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Protection of foreign investments in armed conflicts. Part 2

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Abstract

The article discusses the notion of protection of foreign investments within the context of armed conflict. The author examines the provisions of bilateral investment treaties aimed at protecting investors in the situations of violence, as well as the substantive standards rooted in investment protection. The author also refers to the historical context behind the advent of the first investment treaties and the colonial nature that characterises the emergence of international investment law. The analysis focuses on the challenges commonly indicative of the applicability of investment agreements in armed conflict, which is further complicated by the weakness of the current international legal regulation and the insufficiency of existing provisions. The author argues that the regulatory framework for the protection of foreign investments is not only imperfect for regulating the protection of investments in the event of armed conflict but is also overly cautious with regard to the application of the principles of international humanitarian law to investment disputes. The author considers that the concept of investment protection should be reconciled with the concept of human rights, as well as with the interests of developing countries, since although investment is usually associated with economic stability, this discourse is inapplicable to developing countries, which are often negatively affected by both foreign investment itself and its protection, as the example of Colombia shows. Therefore, the article dwells on the fact that the effectiveness of protecting foreign investment, which is always based on the premise of peace, should be viewed through the prism of three lenses: the law of international treaties, international humanitarian law, and international human rights law. It is precisely on these three levels the author shows the interaction between the economic aims of investors who wish to safeguard their investments, the goals of governmental agencies, and the rights and interests of local communities and indigenous peoples.

Key words: foreign investment protection, armed conflict, human rights, bilateral investment treaties, international humanitarian law

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Защита иностранных инвестиций в контексте вооруженных конфликтов. Часть 2

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Аннотация

В статье анализируется система защиты иностранных инвестиций, в том числе положения двусторонних инвестиционных договоров, а также стандарты, направленные на предоставление такой защиты инвесторам в условиях вооруженных конфликтов. Автор изучает исторический контекст возникновения первых инвестиционных договоров, в частности колониальный период, когда зародилось международное инвестиционное право. Далее автор рассматривает вопрос применимости инвестиционных соглашений в вооруженном конфликте. Для сложившегося международного-правового регулирования характерно осторожное отношение к применению норм международного гуманитарного права к делам, рассматриваемым в рамках инвестиционных споров, ввиду чего имеющаяся нормативная база не идеальна для регулирования защиты инвестиций в случае вооруженного конфликта. По мнению автора, понятие защиты инвестиций должно быть согласовано с понятием прав человека, а также интересами развивающихся стран. Инвестиции, как правило, ассоциируются с экономической стабильностью, которая, однако, не характерна для последних. Пример Колумбии подтверждает, что негативными последствиями могут обернуться как сами иностранные инвестиции, так и их защита. Автор приходит к выводу, что эффективность защиты иностранных инвестиций, в основе которых всегда лежит предпосылка мира, должна рассматриваться сквозь призму права международных договоров, международного гуманитарного права и международного права прав человека: именно на этих трех уровнях происходит взаимодействие между экономическими интересами инвестора в защите своих инвестиций, интересами государства, а также интересами местных сообществ и коренных народов в защите своих прав.

Ключевые слова: защита иностранных инвестиций, вооруженный конфликт, права человека, двусторонние инвестиционные соглашения, международное гуманитарное право

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Introduction

> *We witnessed how this system enables corporate impunity and threatens the realisation and defence of Colombians' fundamental human and environmental rights. We also observed how this system interferes with judicial independence, environmental regulation, and national sovereignty.*
>
> Report of the International Mission to Columbia[1]

The first part of this article focused on the general overview of the historical background of the regime of international law to reveal possible patchworks in the legal regulation of foreign investment protection through the analysis of substantive standards enshrined in the bilateral investment treaties (hereinafter — BIT(s)), as well as armed conflict clauses.

Concordant with the analysis conducted in the first part of this paper, the neutrality of investment treaty arbitration appears to be a mere pretence, as the very crux of a BIT has always been, and will continue to be, wrapped up in the socio-political context. Being a resource-based economy, Colombia represents one of the most striking examples of such distorted disbalance.

As of now, there are 10 still pending cases against Columbia.[2] In 2023, the number of Columbia's claims amounted to $13 billion.[3] As highlighted in 2023 by the International Mission to Colombia, made up of representatives of social and environmental organisations from eight countries, "Colombia is part of an investment protection system that is profitable for foreign corporations but leaves no benefits for the country".[4] For example, in the last six years alone, 18 claims were filed against Columbia by foreign investors. In 2023, the Swiss mining group *Glencore* — an owner of the largest open-pit coal mine in Latin America — has brought yet another (fourth) claim against Columbia[5] following Colombia's Constitutional Court ruling in favor of the Wayúu people's rights to water, health and food sovereignty. Other Canadian companies, including *Eco Oro Minerals*, *Red Eagle* and *Galway Gold*, are also taking legal action against Columbia over the introduction of measures related to environmental protection.

