Part III:
International Humanitarian Law and International Investment Law

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Foreign Investments as Non-Human Targets

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A. Introduction

On 23 July 1983, the LTTE, a separatist Sri Lankan militant group that was fighting for Tamil independence, ambushed and killed 13 Sri-Lankan soldiers. Over the next week, Sinhalese Sri Lankans, with the government's support, retaliated with Tamil blood shed across the country. These events ignited the 25-year civil war between the government and the LTTE. Shortly thereafter, the State created the Special Task Force (STF) to head counter-terrorism missions against the LTTE. By 1987, STF units were mainly deployed in the Batticaloa district, which quickly turned the area into a bloody battlefield.[1]

On 28 January 1987, an STF unit broke into a shrimp farm owned by Serendib Seafoods Ltd. in Batticaloa, which had been suspected of harbouring LTTE separatists.[2] Within hours, Serendib's manager and a dozen more employees were shot to death, yet not a single LTTE separatist was found on site. Before leaving, the STF destroyed the farm, causing it to go out of business. Accordingly, AAPL, a Hong Kong corporation which half-owned Serendib, filed an investment claim against Sri Lanka under the Sri Lanka – UK BIT,[3] claiming compensation for the losses. The *AAPL v Sri Lanka* Tribunal mostly accepted the claim and held that by failing to use less-deadly means and methods in its military operation, the State breached the BIT obligation to act in due diligence so as to protect the physical integrity of the investment. The Tribunal however, paid little attention to

1 Human Rights Watch, 'State Responsibility for "Disappearances" and Abductions in Sri Lanka', Section IV <https://www.hrw.org/reports/2008/srilanka0308/4.htm#_ftnref136> accessed 23 November 2017.

2 *Asian Agricultural Products Ltd v Sri Lanka* (Final Award) (1991) ICSID case No ARB/87/3 30 ILM 580 (hereafter *AAPL v Sri Lanka*).

3 UK-Sri Lanka BIT (1980). Unless explicitly stated otherwise, all investment treaties cited herein are available at UNCTAD – international investment agreement navigator http://investmentpolicyhub.unctad.org/IIA accessed 23 November 2017. For purposes of convenience these treaties are cited by their abbreviated version.

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the existence of the protracted war in Sri Lanka, and made no reference to the laws that regulate the conduct of hostilities.

A similar occurrence concerned Kinshasa in the DRC, where Mr Mitchell had operated a boutique law firm, Mitchell & Associates. In March 1999, under a military court order that cited grounds of alleged illegal collaboration between the firm and the rebels, Congolese armed forces burst into the firm. They forcefully dragged the employees for detention, shuttered the business, sealed the premises, damaged the property, and seized several documents. Consequently, Mr Mitchell brought an investment claim against the State under the US-Zaire BIT arguing,[4] *inter alia*, that his investment was expropriated as a result of the State measures.

The State's primary defence was that the law firm did not qualify as an 'investment' and thus did not benefit from the standards of protection under the BIT. This objection was rejected by the *Mitchell v DRC* Tribunal. It held that the BIT's definition of 'investment', which covered 'service contracts', was wide enough to encompass the services of Mitchell & Associates. Since the Tribunal determined that the firm was a covered investment, which benefited from certain protection, it also held that the firm was expropriated as a result of the military operation.[5] Pertinently, at the time of the events subject-matter of the claim, Kinshasa was a conflict-ridden area, and the DRC was in the midst of the Great African War that had commenced in August 1998.[6] Nevertheless, neither the Tribunal nor the *ad hoc* annulment Committee, which annulled the award on grounds that the firm did not constitute an 'investment'[7] engaged in an IHL analysis in the assessment of the attack.

These examples illustrate that in practice investments may be the subject of military attacks. Yet in these cases, the lawfulness of the attacks was assessed in isolation from IHL; the tribunals focused rather on the classification of the object under the BIT's definition of 'investment' and on the standards of protection that were conferred upon this investment under the treaty. Nevertheless, these instances raise the question whether investments, in the forms of tangible economic objects, are in fact protected from direct and deliberate attacks or whether they can be lawfully targeted

4 US-DRC (formally Zaire) BIT (1989).

5 *Mitchell v Democratic Republic of the Congo* (Award) (2004) ICSID case No ARB/99/7.

