclusion 20, whereby, in the case that the treaty term is clear and leads to a different result than the customary rule, one should apply the treaty rule to the exclusion of that rule.
the European Court of Human Rights, has already proceeded in this way.\textsuperscript{115} An arbitral investment tribunal must decide the question of compensation submitted to it, while the question of legality under humanitarian law must be addressed by the bodies of humanitarian law, whose ‘remedies will continue to be available and will be unaffected by whatever decision the tribunal gives in the present case’.\textsuperscript{116}

In this context, finally, it is striking that respondent states have apparently not yet attempted to use humanitarian law’s ‘military necessity’ as a defence in an investment arbitration in a comparable situation. So far, arbitral tribunals have not yet had to address the possible interplay of international investment law and international humanitarian law of non-international armed conflicts. The almost classic reason for this is that states are, apparently, in any case reluctant to admit to the existence of non-international armed conflicts and, not least, wish to avoid the applicability of international humanitarian law of non-international armed conflicts to, from their point of view, internal affairs.\textsuperscript{117} In these cases, the respondent states are anyway often accommodated by the fact that it is, frequently, challenging for the plaintiff investor to prove attributability and causality.

\section*{4 Burden of Proof}

The ‘fog of war’,\textsuperscript{118} the classically occurring \textit{uncertainty} in situational awareness in armed conflicts, also applies equally to investment arbitrations dealing

\begin{footnotesize}
\begin{enumerate}
\item With regard to the parallel relationship between the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 3 September 1953, entered into force 4 November 1950) 233 UNTS 221 (\textit{ECHR}) and other treaty obligations, see – with respect to Matthews v UK, App no 24833/94 (ECHR, 18 February 1999, Merits and Just Satisfaction) – Marko Milanovic, ‘A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law’ (2010) 15 J Confl & Sec L 459, 470: ‘The Court thus found the UK responsible for violating the \textit{ECHR}, irrespective of its other treaty obligations. This did not mean, however, that the treaty prohibiting the extension of the franchise to the inhabitants of Gibraltar was invalid, or that the \textit{ECHR} prevailed over it in some hierarchical sense. Both treaties were formally of equal stature, and no norm conflict resolution was possible – the UK could not fulfil its obligations under either treaty without violating the other, thereby incurring State responsibility. […] but […] this simply did not matter for answering the question that was posed to the Court […]’. Rompetrol Group NV v Romania, \textit{ICSID} Case no ARB/06/3, Award (6 May 2013) para 170 regarding the interaction between the investor-state dispute settlement and \textit{ECHR} regime.
\item Kolb (n 33) 29, 104.
\item The term ‘fog’ in reference to uncertainty in war was introduced by Carl von Clausewitz, \textit{On War} (first published in German 1832, N Trübner 1873), ch 3: ‘War is the realm of
\end{enumerate}
\end{footnotesize}
with such situations. In our initial case, *AAPL v Sri Lanka*, with respect to the extended war clause, the investor had essentially to establish as cumulative requirements, first, the causality between the property’s destruction and the government forces’ action and, secondly, the ‘necessity of the situation’. The tribunal in *AAPL v Sri Lanka* found:

In the present case, neither Party was able to provide reliable evidence explaining with precision the conditions under which the destructions and other losses [...] took place. Under these circumstances, it would be extremely difficult to decide whether the destruction and losses were caused as an inevitable result of the “necessity of the situation”, or, on the contrary, were avoidable if the governmental security forces would have been keen to act with due diligence. [...] Consequently, all three conditions necessary for the applicability of Article 4.(2) are proven to be non-existent [...].

As the claimant who bore the burden of proving these cumulative requirements could not establish the relevant facts, a claim based on the extended war clause had to be dismissed. In this frequently occurring situation, where the investor is usually merely an onlooker, the tribunal in *AAPL v Sri Lanka* soberly noted that ‘the foreign investor who invokes the applicability of said Article 4(2) assumes a heavy burden of proof’.

Such a ‘heavy burden of proof’ for the claimant, not only in cases of extended war clauses, but also based on the full protection and security standard, often has the consequence that investors, but also their states (which receive the claim by way of ‘subrogation’), waive the assertion of this treaty claim from the outset in the absence of foreseeable demonstrability of attributability and causality. Thus, the legal instrument of a BIT, which is available in itself, often does not come into effect in these situations. It seems indeed questionable

119 *AAPL v Sri Lanka*, Final Award (n 1) para 64.

120 ibid para 58.

121 BITS contain a ‘subrogation clause’ for the case that the investor has secured its investment with an investment guarantee and, in the event of loss, makes use of this guarantee. In these cases, the claim resulting from the investment treaty against the host state is usually transferred (‘subrogated’) from the investor, as the previous claimant, to the home state as guarantor. See, eg, Germany–Egypt BIT (2007) art 6: ‘[...] The latter Contracting State shall also recognize the subrogation of the former Contracting State to any such right or claim (assigned claims) which that Contracting State shall be entitled to assert to the same extents as its predecessor in title.’
how such a sole burden of proof is compatible with the principles of fair trial and procedural equality of parties. One could refer to general principles of international law on the burden of proof, as they have found expression, inter alia, in the case law of the ICJ. For such comparable cases, the ICJ in the Corfu Channel case has proposed the easing of the burden of proof:

[...] the fact of this exclusive territorial control exercised by a state within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that state as to such events. By reason of this exclusive control [...], the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a [victim] should be allowed a more liberal recourse to inferences of fact and circumstantial evidence.122

Also, domestic courts, such as the German Federal Constitutional Court in a constitutional complaint relating to civilian casualties of a NATO air raid on a bridge in the Serbian town of Varvarin during the Kosovo War, are in favour of easing the burden of proof:

