

APPROACHES TO RESOLVING CONFLICTS OF LEGAL REGIMES IN THE PROTECTION OF INVESTMENTS DURING ARMED CONFLICTS

ПІДХОДИ ДО ВРЕГУЛЮВАННЯ КОНФЛІКТУ ПРАВОВИХ РЕЖИМІВ ПРИ ЗАХИСТІ ІНВЕСТИЦІЙ У ПЕРІОД ЗБРОЙНИХ КОНФЛІКТІВ

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Abstract. *The article examines the interaction between international investment law and international humanitarian law in the context of armed conflicts. It analyses the concept of lex specialis within both legal regimes and considers different approaches to determining their priority of application, namely international humanitarian law, international investment law, and the contextual approach. Particular attention is paid to the practical application of bilateral investment treaties in situations of military occupation of territory and to issues of state responsibility in such circumstances. The study highlights the challenges of protecting investments in contexts of occupation and frozen conflicts, as well as approaches to determining the legal status of investment assets (civilian or military), especially where the activities of an investment object are directed towards the production of dual-use goods. The article further examines arbitral decisions and scholarly opinions concerning the impact of armed conflicts on the operation of bilateral investment treaties. It emphasizes that an international armed conflict may be interpreted differently under the two regimes: as a regular normative condition in international humanitarian law, and as a circumstance of force majeure in international investment law. The necessity of adopting a flexible, contextual approach is underlined, one that simultaneously takes into account the objectives of both regimes (safeguarding investors' rights under international investment law and ensuring compliance with states' humanitarian obligations under international humanitarian law).*

Keywords: *international humanitarian law; investment protection; armed conflict; legal regimes; conflict of norms; international investment arbitration; jurisdiction.*

Анотація. *У статті досліджується взаємодія міжнародного інвестиційного права та міжнародного гуманітарного права в умовах збройних конфліктів. Проаналізовано концепції lex specialis у контексті обох правових режимів. Розглянуто різні підходи до визначення пріоритетності їх застосування, а саме міжнародного гуманітарного права,*

міжнародного інвестиційного та застосування контекстуального підходів. Здійснено аналіз особливостей практичного застосування Двосторонніх інвестиційних договорів у контексті воєнної окупації території та відповідальності держав у такому контексті. Особливу увагу приділено проблемам захисту інвестицій в умовах окупації та заморожених конфліктів, а також підходи до визначення статусу інвестиційних об'єктів (цивільні чи військові), зокрема, коли діяльність інвестиційного об'єкту спрямована на виготовлення товарів подвійного призначення. Проаналізовано рішення інвестиційних арбітражів та позиції науковців, які стосуються впливу збройних конфліктів на дію двосторонніх інвестиційних договорів. Наголошено на тому, що міжнародний збройний конфлікт може тлумачитися по-різному у межах двох правових режимів: як регулярний нормативний стан у міжнародному гуманітарному праві та як обставина непереборної сили в міжнародному інвестиційному. Підкреслено необхідність застосування гнучкого, контекстуального підходу, який буде враховувати одночасно цілі обох галузей: забезпечення захисту прав інвесторів в міжнародному інвестиційному праві та дотримання гуманітарних зобов'язань держав за міжнародним гуманітарним правом.

Ключові слова: міжнародне гуманітарне право; захист інвестицій; збройний конфлікт; правові режими; колізія норм; міжнародний інвестиційний арбітраж; юрисдикція.

Introduction. The interaction between international humanitarian law and international investment law is gaining increasing relevance due to the growing number of armed conflicts accompanied by significant economic and legal consequences. On the one hand, international humanitarian law establishes the rules of warfare and ensures the protection of civilians and civilian infrastructure. On the other hand, international investment law is designed to guarantee security and stability for foreign investors by safeguarding them against expropriation and discriminatory actions by states. However, in situations where investments are located in territories affected by international or non-international armed conflicts, conflicts of norms and jurisdictional issues arise, requiring comprehensive legal analysis.