6 Filip Reyntjens, The Great African War: Congo and Regional Geopolitics (CUP 2010), see generally 1-10 and chapter 7.

7 *Mitchell v Democratic Republic of the Congo* (Decision on the Application for Annulment) (2006) ICSID case No ARB/99/7, 25-33.

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under certain circumstances. The answer to this question, it is argued, turns not only on the treatment that investment law prescribes for certain assets, but also on the treatment of these objects under IHL and the principles of distinction more specifically.

Distinction is a fundamental and 'intransgressible' principle of customary international law. It is anchored in Art. 48 of AP I, which mandates that attacks may be directed 'only against military objectives', while 'civilian objects shall not be the object of attack'.[8] The classification of investments under this principle may appear deceptively simple, since the term 'investment' is used in everyday language which forms the perception that it is necessarily a civilian economic asset that denotes a shared understanding. This classification however is far more complex in practice.

Accordingly, Section 2 establishes that the concept 'investment' encompasses a wide array of objects. An investment is potentially any economic asset in any sector that is owned or controlled by a foreign national. Such assets benefit from certain treaty standards of protection that remain operational during hostilities.[9] At the same time, Section 3 demonstrates that the scope of permitted targets under the definition of 'military objective' is as wide. Often objects are classified as targets for the economic sector in which they operate and for their ability to generate profits.

Building on the foregoing, Section 4 addresses the classification of investments into military objectives and civilian objects, and examines when, if at all, investments may be classified as lawful targets. Additionally, it is argued that the concrete rules that emanate from any such classification may result in a norm conflict, whereby what is permitted or required under IHL is prohibited under investment law. This norm conflict affects the treatment and protection of investments during hostilities and the invocation of international responsibility of the host State thereof.

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8 Art. 48, 51 (2) and 52 AP I; Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226, 257; Yoram Dinstein, 'Legitimate Military Objectives Under The Current Jus In Bello' (2002) 78 ILS 139, 139 (hereafter Dinstein, 'Legitimate military objectives').

9 Art. 3, 4, 7, and the Annex to Art. 7 ILC Draft Articles on the Effects of Armed Conflict on Treaties, Official Records of the General Assembly, Sixty-sixth Session, Supp 10, UN Doc A/66/10 <http://www.un.org/ga/search/view_doc.asp?symbol=a/res/66/99> accessed 9 December 2016.

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B. The Classification of Assets under Investment Law

This section focuses on the classification of tangible economic objects under investment law and the international obligations that result thereof. Overall, this section establishes that 'investment' encompasses a very wide array of tangible objects in various economic sectors, that benefit from certain protections, in peacetime and hostilities.

International law of foreign investment is a field of public international law that is mostly regulated by investment treaties. This legal regime was described as the combination of substantive protections for foreign investors and investments, with remedial procedures that serve to enforce these protections.[10] Thus explained, the concepts of 'investment' and 'investor' are the foundations of investment law. The term 'investment' determines economic interests, to which States extend substantive protections in investment treaties, while the term 'investor' specifies the range of legal and natural persons who stand to benefit from any such treaty. The centrality of 'investment' notwithstanding, the concept has no universally accepted definition.

In economic parlance, a foreign direct investment, as opposed to a portfolio investment, entails, *inter alia*, regular income, long-term relationship, and business risk. The parlance of investment treaties however, goes beyond the meaning associated with economics. 'Investment' is defined in each instrument independently in a manner that arguably reflects the contractual bargain between the particular State parties to the treaty.[11] In this sense, the treaty definition serves to identify the types of investments that capital-importing States wish to attract and to ascertain the types of investments capital-exporting countries wish to protect overseas. Because treaties are forward-looking and since technology and provision of services is ever-evolving, there is some difficulty with defining 'investment' in exhaustive terms.

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10 Julian D Mortenson, 'The Meaning of "Investment": ICSID's Travaux and the Domain of International Investment Law' (2010) 51(1) Harv. Int'l L. J. 257, 262.