[...] that the party who is not charged with the burden of proof may impose a so-called secondary burden of proof if the party required to provide proof is outside the course of events which it is obliged to present and has no further knowledge of the relevant facts, whereas the respondent has those facts and can reasonably be expected to provide further details.123

Prerequisite for such prima facie evidence to be sufficient is, therefore, that, on the one hand, the information in question must be inaccessible to the claimant and, on the other hand, under the exclusive control of the respondent state. Indeed, the constellations presented here are characterised precisely by the fact that it is often almost impossible to reconstruct the exact facts of revolutionary upheavals and armed conflicts which brings to mind the ‘fog of war.’ The essentially decision-relevant circumstances lie almost exclusively within the state’s sphere of power. The respondent state has sovereignty over the sensitive, often confidential information of the state forces’ actions, which, in case of doubt, are not accessible to the public. Moreover, the respondent state would, in any

122 Corfu Channel (UK v Albania) (Merits) [1949] ICJ Rep 18.
123 Bridge of Varvarin [2013] Case no 2 BvR 2660/06, para 64 (German Federal Constitutional Court) (translation by the author).
event, have no incentive to make this information available to the claimant, *ie* the investor. Finally, extended war clauses usually contain a wording that the ‘destruction of its investment [...] was not required by the necessity of the situation [...]’. This forces the claimant to prove a *negative* which raises the question of how this is compatible with the basic procedural principle that ‘the burden of proof lies upon him who affirms, not him who denies’.\textsuperscript{124}

For reasons of procedural equality of parties, therefore, it follows that in such a constellation that *prima facie* evidence for the plaintiff investor must suffice. The respondent state can then, in turn, counter with its own (secondary) evidence as to why the destruction of the investor’s property was necessary for reasons of the ‘necessity of the situation.’ If the respondent state does not present sufficient evidence, the tribunal, if necessary, ‘may be prepared to draw appropriate inferences from the respondent’s apparent non-production of documents’ under these circumstances.\textsuperscript{125}

### 5 Conclusion

In a decentralised system such as public international law with its many specialised subfields, the question of how to conceptualize the relationship and interplay of its distinct subfields becomes especially salient. Moreover, this question becomes even more acute when these subfields simultaneously claim authority and possibly arrive at quite different, if not conflicting, results. When revolutionary upheavals culminate in civil war, and in the course of a non-international armed conflict, a foreign investor’s production site is destroyed by government forces, this may be the very question which needs to be answered. Under international investment law, on the one hand, such a situation may lead to a breach of a *BIT* – under international humanitarian law of non-international armed conflicts, however, if the destruction was authorised by ‘military necessity’, on the other hand, this state action must be regarded as lawful.

Though, in principle, both legal regimes are applicable in a such a situation, the assumption of a normative conflict, as this contribution shows, seems premature: While humanitarian law authorizes the state to use force to destroy

\textsuperscript{124} Or ‘*ei incumbit probatio qui dicit non qui negat*.’

\textsuperscript{125} *Feldman v Mexico*, ICSID Case no ARB(AF)/99/1, Award (16 December 2002) para 178; *Methanex v USA* (n 97) pt 11 ch C para 24, ch G para 25; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v Kazakhstan*, ICSID Case no ARB/05/16, Award (29 July 2008) paras 709 et seq; *Gujarat State Petroleum Corp Ltd et al v Yemen and the Yemeni Ministry of Oil and Minerals*, ICC Case no 19299/MCP, Final Award (10 July 2015) para 102.
property in accordance with its specific rules, it does not necessarily oblige
the state to do so. Therefore, there may indeed be a normative overlap here,
but not necessarily a normative conflict in a strict legal sense. Moreover, it also
seems questionable for convincing reasons whether the principle of lex specia-
lis is at all suitable for resolving potential normative conflicts between interna-
tional law’s different specialised subfields. As a consequence, an informative
approach whereby specific assessments of humanitarian law could, possibly,
be used to inform the interpretation of BIT norms and vice versa seems pref-
erable overall.

The extended war clauses of investment treaties offer compensation for in-
vestments demonstrably destroyed by state organs in cases in which the de-
struction was not required by the ‘necessity of the situation’. If this term is
understood in light of humanitarian law’s ‘military necessity’ and the specific
rules of customary international law applicable in non-international armed
conflicts, a militarily necessary destruction of an investor’s property, which is
lawful under international humanitarian law, would not render the state liable
for compensation under international investment law. The better arguments,
as this contribution shows, however, speak in favour of an autonomous treaty
interpretation of the ‘necessity of the situation’ on its own terms and not ex-
clusively from a purely military perspective. The wording shows, inter alia, that
destroyed investments are not entirely considered to be a case of ‘collateral
damages’ in armed conflicts, for which investors are usually neither responsi-
ble nor the cause, and, therefore, indicates that a possible compensation under
certain conditions then goes just beyond and supersedes the assessments of
customary international law.

Yet, the fact remains, that both subfields – international investment law and
international humanitarian law – are applicable in parallel. This does, how-
ever, not change the obligation to decide on the legality of state actions in
those institutions of the respective subfield. An arbitral investment tribunal
must decide the question of compensation submitted to it, while the ques-
tion of legality under humanitarian law must be addressed by the bodies of
humanitarian law.

Finally, for reasons of fair trial and procedural equality of parties, prima fa-
cie evidence of attributability and causality for the claimant, i.e. the investor,
is to be considered sufficient, if and because the essentially decision-relevant
circumstances in question lie almost exclusively within the respondent state’s
sphere of power and are, in addition, under its exclusive control. The respon-
dent state can then, in turn, counter with its own secondary evidence as to why
the destruction of the investor’s property was necessary for reasons of ‘neces-
sity of the situation.’
Note on the Text

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