Literature review. A substantial body of scientific research has been devoted to the study of international investment law, in particular to issues of investment protection and the interpretation of investment standards, including the works of Dolzer and Schreuer (2012), Schreuer (2009), and Yannaca-Small (2008). An equally significant number of works focus on international humanitarian law, especially regarding the regulation of military operations and permissible restrictions on property rights during armed conflicts, as addressed by Sassòli (2019), Cerone (2006), Roberts (2008), Bothe (2013), and Milanovic (2011).

Moreover, most scholarly works address the resolution of conflicts of norms in peacetime, while the specificities of periods of armed conflict remain underexplored. Only a few researchers emphasize the necessity of harmonizing legal regimes and developing approaches for their coordinated application, including McLachlan (2005), Kriebaum (2010), Dolzer (2011), Brower (2010), Schill (2011), Happold (2009), and Roe (2013). Thus, in the academic discourse, there arises a need for a detailed research of the conflict between this law regims.

The purpose of the study. The purpose of the article is to analyze the interaction between international humanitarian law and international investment law within the framework of armed conflict.

Main results of the research. The main goal of international investment law is the protection of investors' rights and assets. It provides guarantees, as enshrined in investment treaties (the primary instruments governing investors' activities), such as protection against unlawful expropriation, fair and equitable treatment, as well as effective mechanisms for resolving disputes between investors and states. International humanitarian law seeks to establish standards of protection for the civilian population and civilian objects during armed conflicts. Such civilian objects may include investments, particularly those located in areas of hostilities and, accordingly, in need of protection.

However, international humanitarian law contains certain exceptions that allow for the restriction or even destruction of private property when justified by military necessity. This implies that, in situations of armed conflict, investment assets may be endangered as a result of actions directed toward achieving military objectives, which stands in contrast to the general principles of investment protection applicable in peacetime.

It should be noted that conflicts between different branches of international law, particularly between the norms of international investment law and international humanitarian law, may be resolved by analogy with another branches. For example, between international humanitarian law and international human rights law. In science discourse on the interaction between international human rights law and international humanitarian law during armed conflicts, three key positions have emerged, reflecting different approaches to the application of these legal regimes:

The first approach is the recognition of the primacy of international human rights law even in times of war. In the paper of Cerone, during armed conflicts international human rights law not only remains in force but may, in certain cases, take precedence (Cerone, 2006). In his view, international human rights judicial bodies, including the European Court of Human Rights, have repeatedly affirmed states' jurisdiction and their obligations under international human rights law even during periods of hostilities, particularly with respect to the right to life, the prohibition of torture, and access to justice.

The second approach is the prioritization of international humanitarian law. For instance, Droege (Droege, 2007), in her research, asserts that in situations of armed conflict, international humanitarian law should take precedence. She emphasizes that the provisions of international humanitarian law constitute special norms (*lex specialis*) that replace or limit the application of general norms of international human rights law during armed conflict. According to the International Court of Justice's ruling in the case of "Armed Activities in the Congo," the application of international human rights law may be restricted in circumstances where the relevant aspects of the conflict are already comprehensively regulated by international humanitarian law (International Court of Justice, 2000).

Similar approach was proposed by Frey Baetens, who argues that the norms of international humanitarian law should be considered *lex specialis*, supporting her view with the reasoning that during conflicts states may derogate from certain fundamental human rights (International Institute for Sustainable Development, 2011). A similar approach is observed in practice; for example, Ukraine has temporarily suspended certain fundamental rights in connection with the full-scale invasion of its territory by the Russian Federation [5].

The third approach is the contextual approach, which holds that the applicable legal regime depends on the specific circumstances. For example, Hathaway and all emphasize that neither legal regime holds automatic precedence (Hathaway et al., 2012). The application of international human rights law or international humanitarian law depends on the concrete context, the type of armed conflict (international or non-international), the status of individuals (civilians, combatants, detainees, etc.), as well as territorial factors. They propose a dynamic approach to determining which norm should prevail, taking into account legal gaps, protective potential, and the objectives of both branches of law.

