

Investment and Human
Rights in Armed Conflict
Charting an Elusive Intersection

Daria Davitti

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Introduction

I. FOCUS OF THE BOOK

IN THIS BOOK I focus on the way in which international investment law (IIL) and international human rights law (IHRL) are deployed, or not, in conflict countries within the context of natural resources extraction. More specifically, I analyse the way in which IIL protections impact on the parallel protection of economic, social and cultural rights (ESC rights) in the host state, with a special emphasis on the right to water. In doing so, I outline the specificities and inherent shortcomings of both bodies of international law,¹ examining the way in which IIL insulated foreign investment from democratic processes and redistributive claims,² whilst the right to water foreclosed more radical claims against the privatisation and commodification of water.³ After examining the way in which existing tensions between these two bodies of international law have been unsatisfactorily approached so far, I consider the emergence of the ‘Protect, Respect and Remedy’ framework and the Guiding Principles for Business and Human Rights (jointly the Framework) as an alternative analytical instrument.⁴

¹ See in particular ch 4. Throughout this book I adopt Tzouvala’s definition of neoliberalism ‘as an intellectual and political project that arose as a reaction to a crisis of nineteenth-century classical liberalism and the rise of the redistributive state. It rests on ideas of generalized competition and state intervention in the construction, guarantee and expansion of competitive relations, including within the structure and functions of the state itself’. N Tzouvala, ‘The Academic Debate About Mega-Regionals and International Lawyers: Legalism as Critique?’ (2018) 6 *London Review of International Law* 189, 191.

² Q Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge MA, Harvard University Press, 2018) 6: ‘If we place too much emphasis on the category of market fundamentalism, we will fail to notice that the real focus of neoliberal proposals is not on the market per se but on *redesigning states, laws, and other institutions to protect the market*’ (emphasis added). At 7, Slobodian posits that the neoliberal idea is centred not so much on the withdrawal or shrinking of the state, but on the concept that markets ‘are products of the political construction of institutions to *encase* them’ (emphasis added). A clear example of this ‘encasing’ can be seen in the emergence of IIL, and in its consolidation and expansion through investor-state arbitration (ISDS), which crystallised the rights of foreign investors: see Slobodian’s ch 4 ‘A World of Rights’.

³ C Clark, ‘Of What Use is a Deradicalized Human Right to Water?’ (2017) 17 *Human Rights Law Review* 231, 241. See also J Wills, *Contesting World Order: Socioeconomic Rights and Global Justice Movements* (Cambridge, Cambridge University Press, 2017) especially ch 5 ‘A Commodity or a Right? Evoking the Human Rights to Water to Challenge Neo-liberal Water Governance’. See further, K Bakker, ‘The “Common” versus the “Commodity”’: Alter-Globalization, Anti-Privatization and the Human Right to Water in the Global South’ (2007) 39 *Antipode* 430, 432; and B Morgan, ‘The Regulatory Face of the Human Right to Water’ (2004) 15 *Journal of Water Law* 179, 180.

⁴ Throughout this book the term Framework is used to refer both to the Protect, Respect and Remedy Framework endorsed by the UN Human Rights Council in 2008 (individually referred to

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I examine the claim, advanced by some scholars, that the Framework could create opportunities for a different articulation of the relationship between IIL and IHRL.⁵ In so doing, I investigate whether attempts to ‘recalibrate’ IIL or the Framework itself⁶ could be successful in preventing corporate abuse, especially in relation to the right to water in the conflict context of Afghanistan. Through the emblematic example of Afghanistan I seek to examine the elusive intersection between these two bodies of international law, which, it has been claimed, have so much in common,⁷ yet remain so far apart. Afghanistan is a host country where the armed conflict continues to rage and a full economic restructuring continues to take place away from the public eye, not least through the deployment of investment-friendly reforms and the apparent inaction – or willed agnosticism⁸ – of IHRL. As such, Afghanistan is perfectly placed to represent a worse-case scenario in terms of both protection of human rights and of so-called investors’ rights.⁹

as the UN Framework) and the Guiding Principles for the operationalisation of the UN Framework adopted in 2011 (individually referred to as the Guiding Principles or UNGPs).

⁵S Deva, ‘The Zero Draft of the Proposed Business and Human Rights Treaty, Part II: On the Right Track, but Not Ready Yet’ at www.business-humanrights.org/en/the-zero-draft-of-the-proposed-business-and-human-rights-treaty-part-ii-on-the-right-track-but-not-ready-yet, where it is suggested that provisions under Arts 13(6), 13(7) and 14 of the Zero Draft of the proposed business and human rights treaty are first steps, albeit insufficient ones, towards ‘humanising international investment agreements (IIAs)’. As further discussed in chs 4 and 5, this idea of ‘humanising’ international investment law leads to a conceptualisation of market-friendly human rights which is not only undesirable, but also ineffective in terms of addressing the way in which IIAs adversely impact the rights of a host country’s population. On ‘humanising’ IIAs, see also S Deva, ‘Managing States’ Fatal Attraction to International Investment Agreements’ (13 August 2018) at <http://investmentpolicyhub.unctad.org/Blog/Index/75>.

⁶Ruggie himself referred to a need to carefully calibrate ‘the interplay between systems of legal compliance and the broader social dynamics that can contribute to positive change’. JG Ruggie, ‘Business and Human Rights: The Evolving International Agenda’ (2007) 101 *American Journal of International Law* 822, 839–40. In ch 4 I question whether any recalibration is at all possible and/or desirable.

⁷See eg Eric De Brabandere, ‘Human Rights and International Investment Law’, Grotius Centre Working Paper 2018/75-HRL (April 2018), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3149387, also forthcoming in M Krajewski and R Hoffmann (ed), *Research Handbook on Foreign Direct Investment* (Cheltenham, Edward Elgar, 2018). See also Y Radi, ‘The “Human Nature” of International Investment Law’ (2013) 1 *Transnational Dispute Management* at www.transnational-dispute-management.com/article.asp?key=1928.