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1 Report of the International Mission to Columbia, 2023. P. 2. URL: https://waronwant.org/sites/default/files/2023-08/Report%20of%20the%20International%20%23STOPISDS%20delegation%20to%20Colombia.pdf.

2 Investment policy hub. URL: https://investmentpolicy.unctad.org/investment-dispute-settlement/country/45/colombia.

3 Litigation report. State National Agency for Legal Defense (Agencia Nacional de Defensa Jurídica del Estado). 31 March 2023.

4 Report of the International Mission to Columbia, 2023. P. 2. URL: https://waronwant.org/sites/default/files/2023-08/Report%20of%20the%20International%20%23STOPISDS%20delegation%20to%20Colombia.pdf.

5 Fisher T., *Glencore brings new claim against Colombia* // GAR. 17 November 2023. URL: https://globalarbitrationreview.com/article/glencore-brings-new-claim-against-colombia.

As the number of clams exponentially increases, it inevitably adversely affects the rights of the local communities, as well as contributes to the facilitation of already existing violence. As follows from the Situation Report conducted by Project HOPE, a conflict between armed groups of the National Liberation Army and the Revolutionary Armed Forces of Colombia in Catatumbo, the largest coca-growing enclave in the country, has "steadily increased since January 15, 2025".[6] This conflict alone, which is only "expected to worsen",[7] has already led to the displacement of more than 50,000 people, with almost 30,000 remaining confined.[8] With more than 80,000 people already affected, "the situation surpasses the capacities of local partners, institutions and even the national government".[9] With more than eight non-international armed conflicts currently raging across the country, there is simply no room for any impediments to action.

1. International human rights law and international humanitarian law: a two-headed lion?

The interaction between international human rights law (hereinafter — IHRL) and international humanitarian law (hereinafter — IHL) is one of the most fascinating and extensively studied phenomena in international law scholarship. The International Court of Justice (hereinafter — ICJ) has on numerous occasions confirmed the applicability of rules of IHRL in times of armed conflict.[10] As was pronounced by the ICJ in *Legal Consequences of the Construction of a Wall*, "the protection offered by human rights conventions does not cease in case of armed conflict <…> As regards the relationship between IHL and IHRL, there are three possible situations: some rights may be exclusively matters of the former; others may be exclusively matters of the latter; yet others may be matters of both these branches of international law".[11] Since it is investment relations that may pierce through either of them, the author considers it indispensable to conduct a comparative analysis of their interaction in the present article.

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6 Armed conflict and mass displacement in Colombia. Situation report № 1. Project HOPE. 22 January 2025.
URL: https://reliefweb.int/report/colombia/armed-conflict-and-mass-displacement-colombia-situation-report-1-january-22-2025. P. 1.

7 Ibid. P. 1.

8 UN News. Colombia: Fleeing the thunder of violence in Catatumbo.
URL: https://news.un.org/en/story/2025/02/1160401.

9 Ibid.

10 ICJ. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* of 8 July 1996. § 25; ICJ. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.* Advisory Opinion of 9 July 2004. § 106; ICJ. *Case concerning armed activity on the territory of the Congo (Democratic Republic of the Congo v. Uganda).* Judgment of 19 December 2005, § 216–220.

11 *Legal consequences of the construction of a wall in the occupied Palestinian territory.* Advisory Opinion, 2004. ICJ Reports, § 106.

Nevertheless, for many the relationship has remained an odd one. Historically, IHL and IHRL have been seen as virtually diametrical and mutually exclusive (Krieger, 2006, p. 266) with the Universal Declaration of Human Rights and the Geneva Conventions being drafted without taking account of one another (Kolb, 2022, p. 267).

First, while IHL, "one of the oldest branches of international law" (Sassoli, 2020, p. 25), was developed specifically for use in times of armed conflict, IHRL was designed with a substantially different setting in mind (Sassoli, 2020, p. 25). The horrors of World War II have influenced its "people-based, missionary character" (Bertrand, 2013, p. 157), which inspired the "prevention of gross violations of human rights and of conflicts" (Bertrand, 2013, p. 157) as a "defining issue of our time".[12] In a way, it also predetermined the essence of the "law-making process of the future endeavours" to deal "with the grievous threats facing humanity" (Bertrand, 2013, p. 250).