11 Zachary Douglas, *The International Law of Investment Claims* (CUP 2009) 161-65.

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To this end, two main approaches have developed in treaty practice.[12] The first approach uses an open-ended asset-based definition. In these cases, 'investment' is defined as 'every kind of asset' or 'any kind of asset', often accompanied by a non-exhaustive list of examples. For instance, the Albania-Cyprus BIT defines 'investment' as 'every kind of asset and in particular, although not exclusively, the following…'.[13] The second commonly found approach uses principle-based definitions, which elucidate the concept by reference to the economic features of an investment, frequently using an illustrative list. For example, the Morocco-Nigeria BIT defines 'investment' as:

> An enterprise within the territory of one State established, acquired, expanded or operated, in good faith, by an investor of the other State in accordance with law of the Party in whose territory the investment is made taken together with the asset of the enterprise which *contribute sustainable development of that Party and has the characteristics of an investment* involving a commitment of capital or other similar resources, pending profit, risk-taking and certain duration. An enterprise will possess the following assets … For greater certainty, Investment does not include …[14]

Recent investment instruments have attempted to develop a more nuanced definition by way of using a combination of both approaches and a list of inclusive and exclusive examples. Art. 8.1 of the EU-Canada Comprehensive Economic and Trade Agreement, for instance, reads:

> Investment means *every kind of asset* … that has the *characteristics of an investment*, which includes certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include …[15]

The content and scope of these treaty definitions is asserted by way of treaty interpretation.[16] Thus, no particular debate arises over the classification of an object that is enumerated under the treaty.[17] Likewise, if the treaty provides for an asset-based definition, then 'the definition is open, general

12 Rudolf Dolzer and Christopher Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 62 et seq (hereafter Dolzer and Schreuer, *Principles of Investment Law*).
13 Art. 1 of the Albania-Cyprus BIT (2010).
14 Art. 1 of the Nigeria-Morocco BIT (2016) (emphasis added).
15 Emphasis added.
16 Art. 31 VCLT.
17 *Petrobart Limited v The Kyrgyz Republic* (Award) (2005) SCC case No 126/2003 24.

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and not restricted'[18] and any economic asset could potentially qualify as an investment.

However, the growth of investment treaty disputes illustrated the implications of using broad treaty definitions of 'investment'. Arguably, States are often surprised at the type of asset that is considered as an investment under the relevant treaty, in that the meaning of 'investment' had been extended beyond what was envisaged by the host State. This results in frequent challenges of the jurisdiction of arbitral tribunals on the ground that the investor's assets do not constitute an investment. In response, arbitral tribunals that were constituted under the ICSID Convention, which limits the jurisdiction of the tribunal to legal disputes 'arising directly out of an investment',[19] but does not define the term, attempted to provide an 'objective' elucidation of 'investment'. Practically this means that the investor needs to demonstrate to the ICSID tribunal that the asset at bar meets the definition of 'investment' under both the applicable treaty 'and' Art. 25 of the ICSID Convention.

This 'objective' definition is commonly known as the '*Salini* criteria', whereby 'investment' entails: (a) duration, (b) regularity of profit and return, (c) assumption of risk, (d) substantive commitment, and (e) contribution to the host State's development.[20] To be sure, these criteria are far from widely accepted. For the purposes of the present discussion however several debates over the issue are put aside.[21] Namely, the relative weight of each of these features;[22] whether these are cumulative prerequisites, facultative characteristics, or an attempt to read into treaty

18 *RREEF v Spain* (Decision on Jurisdiction) (2016) ICSID case No ARB/13/30 156-60 (hereafter *RREEF v Spain*).

19 Art. 25 ICSID Convention.

20 *Fedax NV v Venezuela* (Award on Jurisdiction) (1997) ICSID case No ARB/96/03, 43; *Salini Costruttori SpA v Morocco* (Decision on Jurisdiction) (2001) ICSID Case No ARB/00/4 52; *Joy Mining v Egypt* (Award) (2004) ICSID case No ARB/03/11 53.

21 See *Beijing Urban Construction v Yemen* (Decision on Jurisdiction) (2017) ICSID case No ARB/14/30 124-38; David Williams and Simone Foote, 'Recent developments in the approach to identifying an "investment" pursuant to Article 25(1) of the ICSID Convention' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011) 42.