⁸J Whyte, ‘Human Rights and the Collateral Damage of Neoliberalism’ (2017) 20 *Theory & Event* 137, where at 137 (citing Asad) Whyte argues that economic restructuring and privatisation may have more far-reaching effects than armed intervention, ‘yet the ensuing devastation cannot be viewed as an abuse of human rights’. See also T Asad, ‘What Human Rights Do? An Anthropological Enquiry’ (2000) 4 *Theory & Event* 1. See further KM Son, ‘The Making of the Neoliberal Subject: Response to Whyte’ (2018) *Political Theory* at <http://journals.sagepub.com/doi/full/10.1177/0090591718774572>.

⁹As further discussed in ch 4, it is preferable to understand investment standards as granting protection to a specific foreign investment, rather than creating investors’ rights. This has implications in terms of how we conceptualise the nature and scope of the protection granted, vis-à-vis competing state’s obligations under human rights instruments.

My aim, in part, is to highlight some of the underlying dynamics of the Afghan restructuring, so that they can be openly analysed and, where appropriate, challenged. In larger part, the aim is to advance two claims, reflecting the outcomes of this research project. The first claim (mirroring the analysis in chapters one to four) is that existing research and energy would be better directed into redefining alternative purposes for the IIL and IHRL projects. In particular, in my view, research and energy need to be channelled into understanding and acknowledging the inherent shortcomings of these two bodies of international law, in order to avoid proposals for reform that maintain and entrench the status quo and the structural inequalities that underpin it.¹⁰ Much of the existing literature on IIL and IHRL tends to focus, for instance, on interpretative strategies aimed at overcoming (mainly via ‘harmonisation’ and ‘systemic integration’) the fragmentation of international law,¹¹ of which the tensions between IIL and IHRL are often seen as a clear example. Various commentators have offered suggestions on how international investment tribunals could ‘balance’ human rights against so-called investors’ rights. As discussed in chapter four, however, such ‘balancing’ ultimately serves the self-preserving purposes of a legal system which is currently under intense public scrutiny, and in much need of gaining legitimacy, not least by accommodating certain (mainly innocuous) human rights considerations. This focus on balancing largely ignores, however, that IIL, with investment treaty arbitration at its core, is ‘part of a historically specific complex of ideas about government and democracy held by influential elites today that has enormous consequences for the distribution of material values among and between societies’.¹² Similarly, it also ignores the limitations of articulating justice claims in human rights terms, since ‘fram[ing] questions of justice in the language of human rights implies certain assumptions about what constitutes injustice – and how to vanquish it’.¹³ Thus, within the current debate

¹⁰ An example of such proposals is the debate by Working Group III at UNCITRAL in Vienna on the possible reform of investor-state dispute settlement (ISDS). See available recordings of all sessions at www.uncitral.org/uncitral/audio/meetings.jsp. For an analysis of the proposed reform, see A Roberts, ‘UNCITRAL and ISDS Reform: Not Business as Usual’ *EJILTalk!* (11 December 2017) at www.ejiltalk.org/uncitral-and-ids-reform-not-business-as-usual/.

¹¹ See eg PM Dupuy, ‘Unification Rather Than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law’ in PM Dupuy et al (eds), *Human Rights in International Investment Law and Arbitration* (Oxford, Oxford University Press, 2009). See also V Kube and EU Petersmann, ‘Human Rights Law in International Investment Arbitration’ (2016) 11 *Asian Journal of WTO and International Health and Law Policy* 65, where it is conveniently claimed that ‘arbitral tribunals are more open towards human rights as due process rights and as principles of procedural fairness and balancing than towards integrating human rights as an authoritative legal regime consisting of legally enforceable entitlements. The only exception to this general trend remains the right to property’. See further A Peters, ‘The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization’ (2017) 15 *I-Con* 671.

¹² M Koskeniemi, ‘It’s not the Cases, It’s the System’ (2017) 18 *Journal of World Investment and Trade* 343, 347.

¹³ Whyte (n 8) 138.

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on IIL and IHRL the purpose and scope of these two legal projects are not, in and of themselves, challenged. As a result, and as argued by Lang within the context of the ‘trade and’ debate, this approach precludes any discussion on what the specific projects of IIL and IHRL law *could* be, whether and how they could change and pursue different objectives.¹⁴

The second claim I advance (mirroring the analysis in chapter five) is that the current over-reliance on the Framework for business and human rights when pursuing ways to reconcile IIL and IHRL is largely misplaced, especially when it comes to conflict contexts. More specifically, I contend that the inherent limitations of ESC rights (discussed in chapter three) are exacerbated by the astigmatism of the Framework¹⁵ which, with its non-recognition of home states’ obligation to regulate the extraterritorial activities of companies domiciled in their territory and/or under their jurisdiction, missed the opportunity to add value to the IIL–IHRL debate in two regrettable ways. First, as the predominant discourse on business and human rights, the Framework could have been an initial springboard for further action: given the way it was accepted by most business stakeholders, efforts could have been made to overcome the legal gaps which were left unaddressed by the UNGP. Despite claims that the UNGP only marked ‘the end of the beginning’, attempts to refine or recalibrate the Framework are often met by significant resistance from its main proponents, including the former United Nations (UN) Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (SRSG) himself.¹⁶ As further discussed in chapter five, the shortcomings already identified at the time of the adoption of the UNGP in 2011 have transformed what was initially welcomed by many as a tool for human rights protection into a management tool,¹⁷ which

¹⁴ A Lang, *World Trade after Neoliberalism: Reimagining the Global Economic Order* (Oxford, Oxford University Press, 2011) 61. See also A Lang, ‘Re-thinking Trade and Human Rights’ (2007) 15 *Tulane Journal of International and Comparative Law* 335, 339.

¹⁵ D Davitti, ‘Article 4 UDHR and The Prohibition against Slavery: A Critical Look at Contemporary Slavery in Company Operations and Supply Chains’ in Humberto Cantú Rivera, *The Universal Declaration of Human Rights: A Commentary* (Leiden, Brill/Nijhoff, forthcoming 2019).