Second, another line on which the proponents of divergence between the two branches agree on is that of their relationship to the application of domestic law. While the rules of the IHL are "conceived as applying universally" (Sassoli, 2020, p. 5) the rules of the IHRL are largely dependent on regional mechanisms and the constitutional law of the states.

Nevertheless, with respect to the substantive rules of both branches, the difference between them "should not be over-emphasized" (Sassoli, 2020, p. 5). Both branches share the common goal of ensuring the respect for human life and dignity. This is particularly evident in a non-international armed conflict (hereinafter — NIAC), the most common form of armed conflict today (Tonge, 2014, p. 12), where IHL is increasingly influenced by IHRL and its implementation mechanisms. As the area of NIACs still lacks an adequate regulatory framework, it can be argued that the reliance on the IHRL paradigm in the context of IHL seeks to place NIACs and international armed conflicts on an equal footing in terms of the importance of protection of life in both types of conflict. For example, the European Court of Human Rights (hereinafter — ECtHR) stated in the landmark case of *Isayeva v. Russia*, in which the Court assessed the compatibility of Russian military actions with the European Convention of Human Rights (hereinafter — ECHR), that "using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society".[13] In this case, the Court found a violation of the right to life.

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12 Economic and Social Council. (1999). *Report of the United Nations High Commissioner for Human Rights and follow-up to the World Conference on Human Rights*. UN Doc E/CN.4/2000/12.

13 ECtHR. *Isayeva v. Russia.* Application no. 57950/00. Judgement of 24 February 2005. § 191.

Some will argue that interconnection between the two areas is possible only with IHL as the *lex specialis*, since the ICJ in the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* explicitly proclaimed the following: "[t]he test of what is an arbitrary deprivation of life <…> falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict".[14] In general, this statement has been common in the attempts to establish the clear assumption that IHRL is the *lex generalis*, while IHL is the *lex specialis*.

Although both IHL and IHRL still share "a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity",[15] the use of lethal force is generally permitted under the rules of IHL, while it is strictly limited under the rules of IHRL. On the other hand, another important issue to consider is the degree of flexibility of the respective rules in each regime. While IHRL usually explicitly allows for certain exceptions based on the strict standards, i.e. *necessity, proportionality,* IHL mostly comprises non-derogable standards, that cannot be deviated from in times of war. When it comes to the right to life, it is IHRL that sets an unmistakably high threshold.

As stated in Human Rights Council (hereinafter — HRC) Comment № 36, deprivation of life is a "deliberate or foreseeable and preventable life-terminating harm or injury, caused by an act or omission".[16] As to what constitutes arbitrary, the African Commission on Human and People's Rights in its General Comment 3 affirmed that it "should be interpreted with reference to considerations such as appropriateness, justice, predictability, reasonableness, necessity and proportionality".[17] Notably, this approach is in line with the 1982 *Suarez de Guerrero v. Colombia* decision, in which the Committee established the following criteria of arbitrariness: (a) sufficient legal basis; (b) legitimate purpose; (c) absolute necessity; (d) strict proportionality.[18]

It is therefore only logical that an assessment of the arbitrariness of such deprivation in times of armed conflict, as well as its consistency with IHRL, should be made on the basis of IHL rules applicable in armed conflict. In particular, this has been confirmed by the UN Human Rights Council,[19] the Inter-American Commission on Human Rights and the Inter-American Court of

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14 *Legality of the Threat or Use of Nuclear Weapons.* Advisory Opinion of 8 July 1996. ICJ Reports, § 25.

15 IACHR. *Juan Carlos Abella v. Argentina*. Case № 11.137. Report № 55/97. OEA/Ser.L/V/II.95 Doc. 7 rev. at 271. 1997. § 183.

16 HRC. *General Comment № 36,* 2019. § 6.

17 OAU. *ACommHPR.* 2015. § 12.

18 HRC. *Suarez de Guerrero v. Colombia*. CCPR/C/15/D/45/1979. 1982(a).

19 CCPR. *General Comment № 36: Article 6 (Right to Life)* (2018). CCPR/C/GC/36. § 64.

Human Rights (hereinafter — IACtHR).[20] In the case of *Santo Domingo Massacre v. Colombia*, the IACtHR assessed the "legality of a military assault on a Colombian village in accordance with the relevant norms and principles of IHL".[21] After identifying initial breaches of the principles of distinction, proportionality and precaution, the Court found that Colombia had infringed upon the rights to life and physical integrity of those who perished or were harmed in the attack.