The contextual approach appears to be the most reasoned and flexible framework in the contemporary conditions of armed conflicts. Unlike approaches that prioritize one branch of law over the other, the contextual model allows for consideration of the specificities of each situation without creating an artificial hierarchy of norms. Accordingly, no legal regime is universally dominant, and the effective protection of human rights during wartime requires a flexible and purposive application of legal instruments. This approach better reflects the complexity of modern conflicts, where the boundaries between combat zones, the status of individuals, and forms of violence are often blurred. Consequently, a dynamic combination of norms from both branches, adapted to the specific circumstances, provides the most comprehensive and responsive mechanism for safeguarding human dignity in times of war.

Similarly to the contextual approach in the interaction between international humanitarian law and human rights, the norms of international investment law must also be capable of adapting to the realities of armed conflict. This means that investment law should not remain isolated from the

wartime context, but must take into account the requirements of humanitarian law, particularly the restrictions imposed on the state to protect the civilian population, ensure security, or carry out other critical functions during armed conflict (Gazzini, Brabandere, & Nijhoff, 2021; Baetens, 2020).

In peacetime, the norms of international investment law would generally be considered *lex specialis*. However, during armed conflict, we hold that the determination of which norms constitute *lex specialis* depends on the specific circumstances and the nature of the situation. For instance, depending on whether the issue concerns the protection of an investment as a civilian object or its involvement in military operations, the applicable *lex specialis* may vary, taking into account the relative priority of humanitarian or investment norms in the given context.

This approach allows for a more comprehensive and equitable protection of investments. On one hand, it recognizes investors' right to safeguard their economic interests. On the other, it does not disregard the state's obligations under international humanitarian law, which governs conduct during armed conflicts. For example, in a situation where a state is compelled to destroy infrastructure to prevent a threat to the civilian population or to repel an attack, such an action may be justified under humanitarian law, even if it affects foreign investments (Bell, 2021; Padin, 2020).

Therefore, in the context of armed conflict, the determination of *lex specialis* is situational and depends on the circumstances of each case. For instance, if an investment asset that has no military function is damaged in a manner contrary to the rules of international humanitarian law (e.g., due to indiscriminate shelling), humanitarian law may take precedence as the *lex specialis*. Conversely, in cases involving the protection of investor rights such as restrictions on access to the asset or discriminatory actions by the host state priority may be accorded to the norms of international investment law.

Another key issue is the determination of which international agreement on the promotion and protection of investments applies in cases where an investment was made in territory that subsequently came under the occupation of a third state.

For example, an investor who holds the nationality of State A made a capital investment in State B. After some time, an international armed conflict erupted between State B and State C, resulting in part of the territory of State B—specifically the region where the investment project was implemented—coming under the effective control of State C. Under the rules of international humanitarian law, namely Article 43 of the Regulations concerning the Laws and Customs of War on Land (Annex to the 1907 Hague Convention I(V)) (International Humanitarian Law Databases, 1907) and Article 43 of the Convention relative to the Protection of Civilian Persons in Time of War of 1949, the occupying power is obliged to take all possible measures to ensure public order and safety in the occupied territory, “while respecting, as far as possible, the laws in force in the country (International Humanitarian Law Databases, 1949). Such laws are understood to include both the domestic law of State B and the international treaties it has ratified, including investment promotion and protection agreements that were in force prior to the outbreak of the conflict.

Thus, even in the event of a *de facto* change of control over territory, the relevant investment promotion and protection agreement between State A and State B does not cease to be in force *ex proprio vigore* and continues to apply to investments located in the occupied territory. Accordingly, the occupying state—in our example, State C—is obliged to ensure compliance with the provisions of the IPA, including guarantees of investment protection, non-discriminatory treatment, fair and equitable treatment, and protection against expropriation without adequate compensation. At the same time, the limitation formulated in Article 43 “except where absolutely impossible” must be taken into account, creating room for interpretation and potential disputes regarding the scope of the occupying state's responsibility.