¹⁶ See eg J Bonnitcha and R McCorquodale, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights’ (2017) 28 *European Journal of International Law* 899, 900–01; the response in JG Ruggie and JF Sherman, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale’ (2017) 28 *European Journal of International Law* 921; and the rejoinder in J Bonnitcha and R McCorquodale, ‘The Concept of “Due Diligence” in the UN Guiding Principles on Business and Human Rights: A Rejoinder to John Gerard Ruggie and John F Sherman, III’ (2017) 28 *European Journal of International Law* 929.

¹⁷ See eg Principles for Responsible Investment Initiative (PRI), ‘Human Rights in the Extractive Industry: Why Engage, Who to Engage, How to Engage’ (July 2015) at www.unpri.org/download?ac=1655: in this report the UN Guiding Principles Reporting Framework and the questions it offers are taken as key elements of performance. As explained by Caroline Rees, Director and Co-Founder of Shift, the UN Guiding Principles Reporting Framework ‘offers [companies] questions to which they won’t have answers anyway, just to know they are managing the issues’: www.ungpreporting.org/. See also PRI, Research Note: The Extractive Industry and the UN Guiding Principles on Business and Human Rights (2015) at www.unpri.org/download?ac=1797.

tends to prioritise procedural mechanisms for measuring, tracking and assessing human rights harm at the expense of substantive protection and effective remedies for the victims of corporate abuse.¹⁸ Second, and on the basis of this latter statement, I contend that, in its current form, the Framework can do little but maintain and/or reinforce the substantive inequality and violent structures which enable corporate abuse in conflict countries such as Afghanistan. Moreover, it also precludes alternative approaches to justice for such abuses, since the debate is now mainly articulated at a systemic and procedural level, whereby the tracking, monitoring and reporting throughout a company's due diligence processes have taken priority over the substantive scope and content of the legal obligations, at the expenses of effective remedies. As I discuss in chapters four and five, various solutions which were initially considered in this research as possible entry points to prevent human rights abuses by companies and to counter the imbalances of IIL, would actually do very little to either mitigate adverse human rights impacts caused by extractive sector investors in conflict countries or to 'rebalance' IIL itself.

In order to contextualise these two claims, I use the example of Afghanistan to analyse the impact of IIL-backed extractive sector investments on human rights. In November 2007, at the end of a bidding process marred by allegations of corruption,¹⁹ the Afghan Ministry of Mines granted a 30-year lease to a consortium which included the China Metallurgical Construction Company (MCC) and Jiangxi Copper Company Limited (JCL)²⁰ for USD 3 billion for the exploitation of Aynak, one of the largest copper deposits in the world.²¹ Being the largest foreign investment in Afghanistan's history, in 2014 the Aynak project was hailed by the international community as the first step towards a new

¹⁸ As evidenced by the work of the UN Office of the High Commissioner for Human Rights (OHCHR) on Access to Remedy, the present lack of legal clarity and certainty over the obligations of home states and of companies creates significant challenges when pursuing judicial remedies in domestic courts. See UN Human Rights Council, 'Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse' (10 May 2016) UN Doc A/HRC/32/19, para 24: 'Cross-border cases pose particular challenges that can undermine efforts to ensure accountability and access to remedy. The prevailing lack of clarity across jurisdictions about the roles and responsibilities of different interested States in cross-border cases create a significant risk that no action will be taken, leaving victims with no prospect of remedy. Against that background, various human rights treaty bodies have recommended that home States take steps to prevent business-related human rights abuses by business enterprises domiciled in their jurisdiction' (references omitted). Similarly, in relation to the difficulties engendered by a lack of clarity over the applicability of human rights standards to companies, see J Zerk, 'Business and Human Rights: Enhancing Accountability and Access to Remedy, Analysis of Written Submissions' (September 2014) at www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/RemedyProject1.pdf, 15.

¹⁹ See the report by the advisor to the Afghan Ministry of Mines and Petroleum at the time of the tender, JR Yeager, 'The Aynak Copper Tender: Implications for Afghanistan and the West' (Skyline Laboratories and Assayers, 2009) at www.cimicweb.org.

²⁰ The consortium then set up an Afghanistan-based company called MCC-JCL Aynak Minerals (MJAM) to manage the extractive project.

²¹ According to official estimates by the Afghan Ministry of Mines and Petroleum, the deposits hold approximately six million tons of copper (5.52 million metric tons). See www.mom.gov.af/en.

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future for aid-dependent Afghanistan.²² Swept away by what was unanimously depicted as a success story, media representatives, members of the Afghan government and of the international community at the time did not appear (in public at least) too concerned by the fact that Aynak is located approximately 40 kilometres to the South-East of the Afghan capital Kabul, in the province of Logar. This province is and has been, historically, a stronghold of the Taliban and of other anti-government elements (AGE) engaged in the ongoing armed conflict.²³ Similarly, at the time commentators failed to report the concerns of the local population in relation to the impact of future mining activities on their lives, both in terms of potential displacement and, most importantly in drought-prone Logar, in terms of access to water.²⁴

The above example of Aynak, to which I will return from time to time throughout this book, is emblematic of the dilemmas engendered by the arrival of foreign extractive companies – mining, oil, gas and energy companies – in the midst of armed conflict. It is not unusual for extractive companies to invest and operate where armed violence is on-going, mainly because untapped natural resources deposits are prevalently found in countries that are either in or emerging from armed conflict, or more generally in countries with fragile government structures in place, unable to exploit these resources themselves and maximise their extraction for the benefit of the country as a whole.²⁵ This contextualisation is of fundamental importance to understand how armed conflict is often connected to natural resources exploitation, both in the way in which resources extraction may exacerbate violence, and in the way in which it may trigger interventions of various type, where state or non-state actors vie to control and personally profit from the revenues deriving from natural resources.²⁶ For instance, resources extraction of precious metals, stones and minerals or of oil

²² See eg press statements by UNAMA, at www.unama.unmissions.org.