A similar approach has been taken with regard to the right to liberty and the detention of prisoners of war. While human rights law prohibits arbitrary detention, provisions such as Article 21 of Geneva Convention III and Articles 42 and 78 of Geneva Convention IV permit the internment of prisoners of war and civilians for security purposes, in these cases, humanitarian law sets the standard for determining arbitrariness. As highlighted in the General Comment on Article 9 of the International Covenant on Civil and Political Rights by the Human Rights Committee, security detention that is authorised, regulated by, and compliant with IHL is not inherently arbitrary. The Inter-American Commission on Human Rights echoed this position. Even the ECtHR, which had previously refrained from explicitly referencing humanitarian law in cases arising from armed conflict, embraced this approach in the *Hassan v. UK* case. Notably, this shift was a departure from its previous reliance on Convention-specific criteria such as legitimacy, necessity and proportionality, and now explicitly recognising the interpretive significance of humanitarian law in relation to the ECHR.

All in all, the argument that IHL and IHRL are mutually exclusive due to the existence of normative collision is principally absurd. In essence, the combined application of the two most extensively studied areas of international law, IHL and IHRL, on the basis of human rights principles positively raises the threshold for the permissible use of force in armed conflict (Rusinova, 2013, p. 16). It therefore seems that a similar analysis can be applied to the relationship between IHL and IHRL. By adopting a parallel approach to that used in human rights law cases, the level of protection afforded to investors during armed conflict, particularly concerning protection from attacks, will essentially mirror the level of protection granted to civilians under humanitarian law. Although the rights of investors cannot be considered as basic human rights in the sense of the framework of the latter,[22] the same logic of reasoning may still be applied. Thus, as long as international law continues its attempts to avoid depoliticisation

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[20] IACtHR. *Cruz Sánchez and others v. Peru*. 2015. § 273; IACtHR. *Bámaca-Velásquez v. Guatemala*. 2000. §208–209.

[21] IACtHR. *Santo Domingo Massacre v. Colombia*. Judgment of 5 June 2012.

[22] Buergenthal, T. (2007). Human rights. Max Planck Encyclopedias of International Law. URL: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e810.

in an inherently political framework, the combined systemic application of international investment law, IHRL and IHL seems to be of the paramount importance.

Armed conflicts pose similar challenges to investment law, because the former shares a basic assumption with human rights law in requiring a functioning state and effective institutions. Failure of the host state to exercise control jeopardises not only investor rights, but human rights as well. Moreover, both human rights and investment law face a common dilemma in armed conflict: the balancing act between creating unrealistic obligations that may hinder state compliance with international rules, while at the same time preventing the dilution of protection standards to the point where they lose their intended purpose. Given these similarities, the impact of humanitarian law on interpreting human rights obligations can serve as a model, with some considerations, for interpreting investment treaties in times of armed conflict.

2. Investment and violence in developing countries

The modern state of investment protection in international investment law (hereinafter — IIL) remains shaped by "dominant narratives and assumptions about the social functions of investment, its relationship with the broader community, and the place of law in regulating that relationship" (Poon, 2021, p. 3). As of today, the majority of investment claims are being brought against developing countries.[23] While Latin American countries, having had a "fraught relationship" (Calvert, 2022, p. 14) with investment treaty law, entered into a great number of BITs at the end of the past century,[24] they are currently the ones dominating more than a third of cases at the International Centre for Settlement of Investment Disputes (hereinafter — ICSID). At the top of the list are Argentina[25] and Venezuela, constituting more than 12 percent of ICSID's historical caseload.[26] At the same time, the author acknowledges the risks behind the common usage of the dichotomy "developing vs. developed". Hence, it is only for the sake of simplicity that the paper employs this language when

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[23] UNCTAD. (2023). *Trends in the investment treaty regime and a reform toolbox for the energy transition*. Issues Note.
URL: https://unctad.org/system/files/official-document/diaepcbinf2023d4_en.pdf.

[24] ICSID. Caseload statistics.
URL: https://icsid.worldbank.org/sites/default/files/publications/2011-1%20English.pdf.

[25] ICSID. *Enron creditors recovery corporation (formerly Enron Corporation) and ponderosa assets, L. P. v. Argentine Republic*. Case № ARB/01/3. Award of 1 November 2001; ICSID. *CMS Gas Transmission Company v. Argentine Republic*, Case № ARB/01/8. Award of 11 January 2002; ICSID. *Azurix Corp. v. Argentine Republic*. Case № ARB/01/12. Award of 8 April 2002; ICSID. *Siemens A.G. v. Argentine Republic*. Case № ARB/02/8, Award of 19 December 2002.