A more complex legal configuration arises in situations where an investor, while formally remaining a domestic subject, effectively acquires the status of a foreign investor as a result of territorial occupation. For instance, if an investor from State A made an investment in territory belonging to the same state, but part of this territory subsequently came under the effective control of State C due to an international armed conflict, and the stability and duration of such control are established, the question may arise as to whether the investor should be regarded as “foreign” vis-

à-vis State C. In other words, without changing citizenship or residence, the investor effectively interacts with a new sovereign jurisdiction that is not the investor's state of origin. In such a case, the investor may have grounds to claim protection of their rights under applicable international investment standards, if these standards are in force for the occupying state or can be applied by analogy under the doctrine of effective control.

Hence, in situations of occupation, a layered legal scenario arises in which the application of an investment agreement between the investor and the state that *de jure* retains sovereignty over the relevant territory may be justified, provided that the treaty forms part of the domestic legal order. At the same time, the occupying state, while exercising *de facto* public authority, is obliged to respect these legal obligations unless circumstances render their fulfillment objectively impossible.

Another critical issue concerns the determination of the status of an investment object during armed conflict? specifically, whether the asset is considered civilian or a legitimate military target. As a general rule, investments, like enterprises engaged in the civilian economy, are treated as civilian objects, meaning they do not take a direct part in hostilities. Accordingly, they are protected under international humanitarian law, and their destruction or damage, if they do not constitute a military objective, constitutes a violation of the laws of war.

However, in practice, situations may arise in which an investment object loses its civilian status and may be considered a lawful military target. This occurs, for example, if an investor allocates funds to the production of weapons, military equipment, or other means of warfare. In such cases, the enterprise directly or indirectly contributes to the military efforts of the state and may therefore be recognized as a target permissible under the rules of international humanitarian law.

States involved in armed conflict are often interested in locating such production facilities within their own territories, due to logistical convenience, control, possibility of testing of military products (when product concerns means of warfare), and stable government procurement. Accordingly, these states may create favorable conditions for investors in the military or related sectors. For example, states can provide special tax incentives or simplified permitting procedures.

A specific example concerns investments in the production of goods of dual-use products that can be used for both civilian and military purposes. This may include GPS navigation systems, software for unmanned aerial vehicles, communication equipment, radar devices, and similar technologies. Even if the investor's primary aim is commercial, in times of war such products may be redirected for military use.

If there is evidence or a reasonable presumption that an asset is linked to the production of military equipment, infrastructure, or other facilities directly used in armed conflict, the adversary has the right, under international humanitarian law, to treat that asset as a legitimate military target. This means that its targeting (for example, by a missile strike) may be considered justified on the grounds of military necessity, provided that the principles of distinction, proportionality, and necessity are observed.

Thus, during armed conflict, even foreign investments may lose their protection if they are associated with objects performing a military function. This creates additional risks for both the investor and the host state. It is therefore crucial to clearly distinguish between civilian and military objects and to consider the potential consequences of involving investors in defense-related production.

Another important aspect in the research of the interaction between legal regimes is the understanding of the term «international armed conflict» as a *force majeure* case in the context of international investment law.

In international law, the concept of *force majeure* carries different meanings depending on the branch of law. From the perspective of international humanitarian law, an armed conflict is not considered an extraordinary circumstance justifying non-compliance with obligations. On the contrary, it is a normatively regulated situation (one of the possible states) during which states are required to adhere to clearly defined rules, including ensuring the protection of civilians, civilian infrastructure, property, and maintaining public order (Schreuer, 1996). In other words, humanitarian law treats armed conflict as a situation that requires legal preparedness rather than as a circumstance that automatically relieves a state of responsibility.

At the same time, international investment law often treats armed conflict as a *force majeure* event, an occurrence beyond the state's control that makes the performance of certain obligations impossible. If a state can demonstrate that the loss of investments, damage to property, or suspension of economic activity resulted from hostilities or related events, it may potentially avoid liability for non-performance of its obligations to the investor (Sornarajah, 2017; Dolzer & Schreuer, 2012). This is particularly relevant in cases, when the state's actions were neither arbitrary nor discriminatory but were necessitated by the need to respond to a military threat or to ensure national security.