²³ See eg A Jackson, 'The Taliban's Fight for Hearts and Minds' (12 September 2018) at <https://foreignpolicy.com/2018/09/12/the-talibans-fight-for-hearts-and-minds-ghanistan/>. See also T Ruttig, 'Flash from the past: Kabul security handed back to the Afghans in 2008' (22 September 2018) at www.afghanistan-analysts.org/flash-from-the-past-kabul-security-handed-back-to-afghans-in-2008/; and see A de Toledo Gomes and M Mitri Mikhael, 'Terror or Terrorism? Al-Qaeda and the Islamic State in Comparative Perspective' (2018) 12 *Brazilian Political Science Review* 1, at www.scielo.br/scielo.php?script=sci_arttext&pid=S1981-38212018000100202.

²⁴ The initial exploration of the site also revealed a series of ancient Buddhist monasteries and stupas of significant archeological and heritage value. The discovery of a major historical heritage site, called Mes Aynak, and the fact that the mine will nevertheless continue to be developed, have attracted international concern, not least in terms of protection of cultural heritage. This topic, however, is not discussed further in this book. For further information on Mes Aynak, see the Alliance for the Restoration of Cultural Heritage (ARCH) at www.archinternational.org/mes_aynak.html.

²⁵ P Muchlinski, 'Social and Human Rights Implications of TNC Activities in the Extractive Industries' (2009) 18 *UNCTAD Transnational Corporations* 125, 125.

²⁶ I Bannon and P Collier, 'Natural Resources and Conflict: What We Can Do' in I Bannon and P Collier, *Natural Resources and Violent Conflict: Options and Actions* (Washington DC, The World Bank, 2003) 7.

and natural gas may, in certain circumstances,²⁷ be used by fighters to purchase weapons and therefore fuel the conflict.²⁸ In these cases, control over resource-rich areas may compound already existing ethnic or religious violence and add a further dimension to already complex situations of armed conflict.²⁹ More generally, conflict countries tend to be in a situation of flux, characterised by weak infrastructure and government structures, and repeated foreign intervention coupled with rampant impunity, all factors which render impossible an effective exploitation and equitable redistribution of resources.³⁰

Extractive industries obviously follow the geographical location of natural resources, in spite of the high risks generated by the situation of armed conflict and instability in which these are discovered. This means that, from a business perspective, they are particularly exposed to heightened risks on investment, risks that they attempt to minimise through carefully structured investment contracts, backed by growing investment protection standards enshrined in international investment agreements (IIAs). In particular, once an extractive company has already invested in ensuring the extractive capacity of a project, disinvestment in light of a worsening of the security situation or of an escalation of the conflict is often considered to be financially untenable and therefore highly unlikely.³¹ Furthermore, non-investment in a conflict country is also often not seen as a viable option, as this may result in a competitor successfully obtaining exploitation rights over that same area.³²

The home states of extractive companies are generally also very supportive of such large-scale investments, because of the high returns and contribution of the projects to the home economies. In conflict host countries, on the other hand, the incoming flow of foreign direct investment (FDI) for the exploitation of natural resources is often presented – as well as perceived – as a unique opportunity for stabilisation and development,³³ an equation which is not always

²⁷ See eg MC Cordonier Segger, 'Resource of Conflict – Conflict over Resources' (2011) 3 *Gottingen Journal of International Law* 11, 16. See also P Lujala et al, 'Building or Spoiling the Peace? Lessons from the Management of High-Value Resources in Post-Conflict Settings' in P Lujala and SA Rustad (eds), *High-Value Resources and Post-Conflict Peacebuilding* (Abingdon, Routledge, 2012).

²⁸ Although the risks attached to the 'resource curse' are notorious, minerals are also known to successfully boost a country's economy. See eg P Collier and B Goderis, 'Commodity Prices, Growth and the Natural Resources Curse: Reconciling a Conundrum' (2007) Report CSAE WPS/2007-2015, at www.economics.ox.ac.uk.

²⁹ See eg VAB Davies and S Dessy, 'The Political Economy of Government Revenues in Post-Conflict Resource-Rich Africa: Liberia and Sierra Leone' (2012) NBER Working Paper No 18539; P Woodward, 'Politics and Oil in Sudan' in K Omeje (ed), *Extractive Economies and Conflicts in the Global South: Multi-Regional Perspectives on Rentier Politics* (Farnham, Ashgate, 2008).

³⁰ Muchlinski (n 25) 126.

³¹ *ibid.*

³² *ibid.*

³³ A Joubin-Bret et al, 'International Investment Law and Development', in MC Cordonier Segger et al, *Sustainable Development in World Investment Law* (The Hague, Kluwer Law International, 2011) 16.

automatically realised. As already evidenced by various commentators and further discussed throughout this book, the mere presence of natural resources cannot, in itself, trigger prosperity and economic stability for a conflict country,³⁴ especially when appropriate systems are not in place to minimise the negative impact of extraction and thus prevent further destabilisation.³⁵ In practice, the economic situation of conflict countries is usually very dire, as they tend to rely on aid in order to be able to function and to rebuild or set up from scratch the infrastructure necessary for the survival of the country. During and in the immediate aftermath of armed conflict, various sectors – from major road projects to the rebuilding of entire legal systems – are often entirely reliant on aid. The impact of aid policies and their success/failure in achieving development goals have been the object of various studies, with some commentators portraying aid as the only way to achieve development,³⁶ and others criticising the intrinsically neocolonial nature of aid policies and the ways in which they reinforce structures of abuse.³⁷ Discussion of the scope and nature of aid policies in conflict countries is a subject beyond the remit of this research: it is however important to note the aid dependence³⁸ of most conflict countries, because this is what often pressures them to accept far-reaching, investor-friendly regulatory reforms. Moreover, in a situation of global economic downturn like the one experienced since 2007, aid-dependent countries find themselves desperate to attract FDI in an attempt to compensate for aid shortages and to alleviate domestic and international pressure to achieve some sort of economic and political autonomy. This economic-dependent context often leads to a host state that is overly eager to open up and liberalise its economy, and in turn to what Eslava and Buchely have described as the ‘liberal management of vulnerability’,³⁹ that is a situation in which the conditions of local inhabitants become of secondary importance, and their vulnerability, rather than being something that needs overcoming,

³⁴ *ibid.*

³⁵ See eg UN Human Rights Council, ‘Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts’ (19 February 2007) UN Doc A/HRC/4/35, para 1.