[26] Born, G. (23 August 2024). Exploring Latin America's ICSID arbitration landscape. *Latin Lawyer*. URL: https://latinlawyer.com/guide/the-guide-international-arbitration-in-latin-america/third-edition/article/exploring-latin-americas-icsid-arbitration-landscape.

referring to states with historically different economic and socio-political backgrounds.

Although it is generally believed that the outbreak of an armed conflict adversely affects the economy of the country, including its foreign investment inflows, investors continue to invest in conflict-prone countries,[27] which some investors actually find uniquely attractive due to a "higher rate of return for being an early entrant to the market, and the ability to leverage fragile domestic legal institutions or connections to corrupt or kleptocratic regimes to secure favourable deals unavailable elsewhere" (Poon, 2021, p. 748).

In fact, questions can also be raised as to whether fostering of foreign investment in either conflict, or post-conflict states is always "conducive to peace or even beneficial to the host states" (Poon, 2021, p. 748). There is a broad consensus regarding the link between armed conflict and extractive industries, that is "widely recognized, both in the way in which resources extraction may cause or exacerbate violence, and in the way in which it may undermine governance, where both state and non-state actors vie to control and personally profit from the revenues deriving from natural resources" (Bannon & Collier, 2003, p. 7). This observation has been documented in Guatemala,[28] Peru,[29] Liberia,[30] Iraq (Ganson & Wennmann, 2018, p. 14), Afghanistan (Ganson & Wennmann, 2018, p. 14), Angola (Ganson & Wennmann, 2018, p. 101), Sierra Leone (Ganson & Wennmann, 2018, p. 37), and so many others. Furthermore, some argue that the reason for such an unfortunate link hides in the fact that investments in conflict-prone countries or post-conflict countries do not contribute nearly as much to the host state's economy, as they do to the home state of the investor (Ganson & Wennmann, 2018, p. 35). Therefore, the repercussions for the modern policy of those who invest in these countries, which is usually regarded as a risk for an investor in terms of investment protection, appear rather grim.

In 2003, during the World Summit on Sustainable Development in Johannesburg, the UK Prime Minister Tony Blair launched the Extractive Industries Transparency Initiative, which was subsequently supported and joined by more than 50 countries.[31] In its Resolution 62/274, the General Assembly "encourage[d] the international community to strengthen, as appropriate, upon

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27 Fick, M., Miriri, D. (16 December 2021). A Year of war in Ethiopia batters Investors and citizens. *Reuters*. URL: https://www.reuters.com/markets/europe/year-war-ethiopia-batters-investors-citizens-2021-12-16/.

28 UN. (2012). Extractive industries and conflict. URL: https://www.un.org/en/land-natural-resources-conflict/pdfs/GN_Extractive.pdf. P. 15.

29 Ibid. P. 16.

30 Ibid.

31 US Department of State. Bureau of energy resources. *Extractive Industries Transparency Initiative (EITI)*. URL: https://2021-2025.state.gov/extractive-industries-transparency-initiative-eiti/.

request, the capacity of States endowed with natural resources, especially those emerging from conflict situations".[32] Nevertheless, due to the states' diverging views on the role of the Security Council in dealing with the underlying causes of an armed conflict,[33] the support for the initiative has remained inconsistent.

Meanwhile, in destabilised economies prone to corruption and weak governance, extractive companies can be maliciously used to the benefit of the host state, often to the detriment of the civilian population and human rights. As a result, conflict-host countries are likely to "justify their deregulated approach to natural resources exploitation in the name of stabilization and development" (Davitti, 2020, p. 20). The situation in Afghanistan is an example of a detrimental relationship between the location of mining activities, as well as the problem of displacement, access to water, and the fueling of conflict (Davitti, 2020, p. 6–7). Whether extractive spheres are considered as "pro-peace entrepreneur" or "conflict profiteers" (Subedi, 2013, p. 181–182), does not change the fact that their interconnection with the state of peace within the country remains irrevocable.

Developing countries have a tendency of relying on foreign investment inflows as a major source of capital, which is an integral part of economic and political development processes (Mihalache-O'Keef & Vashchilko, 2013, p. 137–156). In this regard, Colombia is no exception. Since the adoption of neoliberal market liberalisation policies in the 1990s, Colombia has swiftly attracted a number of foreign investors. Although Colombia has just recently started gradually shifting away from an extractive model dependent on oil and coal to renewable energy,[34] its oil industry has for the longest time been Colombia's most attractive foreign investment sector (Maher, 2018, p. 227).