Thus, the same situation, namely, an armed conflict, is interpreted differently in the two branches of international law. For international humanitarian law, it constitutes a regular legal regime; for international investment law, it may serve as a basis for exemption from liability if circumstances of *force majeure* can be established (Reinisch, 2007).

This confirms that the determination of which norm constitutes *lex specialis* is not automatic and depends on the nature of the legal relationship, the type of violation, the parties to the dispute, and the circumstances of the case (International Institute for Sustainable Development, 2011). In situations where the state's actions fall under both humanitarian and investment law, context becomes crucial, because it allows for establishing the limits of state responsibility, the investor's entitlement to compensation, and the priority of one legal regime over another. In certain cases, investors may even seek protection not only under investment arbitration but also under the norms of international humanitarian law, particularly when violations affect their property as a civilian object (Cerone, 2007; D'Aspremont, 2009).

Another important issue concerns frozen conflicts. International armed conflicts sometimes don't end with a definitive settlement between states but instead enter a phase commonly referred to as a "frozen conflict." In such cases, the parties may formally declare a ceasefire, yet key aspects of the conflict remain unresolved. This situation is characteristic, for example, of Nagorno-Karabakh, Transnistria, South Ossetia, Abkhazia, and Crimea. In these circumstances, a range of complex legal questions arise, including the protection of foreign investors' rights in disputed or occupied territories.

Frozen conflicts often generate prolonged territorial and legal uncertainty. This can lead to a legal vacuum or a conflict of norms between the legal systems of the parties involved, the state that has lost effective control over the territory and the occupying state or *de facto* authority exercising control. Consequently, ensuring investment protection in such conditions becomes significantly more challenging. Investment treaties typically do not contain provisions that directly address situations related to frozen conflicts or prolonged occupations. As Shoileva notes, "international legal instruments designed to protect investors are often incapable of adapting to the specificities of situations arising in areas of unrecognized or temporary control."

Particular attention should be paid to cases where self-proclaimed or unrecognized entities emerge in conflict-affected territories, seeking to conclude investment agreements and attract capital, yet lacking international legal personality. Such circumstances create additional risks for investors, who cannot be assured of protection of their rights under international investment arbitration or through state-to-state responsibility mechanisms. As Dolzer notes, in these cases there is a significant risk that investments will be deprived of effective legal protection, since "the status of the territory and the entity controlling it may not meet the legitimacy requirements under investment law."

In addition to legal uncertainty, investors also face the risk of expropriation of their assets or their use without proper compensation by one of the parties to the conflict. In the absence of effective control by the state party to the investment treaty, the investor effectively loses the protection provided under that treaty. In some instances, even international institutions are limited in their jurisdiction due to the political sensitivity of the disputed territory's status. As Reinisch observes, "the legal nature of territorial control is crucial for determining the jurisdiction of investment tribunals (Reinisch, 2004).

Thus, frozen conflicts create numerous and systemic risks for foreign investors, including legal uncertainty, lack of guarantees against unlawful expropriation, restricted access to international protection mechanisms, and potential loss of control over assets. This underscores the

need to reconsider approaches to concluding investment agreements and to develop specialized mechanisms for protecting investments made in areas with an unstable legal status.

Conclusions. Thus, the interaction between international humanitarian law and international investment law in the context of armed conflicts reveals complex and multilayered legal challenges. The collision between states' humanitarian obligations and their investment commitments requires a flexible approach based on the analysis of the specific circumstances of each case. The priority of one legal regime over another is determined not only by the formal status of the norms but also by the context, the nature of the violation, the character of the legal relations, and the degree of impact on investors' rights.

Armed conflicts, including frozen ones, create an environment of heightened legal uncertainty in which foreign investors face risks of expropriation, loss of control over assets, and limited access to international protection mechanisms.

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