³⁶ See eg JD Sachs, ‘The Development Challenge’ (2005) 84 *Foreign Affairs* 78; C Arndt et al, ‘Aid, Growth, and Development: Have We Come Full Circle?’ (2009) United Nations University, World Institute for Development Economics Research, UNU-WIDER Working Paper No 2009/05, at www.wider.unu.edu/publications.

³⁷ See in general B Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge, Cambridge University Press, 2003). See also L Eslava, *Local Space, Global Life: The Everyday Operation of International Law and Development* (Cambridge, Cambridge University Press, 2015).

³⁸ Crucially, this aid dependence is not accidental: see C Tan, *Governance Through Development: Poverty Reduction Strategies, International Law and the Disciplining of Third World States* (Abingdon, Routledge, 2011) especially ch 7.

³⁹ L Eslava and L Buchely, ‘Security and Development? A Story about Petty Crime, the Petty State and its Petty Law’ *Revista de Estudio Sociales* (2019, forthcoming, copy in file with author).

becomes something that needs to be efficiently administered.⁴⁰ This ‘liberal management of vulnerability’ is apparent in Afghanistan, where significant structural and economic reforms – often oblivious to the actual needs of the Afghan people – have taken place since the aftermath of the 2001 intervention, mainly under the direction of the World Bank and of international donors.⁴¹

Afghanistan is not only a conflict host country which experiences the phenomenon outlined above; it is also ranked as a Least Developed Country (LDC). Thus, with aid and FDI identified as the two main financial sources for the development of both physical and institutional infrastructure during armed conflict⁴² and LDCs as ‘the most reliant upon aid among all developing countries, and the most lacking in FDI’,⁴³ in countries like Afghanistan FDI tends to be promoted as a requisite form of incoming capital, indispensable in order to acquire a competitive advantage. Increasingly, therefore, a proportion of the aid assistance to conflict LDCs goes inevitably towards experts and consultants capable of supporting a particular LDC in devising new ways to increase its competitiveness in attracting FDI and, more generally, in creating an environment conducive to investment. Some commentators have referred to this phenomenon as a ‘race to the bottom’⁴⁴ both in terms of the elimination of all barriers to investment and of a trading off in labour, social and environmental protections, in order to signal to foreign investors that the host country is committed to full market liberalisation, including of sensitive sectors of the economy which could benefit from some form of protection in favour of fragile, emerging local businesses. The ‘grand bargain’ of international investment treaties such as BITs, Ortino explains, is premised precisely on ‘a promise of protection of capital in return for the prospect of more capital in the future’.⁴⁵

Thus, FDI is promoted as having the potential to unlock sustainable development and to contribute to a reduction of poverty, in particular in LDCs such as Afghanistan.⁴⁶ This ‘potential’, however, does not automatically translate into concrete benefits, especially when the host country is involved in armed conflict. In its current form, the project of international investment law appears

⁴⁰ E Povinelli, *Economies of Abandonment: Social Belonging and Endurance in Late Liberalism* (Durham NC, Duke University Press, 2011) quoted in Eslava and Buchely, *ibid.*

⁴¹ CG Wescott, ‘Evaluating World Bank Support to Building Capacity of the State and Its Accountability to Citizens in Afghanistan’ in A Awotona (ed), *Rebuilding Afghanistan in Times of Crisis: A Global Response* (Abingdon, Routledge, forthcoming 2019), copy on file with author.

⁴² N Turner et al, *Post-Conflict Countries and Foreign Investment* (Tokyo, United Nations University, 2008) 1.

⁴³ *ibid.*

⁴⁴ AT Guzman, ‘Explaining the Popularity of Bilateral Investment Treaties’ in K Sauvnt and L Sachs (eds), *The Effect of Treaties on Foreign Direct Investment* (Oxford, Oxford University Press, 2009) 78.

⁴⁵ F Ortino, ‘Refining the Content and Role of Investment “Rules” and “Standards”: A New Approach to International Investment Treaty Making’ (2013) 28 *ICSID Review* 152, 154. See also, in general, JW Salacuse, *The Law of Investment Treaties* (Oxford, Oxford University Press, 2010) 111.

⁴⁶ Sauvnt and Sachs (n 44), see especially part II, 109–460.

to be promoted in conflict host countries based on the premise that investment *will* bring benefits⁴⁷ but, as already reiterated by various scholars, investment – if left unchecked – will not only fail to generate development, but risks exacerbating particularly volatile contexts, such as those of conflict countries.⁴⁸ At the beginning of his mandate, the SRSG has himself warned that ‘there is no magic in the marketplace. Markets function efficiently and sustainably only when certain institutional parameters are in place. History demonstrates that without adequate underpinnings, markets will fail to deliver their full benefits and may even become unsustainable’.⁴⁹ In March 2013, when discussing the future challenges of the business and human rights agenda, the former SRSG then identified business activities in conflict areas as requiring immediate action at international level. In particular, he stated that where human rights abuses occur in conflict areas or in other situations of heightened risk,

plaintiffs may turn to the home country courts because local courts may be unable or unwilling to act. The international community has determined, and fair-minded observers everywhere would agree, that sovereignty can no longer serve as a shield behind which governments are allowed to commit or be complicit in the worst human rights violations. Surely the same must be true of the corporate form.⁵⁰

As further examined in this book, however, access to home country courts remains controversial in theory and difficult in practice. And in many ways, the international legal order is framed in such a way as to ensure that the protection of foreign investors remains prioritised, vis-à-vis the protection and meaningful development of local populations in the host state.

This book, therefore, locates itself at the centre of the political dilemma faced by Afghanistan and by many other conflict countries: the tension between the pressure to obtain economic independence – following a well-known ‘reconstruction model’⁵¹ characterised by market-liberalisation and systemic deregulation – and the need to maintain the necessary policy space to pursue public policies. The reforms implemented in Afghanistan, however, did not take into consideration this dilemma and were pursued whilst the various international human rights actors, already present in the country, turned a blind eye to

⁴⁷ LE Peterson talks of a ‘generalized faith that the treaties will yield investment, which will, in turn, lead inexorably to development’. See LE Peterson, *Bilateral Investment Treaties and Development Policy-Making* (Geneva, International Institute for Sustainable Development, 2004) 4.