According to the classification provided by the International Committee of the Red Cross, as of April 2024, there are currently eight NIACs in Colombia.[35] Three of them involve confrontations between the Colombian government and a number of non-state armed actors, including the National Liberation Army and the Gaitanist Self-Defence Forces of Colombia, while other conflicts are between non-state armed actors. Yet, Colombia is considered to be a country that has "contributed the most to the development and practical implementation of IHL" (Giraldo & Serralvo, 2020, p. 1118).

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32 UNGA Resolution 62/274 of 11 September 2008. § 3, 4.

33 United Nations Security Council. *Open debate on conflict prevention and natural resources*. UN Doc. S/PV.6982. P. 13, 16.

34 IEA. *Executive summary, Colombia*. URL: https://www.iea.org/reports/colombia-2023/executive-summary.

35 ICRC. (3 April 2024). *The human cost of armed conflicts in Colombia*. URL: https://www.icrc.org/en/document/human-cost-armed-conflicts-colombia.

As a result of the ongoing conflicts throughout the last six decades,[36] the country has faced an unprecedented sixfold increase in the amount of violence, with 145,049 individuals now being displaced, an alarming 18 % increase compared to 2022.[37] The sixfold increase in violence[38] across the country is nothing but alarming. Since the only way these groups have to maintain control of the business is through violence [against the population],[39] people are now living in a "perpetual state of mass kidnapping".[40]

Today, despite the agreement concluded between the Colombian government and the guerrillas of the Revolutionary Armed Forces of Colombia, the same problems persevere. Since 2016, there has been a case of enforced disappearance every four days.[41] Only in 2023, in the territory of Choco, the problem of confinement led to 44 % of the confined population.

In the last five years, the increase in victims of explosive devices, and attacks against health care services amounts to 800 % and 500 % respectively. On 26 March 2024, UN International Human Rights Expert A. Urrejola called upon Colombia to "implement the 2016 Peace Agreement as a State policy and ensure that all dialogue processes with non-state armed groups take a human rights approach focused on victims".[42] With more than 9 million, or 18 % of the total population, having been the victims of Colombia's armed conflict,[43] rebuilding peace is a never-ending challenge of striking reality. Nevertheless, the foreign investment level in Colombia remains high, with expectations of 10 billion US $ flow from renewable energy products in 2024.[44]

The protection of the Caño Limón Coveñas pipeline and other critical oil infrastructure has been achieved through the establishment of public armed forces and paramilitary control in key economic areas in Arauca. This has effectively prevented and deterred attacks on oil facilities. The public armed

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36 ICRC. (3 April 2024). *The human cost of armed conflicts in Colombia*. URL: https://www.icrc.org/en/document/human-cost-armed-conflicts-colombia.

37 Ibid.

38 UN Office of the Coordinator for Humanitarian Affairs. OCHA Monitor. *Totals of violence by year: 2016–2022.* P. 5.

39 Crisis Group. 27 September 2022. *Trapped in conflict: reforming military strategy to save lives in Colombia*. URL: https://www.crisisgroup.org/latin-america-caribbean/andes/colombia/95-trapped-conflict-reforming-military-strategy-save-lives.

40 Ibid.

41 Ibid.

42 Office of the High Commissioner for Human Rights. (26 March 2024). *Colombia: UN expert calls for implementation of peace agreement as a state policy*. URL: https://www.ohchr.org/en/press-releases/2024/03/colombia-un-expert-calls-implementation-peace-agreement-state-policy.

43 Ibid.

44 Colombia predicts $10 bln in foreign investment from Europe this year – minister. (23 April 2024). *Reuters*. URL: https://www.reuters.com/sustainability/sustainable-finance-reporting/colombia-predicts-10-bln-foreign-investment-europe-this-year-minister-2024-04-23/.

forces have established military patrols along the roads surrounding the Caño Limón oil fields and nearby jungle areas, stationed light tanks, fortified bunkers, and rapid-response units at strategic points along the pipeline, and established intelligence centres that support offensive combat operations. Unsurprisingly, this has had a catastrophic impact on the civilian population (Maher, 2018, p. 227).

Another issue to be discussed here is the problem of forced displacement of indigenous people at the time of armed conflict. On 27 February 2024, more than 300 representatives of Wiwa indigenous people, including children, in northern Columbia were displaced as a result of massive confrontations between armed non-state groups.[45] With violence has been continuing for more than several months now, the level of protection, or help to the local communities is inadequate and practically non-existent.[46] Notably, in 2005, the Inter-American Commission on Human Rights (hereinafter — IACHR) granted provisional measures with respect to the Wiwa Indigenous Peoples, who were at the time also victims of sporadic violence and forced displacement. Today, however, although the state is obliged to afford its guarantees to the local population, people's hope is still pending.