⁴⁸ Turner et al (n 42) 2.

⁴⁹ UN Doc A/HRC/4/35 (n 35) para 1.

⁵⁰ JG Ruggie, ‘Business and Human Rights: The Next Chapter’, 7 March 2013, at www.cocacolacompany.com/opinions/business-and-human-rights-the-next-chapter.

⁵¹ See eg R Mills and Q Fan, ‘The Investment Climate in Post-Conflict Situations’ (2006) World Bank Policy Research Working Papers at <https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-4055>, where lessons learned are offered to create an enabling environment for investment through, inter alia, private sector development reforms.

the silent onslaught on claims for substantive equality and redistributive justice. As evidenced by Guttal:

the hallmark of the ‘reconstruction model’ is neo-liberalism – an unregulated, market economy, liberal democracy, free flow of private capital, privatization, removal of domestic regulations and economic protections, and ‘good governance’, which in practice means that the fledgling state’s responsibilities are re-oriented towards facilitating and protecting free market conditions for creating wealth, much of which is expropriated by private sector actors from outside the country and/or consolidated by national elites.⁵²

It is at the heart of this crucial dilemma between following a certain pre-determined ‘reconstruction model’ and the need to retain political and regulatory independence that the elusive intersection between IIL and IHRL delineates itself, and this is what I attempt to chart in this book.

Elaboration of the two claims advanced in this book requires engagement with complex legal questions. It is therefore necessary to set clear limitations to the scope of the topics that I could discuss in this book. There are six such limitations. First, as the focus of the book is on the right to water as affected by the intersection between IIL and IHRL in conflict situations, considerations of international humanitarian law (IHL) are of ancillary importance. This means that although IHL rules are relevant to the situation at hand, arguments made in this work are not IHL-based. Engagement with the debate on the nature of armed conflict and of the law applicable to international armed conflict (IAC) and to non-international armed conflict (NIAC) is therefore not directly relevant. Similarly, I do not discuss the law applicable to belligerent occupation. I recognise that it could and has been argued that Afghanistan offers ample scope for discussing any of the legal frameworks pertaining to IAC (including belligerent occupation), NIAC and possibly also to a potential transnational conflict.⁵³ Engagement with this discussion would also require a detailed examination of the national and international political context of the ongoing conflict, its links to Afghanistan’s history and geopolitical positioning, and its place at the centre of the so-called ‘war on terror’.⁵⁴ In this book, instead, I focus on whether

⁵² See S Guttal, ‘The Politics of Post-War/Post-Conflict Reconstruction’ (2005) 48 *Development* 73.

⁵³ See eg M Milanovic and V Hadzi-Vidanovic, ‘A Taxonomy of Armed Conflict’ in N White and C Henderson (eds), *Research Handbook on International Conflict and Security Law* (Cheltenham, Edward Elgar, 2012) 43; G Corn, ‘Making the Case for Conflict Bifurcation in Afghanistan: Transnational Armed Conflict, Al Qaida, and the Limits of the Associated Militia Concept’ (2009) 85 *US Naval War College International Law Studies* 181.

⁵⁴ See in general T Ruttig, *Islamists, Leftists – And a Void in the Center: Afghanistan’s Political Parties and Where They Come From 1902–2006* (Bonn, Konrad Adenauer Stiftung, 2006); A Giustozzi, *Empires of Mud: Wars and Warlords of Afghanistan* (New York NY, Columbia University Press, 2009); A Giustozzi, *Koran, Kalshnikov and Laptop: The Rise of the Neo-Taliban Insurgency in Afghanistan* (New York NY, Columbia University Press, 2007).

and how the right to water can be better safeguarded when foreign companies invest in the Afghan extractive sector, protected as they are by the provisions of international investment agreements. From a terminological point of view, throughout this book the terms ‘countries experiencing armed conflict’, ‘conflict country’, ‘conflicted country’⁵⁵ and ‘conflict host country’ are used interchangeably to refer to Afghanistan and to describe its on-the-ground situation of armed conflict. It is also crucial to note that, although various commentators in the past two decades have depicted Afghanistan as a post-conflict country, in this book I hold the view that Afghanistan’s protracted armed conflict continued unabated after the 2001 intervention.⁵⁶

Second, when considering the framework of ESC rights, my analysis concentrates on the substantive content of the right to water and discusses states’ obligations, including issues of home state obligations in relation to the extra-territorial conduct of private business actors. This means that the scope of this book can only allow a brief discussion of the limitations to and derogations from ESC rights and of aspects of the debate on justiciability of ESC rights (in particular who is accessing courts; what are the effects of being a rights-holder; and what are the wider effects of judgments). The abovementioned topics, however, are in part discussed in chapter three and referred to within the context of the notion of progressive realisation to the maximum of a state’s available resources and of the concept of the minimum core of ESC rights.

Third, in this book I focus on the overall framework of investment protection granted through BITs and other IIAs and enforced through investment treaty arbitration, rather than examining the investment contracts entered into by Afghanistan with the relevant foreign investors for the exploitation of its natural resources. There are two main reasons for this: on the one hand, key investment contracts have already been examined and discussed at length in various reports.⁵⁷ On the other hand, a focus on the more systemic fault-lines of the investment regime enables a broader analysis of the regulatory restructuring which often accompanies the signing of these investment contracts, followed (or preceded) by the granting of development aid and international assistance, not least in terms of military support. In my view it is important to highlight the external dynamics which may underpin the compromises struck by host conflict countries in the attempt to attract foreign investment. An understanding and acknowledgement of the implications of such compromises – such as the conflation of aid, security and foreign investment – are crucial in order to fully

⁵⁵ I borrow this term from F Ní Aoláin et al (eds), *On the Frontlines: Gender, War, and the Post-Conflict Process* (Oxford, Oxford University Press, 2011).

⁵⁶ This is a view shared by most humanitarian organisations operating in Afghanistan, including the International Committee of the Red Cross. See eg ICRC, ‘Conflict in Afghanistan I and II’ (2010) 92–93 *International Review of the Red Cross* 838.

⁵⁷ See eg the various reports issued by Global Witness and the response by the Afghan Ministry of Mines and Petroleum, at www.globalwitness.org.

grasp the legal and practical impact that they have on the effective protection of ESC rights.

Fourth, in the book I do not cover the debate on whether companies should be held directly accountable for human rights abuses, although I discuss ways in which the ‘respect’ pillar of the Framework could be strengthened and improved. While this is undoubtedly an important debate, in my view it is crucial to first clarify the exact scope of home states’ obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) as this has ultimately a profound impact on the way in which companies are then to be made accountable for their violations. The ultimate purpose of this choice in my research is to try and close the existing gap, whereby companies are able to ‘blame’ home countries for not clearly regulating the business sector, whilst at the same time actively lobbying against new regulations and for the unclear status quo to be maintained.

II. STRUCTURE OF THE BOOK

In chapters one to three of this book I conduct a doctrinal analysis of IIL and IHRL (in particular ICESCR) provisions relevant to foreign investments in the extractive sector in conflict countries. Then in chapters four and five I look at the possible entry points through which these provisions can be used to operationalise the *Protect, Respect and Remedy* framework in conflicted Afghanistan. Thus, the research carried out in chapters one to four relies, inter alia, on Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT),⁵⁸ according to which a treaty shall be interpreted in accordance with its ordinary meaning, taking into consideration the context and its object and purpose. In order to identify the meaning of relevant ICESCR and IIL provisions, however, I do not only rely on a textual interpretation of relevant legal norms.⁵⁹ A teleological approach therefore underpins my analysis in the first four chapters, as I consider it the most appropriate to capture the socio-economic dimension of the right to water.⁶⁰ For the interpretation of ICESCR provisions I refer to the work of the Committee on Economic, Social and Cultural Rights (CESCR). Although the work of CESCR does not represent a legally binding interpretation of the Covenant, it can be a highly authoritative interpretative source, as also recently confirmed by the International Court of Justice (ICJ) in relation

⁵⁸ UN, ‘Vienna Convention on the Law of Treaties’, 23 May 1969, entered into force 27 January 1980, 1155 United Nations Treaty Series 331 (hereinafter VCLT). Note that Arts 31–33 VCLT are considered of customary nature.

⁵⁹ Throughout this book the term norm is used as synonymous with legal rules.

⁶⁰ C Grewe, ‘Vergleich zwischen den Interpretationsmethoden europäischer Verfassungsgerichte und des Europäischen Gerichtshofes für Menschenrechte’ (2001) 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 459, 472.

to interpretations of the International Covenant on Civil and Political Rights (ICCPR) by the Human Rights Committee (HRC).⁶¹ The work of the CESCR, in particular its General Comments, has also been considered as falling under Article 31(3)(b) VCLT, and therefore representing ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’.⁶² Although General Comments do not represent a direct expression of state practice, they have been deemed as an appropriate tool to reflect it, given the unique interaction that takes place between state parties and the CESCR during the drafting of the General Comments.⁶³ General Comments, in fact, can guide state practice for the way in which they encourage state parties to uphold their duties and because of the way in which they are relied upon by national courts.⁶⁴

In order to outline the normative content of the right to water, at times in this book I also refer to the work of UN human rights treaty-monitoring bodies other than the CESCR, as well as to decisions by regional human rights courts that have addressed the right to water. In my analysis I approach these documents and judicial decisions as subsidiary means to determine rules of law as envisaged in Article 38 of the statute of the International Court of Justice⁶⁵ as reflecting customary international law.⁶⁶ Where appropriate, I also refer to relevant judgments by national courts and to recent academic studies reviewing these judgments. It is of course crucial to bear in mind both the varied quality of the legal decision-making processes carried out in different countries and the fact that ESC rights case law remains unfortunately still limited: these judgments, nonetheless, can be important subsidiary means to determine rules of law that add further insight on the nature of a particular right.

In chapter five I then turn to examining the Framework, and therefore rely primarily on the work of relevant UN Human Rights Council Special Procedures mandate holders. In particular, I refer inter alia to the reports of the UN Independent Expert on the Right to Water and Sanitation (later mandated as

⁶¹ The ICJ held that ‘great weight’ should be ascribed ‘to the interpretation adopted by this independent body [the HRC] that was established specifically to supervise the application of that treaty [ICCPR]’: see ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* Merits, Judgment, ICJ Reports 2010, 369, para 66. By analogy, the same approach is appropriate in relation to the interpretation by other UN Treaty Bodies, including the CESCR.

⁶² VCLT (n 58) Art 31(3)(b).

⁶³ See 31(1)(c) VCLT which is relevant in terms of identifying context for interpretation (‘any relevant rule’).

⁶⁴ See generally IT Winkler and C Mahler, ‘Interpreting the Right to a Dignified Minimum Existence: A New Era in German Socio-Economic Rights Jurisprudence?’ (2013) 13 *Human Rights Law Review* 388.

⁶⁵ Statute of the International Court of Justice at http://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.

⁶⁶ See also *Diallo Case* (n 61) paras 66–68 and 77. See also more generally H Keller and G Ulfstein, *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge, Cambridge University Press, 2012).

UN Special Rapporteur on the Right to Water), of the UN Special Rapporteur on the Right to Food and of the SRSG for business and human rights and the Working Group on the issue of human rights and transnational corporations and other business enterprises (also referred to as the Working Group on Business and Human Rights (UNWG)). These reports offer valuable insight not only on the normative content of ESC rights and the obligations flowing from them but also on their applicability to conflict contexts. Throughout this research I also discuss the work of various commentators who have evaluated the work of the Special Procedures mandate holders, in the attempt to better understand the content of the relevant rights and of the Framework.