According to the United Nations Declaration on the Rights of Indigenous Peoples, which has been described as "the most comprehensive international instrument on the rights of indigenous peoples",[47] albeit only of "symbolic and ontological significance",[48] indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognised in the Charter of the UN, the Universal Declaration of Human Rights and IHRL.

As follows from the UN Report, there are more 370 million indigenous people currently spread across 70 countries worldwide.[49] None of the existing legal instruments provide a precise definition of indigenous peoples. One of the first cases that concerned the rights of indigenous people as a result of investor's activity is *Chevron and TexPet v. Ecuador,* which related to the dispute

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45 Torrez Garzón, N. (13 May 2024). We saw our family members cut into pieces: how Colombia's Wiwa people have been forced from their mountain – again. *The Guardian*. URL: https://www.theguardian.com/global-development/article/2024/may/13/we-saw-our-family-members-cut-into-pieces-how-colombias-wiwa-people-have-been-forced-from-their-mountain-again.

46 Forced Displacement of the Wiwa indigenous peoples. (28 February 2024). *ReliefWeb*. URL: https://reliefweb.int/report/colombia/forced-displacement-wiwa-indigenous-peoples.

47 UN. United Nations Department of Economic and Social Affairs. *Indigenous Peoples.* URL: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.

48 Kingsbury, B. (2006). Indigenous peoples. *Max Planck Encyclopedias of International Law*. URL: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e826?prd=EPIL.

49 United Nations Permanent Forum on indigenous issues: who are indigenous peoples. URL: https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf.

between two US companies and the Republic of Ecuador.[50] The roots of the case go back to the class action initiated by indigenous people of Ecuador, who claimed that oil activities of Texaco company caused a pollution of Amazon rainforests and rivers in Ecuador and Peru, which in turn adversely affected the lives of the local civilian population.[51] In 2018, the Permanent Court of Arbitration found Respondent liable for "injuries caused by the breaches of the FET standard and customary international law in Article II(3)(a) of the Treaty and for breaches of the Umbrella Clause in Article II(3)(c) of the Treaty".[52] Notably, Fundacio´n Pachamama and the International Institute for Sustainable Development asked to be included in the procedure, since the case called for "a number of issues of vital concern to specific indigenous communities and peoples in Ecuador",[53] yet the tribunal dismissed the request, hence acting in disregard of the rights of indigenous peoples.

Unfortunately, this example is one of the many where indigenous people have not received suitable protection under international law. There are only a handful of cases that would appear relevant for the present research due to a number of problems that indigenous people face within any existing legal system, be it national or international. Indigenous people experience limited access to justice, shortage of necessary resources to access such help, as well as low probabilities to hear their claims heard. Of all relevant existing cases in over the last two decades,[54] it is evident that the impact of foreign investment on local communities is almost always negative in the way it affects their land, water, natural resources, and environment (Wang, Ning, & Zhang, 2021). In almost none of the cases except few did the indigenous people were able to participate themselves.

Similarly, none of the cases even addressed the interests of the local communities and indigenous people. As a result, many people attacked investors' properties in order to attract more attention, which led to investors seeking more compensation for failed protection. In a way, as was ironically noted by the tribunal in *LLC v. Republic of EI Salvador,* "at most, the State acted only as an intermediary between the Claimant [foreign investors] and the

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50 PCA. *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II).* Case № 2009-23. Award of 30 August 2018.

51 PCA. *Chevron Corporation and Texaco Petroleum Company v. The Republic of Ecuador (II).* Case № 2009-23. Award of 30 August 2018.

52 Ibid. § 8.78.

53 Ibid.

54 Ad hoc*. Glamis Gold v. USA*, Award of 8 June 2009; ICSID. *Ltd., et al, Bernhard von Pezold and others*, *Crystallex International Corporation v. Bolivarian Republic of Venezuela,* Case No. ARB(AF)/11/2. Award of 4 April 2016.

communities".[55] Today, however, since the Investor-State Dispute Settlement mechanism "has shifted from being a shield of last resort to a sword of first resort in many disputes" (Wang, Ning, & Zhang, 2021), there is no framework for intersection between the interests of indigenous people, whose protection of environmental resources may lead to inadequate protection of the investments by the host state, and vice versa.

In the past, there have been documented instances in Arauca, Colombia, and its surroundings where peasant farmers and indigenous communities residing near oil facilities or on land designated for oil exploitation have been subjected to violence and forced displacement.[56] While forced displacement impacts many peasant farmers, a disproportionate number of Afro-Colombian and indigenous individuals are displaced in Colombia due to their presence in resource-rich territories (Escobar, 2004, p. 207–230). Following episodes of violence, there has been an increase in oil production, exploration, and infrastructure development. This data supports the argument that forced displacement has effectively cleared land in these strategic areas, including displacing indigenous groups, thereby granting corporations access to land for oil exploration and drilling that would have otherwise been unavailable.

Additionally, the evidence suggests that violence has created buffer zones to safeguard oil infrastructure and has suppressed opposition to oil interests, particularly from indigenous groups. Escalating levels of violence have facilitated territorial control by the public armed forces and paramilitaries in economically crucial areas of Arauca, benefiting oil interests in the region. Although there was a decrease in human rights violations and forced displacement in Arauca towards the end of 2010, the analysis demonstrates that despite initial spikes in conflict intensity, oil production, exploration, and investment have persisted during periods of heightened violence. Hence, while the present paper does not seek to make any broad generalisations regarding each and every ongoing NIAC in the world, the investors and lawyers should pay a heightened attention to this rather closeted aspect of the relationship between investment protection and conflict. Displacement may not only facilitate the state's strategic military interests in the context of armed conflict, but also increase foreign investment protection, as well as advance economic aims by expropriating land that is rich in natural resources (Lozano-Gracia, Ibáñez, & Hewing, 2010, p. 157–189). The

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[55] ICSID. *Case of the Pac Rim Cayman LLC v. Republic of EI Salvador*. Case No. ARB/09/12. Amicus curiae submissions. 20 May 2011. P. 10. URL: https://www.italaw.com/sites/default/files/case-documents/italaw1208.pdf.

[56] Amazon Watch. (1 March 2002). *Civil conflict and indigenous peoples in Colombia*. (1 March 2002). URL: https://amazonwatch.org/news/2002/0301-civil-conflict-and-indigenous-peoples-in-colombia; Amazon Watch. *Colombia's u'wa face new threats. U'wa indigenous group confront new threats to their lives and territory*. URL: https://amazonwatch.org/assets/files/uwa-issue-brief.pdf.

history of Colombia shows a frightening link between the policy of forced displacement of indigenous people and attraction of foreign investment (Sánchez, 2017).

In the end, it appears that indigenous people remain invisible men for investment tribunals in times of armed conflict. Despite the tribunals' theoretical pronouncement of the importance of a systemic interpretation, practice does not go very far. Unsurprisingly, the notion of investment protection has become so limited to the image of the investor, that all other considerations continue to remain abandoned. At the same time, the lives of indigenous people are routinely being disrupted by investment activity as the notion of investment protection remains primarily concerned with an economic interest of an investor, not the rights of local community, or environmental problems (Ling & Lim, 2020). The extent to which foreign investment continues being impacted by human rights violations and violent armed conflicts, illustrates the persisting interdependence between the two fields.

Conclusion

While the protection of foreign investment is of paramount importance to developing countries, it seems that the politicisation of foreign investment, which scholars often avoid, often facilitates both the unequal distribution of interests between North and South and the idea of violence within developing countries. Ultimately, as long as peace remains underfunded, the protection of foreign investment is not a viable priority for anyone.

Ideally, the relationship between IHL and IHRL should never be seen as a necessary practicality to escape the political nature of IIL. While any objections to their simultaneous applicability are easily debunked, the silver linings of the investors are harder to deal with.

The notion of investment protection has to be reconciled with the notion of human rights, as well as the interests of developing countries. Although investments are usually associated with economic stability, this discourse is inapplicable to developing countries, which are often adversely influenced by both foreign investment and investment protection. The situation in Colombia represents a striking example thereof. Furthermore, the rights of indigenous people, living in the territories with rich land are also negatively affected.

Therefore, it seems that the effectiveness of investment protection essentially boils down to three aspects: the economic interests of the investor to have protection afforded to their investments; the interests of the state to protect its essential interests; and finally, the interests of the local communities to be granted human rights, and to have this promise fulfilled. The paper has also shown how interaction between these three aspects takes place on different

levels: investment treaty interpretation and application, substantive protection of investment, as well as real-life problems that call for real solutions. In the end, if "peace is not merely a distant goal that we seek, but a means by which we arrive at that goal",[57] the connotations are clear.

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[57] Martin Luther King Jr. Speech of 25 February 1967. The Nation Institute, Los Angeles.

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