With regard to the interpretation of the normative content of the various IIL protections, I refer throughout the book to the awards of international investment tribunals, although these do not constitute binding precedents for subsequent tribunals and, as such, often present contradictory outcomes. Despite these challenges, an overview of the published decisions by international investment tribunals is of value to highlight inherent contradictions and, where possible, to identify current trends in this area of law. The contrasting views of commentators are also taken into consideration when ascertaining whether and how international investment tribunals should take cognisance of the human rights impact of the claims before them. The debate on the relationship between IIL and IHRL is a complex one and, in many ways, one with a recent 'pedigree'. As I mentioned above, many scholars have approached the study of this relationship as part of the wider debate on fragmentation of international law, and many have called for interpretative approaches by international investment tribunals aimed at preserving the unity of international law. This contextualisation of the debate poses obvious challenges which I discuss in detail throughout this book, not least the risk of presenting both IIL and IHRL as two unchangeable bodies of international law, incapable of mutating over time. In this debate the objectives of IIL and IHRL are also often taken for granted, as if there was only one way of perceiving the role that these legal projects should play within the wider international legal order.

This research challenges the way in which scholars have approached the relationship between IIL and IHRL. In so doing it contributes to attempts aimed at identifying avenues of contestation that transcend certain preconceived notions of what these two legal bodies of international law are or ought to be.⁶⁷ This is, by no means, an easy approach to the study of the relationship between IIL and IHRL. But it is, in my view, the only realistic approach to the practical application of relevant IIL and IHRL protections in conflict host countries. A rigid understanding of the two legal bodies would only preclude a discussion of the political implications of any available legal interpretation or of any

⁶⁷ Lang, *World Trade After Neoliberalism* (n 14).

‘balancing’ exercise between investment protections and human rights protections. This aspect of the debate is analysed in particular depth in chapter four.

Before turning to a description of the structure of this book, I would like to make one final observation concerning the choice of Afghanistan as an emblematic example for my study on extractive sector investment in conflict contexts. At the start of this research, this was certainly not an obvious choice and I was often met by a surprised audience when presenting my research. Since at least 2012, however, the fact that Afghanistan is a country extremely rich in natural resources has become common knowledge. Yet, the ways in which international law, not least through IIL, supports and enables the inflow of foreign direct investment in the extractive sector is not fully understood. Nor is there an active debate on how such investment may impact on the enjoyment of the right to water, or other ESC rights, in the areas affected by extractive activities. Today, when discussions take place on the future of Afghanistan, the focus of attention remains, for obvious reasons, on the armed conflict. This is the case for debates on security and on political stabilisation, as well as on human rights. In the meantime, however, the granting of licences for the exploration of Afghanistan’s natural resources continues unabated, in parallel to the transformation of the regulatory framework supporting the foreign investment inflow in the extractive sector.⁶⁸ The significance of these changes will only become fully apparent with time, when IIL protections will be triggered by potential breaches by Afghanistan and/or when the first impacts of extractive activities on water sources will become apparent. As of today, due to the continued escalation of the conflict and the waning interest of the international community, the future of Afghanistan remains uncertain. Most importantly, it remains to be seen whether there will be any political interest in debating the long-term future of Afghanistan’s resources, be it mineral or water resources. In my view, the latter debate is of crucial importance for any long-term understanding of Afghanistan’s stabilisation and future development, and it has geopolitical implications which reach far beyond the terrorist threat that triggered the invasion of Afghanistan in 2001. It is with this in mind that the present work was carried out, and as such it remains one of the few legal studies to look beyond the impact of the ongoing armed conflict on civilian lives.

⁶⁸ If anything, an additional sector which is currently attracting international attention is that of renewable energy, equally problematic in light of the highly controversial investment disputes related to investments in this sector. See eg A Franklin, ‘Legitimate Expectations: Lessons from Recent Energy Arbitration Cases on Renewable Energy – Relationship of Fair and Equitable Treatment Standard to Indirect Expropriation’ (22 April 2018) at <https://ssrn.com/abstract=3167034>. See also F Dias Simoes, ‘Case Note – *Charanne and Construction Investment v Spain*: Legitimate Expectations and Investments in Renewable Energy’ (2017) 26 *Review of European Community and International Environmental Law* 174, 177–78. On renewable energy in Afghanistan, see eg A Fahimi and P Upham, ‘The Renewable Energy Sector in Afghanistan: Policy and Potential’ (2018) 7 *Wires, Energy and Environment* e280.

The book is divided into five chapters. In chapters one to four, I examine the legal relationship between IIL and IHRL in order first to provide a general background necessary to the understanding of the ways in which the two bodies of international law sometimes may clash. In these chapters I also aim at clarifying the context within which relevant IIL and IHRL provisions are deployed in conflict contexts. To achieve these aims, I use the following chapter structure. In chapter one I give an overview of the dilemma raised by the arrival of extractive companies in conflict host countries, in order to set the operational background that triggered this research. In chapter two I analyse the relevant legal framework of investment protection by focusing on the IIL standards which are most frequently invoked by international investment tribunals when they are called upon to balance so-called ‘investors’ rights’ against human rights. Similarly, in chapter three I analyse the relevant legal framework of human rights protection, with a particular focus on the right to water. The discussion in chapters two and three sets the basis for my first main claim, presented in chapter four, that a balancing between IIL and IHRL is neither possible nor desirable, and that scholarly efforts would perhaps be better channelled towards gaining a clearer understanding of the ideological and constitutive underpinnings of the two legal regimes, in order to better conceptualise the way in which they intersect and interact in practice.

Building on the analyses carried out in chapters one to four, I then discuss the emergence of the Framework for business and human rights as a potentially valid framework for the protection of relevant IIL and IHRL provisions in conflict contexts. In chapter five I analyse the strengths and weaknesses of the Framework and offer an alternative reading of its normative content by suggesting that, without accepting the existence of a home state obligation to regulate the transnational activities of private business actors, remedies will continue to remain elusive for victims of corporate abuse. I then discuss this in the context of extractive sector investment in Afghanistan, to explain why such a development is of fundamental importance in practice. In the final pages of the book I then draw conclusions on the desirability and viability of pursuing a rebalancing of the relationship between IIL and IHRL, not least through the use of the Framework.