22 *LESI SpA v Algeria* ICSID Case No ARB/05/3, Decision on Jurisdiction, 12 July 2006, para 72; *Bayindir v Pakistan* (Decision on Jurisdiction) (2005) ICSID case No ARB/03/29 131.

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definitions what is simply not there;[23] and, whether these parameters apply only to disputes conducted under the ICSID Convention, to all investment claims, or not at all.[24] Nonetheless, at its lowest it may be said that the objective *Salini* criteria for 'investment' reflect the features that are mostly found in treaty definitions, economics, and investment practice.

Finally, the determination if a given asset is an 'investment' is detached from its area of economic activity. The protection of objects under investment law is independent from and non-contingent upon economic sectors. In practice, tribunals have exercised jurisdiction over a wide array of diverse economic activities and States indeed seek to promote and facilitate investment inflows in various sectors.[25]

The corollary of the classification of an asset as an 'investment' is that this object benefits from certain standards of protection. One such common standard, which was at the heart of the *AAPL* dispute, is 'full protection and security' (FPS). This provision requires states to take feasible precautions so as to protect investments from violence whether authored by the State or by a third party. It has been said to be designed to protect investments against violent actions, in particular during hostilities.[26] Another notable

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23 *MCI v Ecuador* (Award) (2007) ICSID Case No ARB/03/6 165; *Malaysian Historical Salvors v Malaysia* (Award on Jurisdiction) (2007) ICSID Case No ARB/05/10; *Malaysian Historical Salvors v Malaysia* (Decision on the Application for Annulment) (2009) ICSID Case No ARB/05/10; *RREEF v Spain* (n 18) 156-60.

24 *Romak SA v Uzbekistan* (Award) (2009) UNCITRAL, PCA Case 173-243; *Alps Finance and Trade v Slovakia* (Award) (2011) UNCITRAL 240–241.

25 ICSID, 'Annual Report 2017' 33 et seq <https://icsid.world-bank.org/en/Documents/icsiddocs/ICSID%20AR%20EN.pdf> accessed 10 November 2017.

26 For arbitral jurisprudence, See *AAPL v Sri Lanka* (n 2) 77; *AMT v Zaire* (Award) (1997) ICSID case No ARB/93/1 6.05; *Tecmed v The Mexico*(Award) (2003) ICSID case No ARB (AF)/00/2 177; *Saluka v Czech Republic* (Partial Award) (2006) UNCITRAL 483 *PSEG v Turkey* (Award) (2007) ICSID case No ARB/02/5 258; *Pantechniki v Albania* (Award) (2007) ICSID case No ARB/07/2171-4; *Houben v Burundi* (Award) (2016) ICSID case No ARB/13/7 160-64. For scholarship see Giuditta Cordero-Moss, 'Full protection and security' in August Reinisch (ed), *Standards of Investment Protection* (OUP 2008) 134-39; Christopher Schreuer, 'Full Protection and Security' (2010) Journal of International Dispute Settlement 354; Helge Elisabeth Zeitler, 'Full protection and Security' in Stephan Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 183, 201; David Collins, 'Applying Full Protection and Security Standard of International Investment Law to Digital Assets' (2010) 12 Journal of World Investment & Trade 225; Cristopher

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standard of protection, which was found to have been breached in the matter of *Mitchell v DRC*, concerns the dispossession of property. Almost all investment treaties recognise the right of States to expropriate investments as long as the taking is for a public purpose, in a non-discriminatory manner, under due process, and in return for compensation.[27] Finally, if a certain object constitutes an 'investment' that is owned or controlled by an investor, then the investor may also benefit from direct recourse to international adjudication.[28] There, he will be able to invoke the violation of, say, FPS, and claim reparations for losses owing to armed conflict.

In outline, the term investment potentially concerns a very wide scope of assets that are owned or controlled by foreign nationals. This definition, due to its width, confers certain standards of protection, in peacetime and hostilities, upon a varied range of tangible objects. Yet, the above referenced cases of *AAPL* and *Mitchell* demonstrate that in the reality of hostilities the determination that an asset is an 'investment' does not translate into its inviolability from attacks. In fact, it appears that the treatment of such investments during hostilities is predicated on a completely separate set of considerations. These considerations arguably stem from IHL and are therefore examined at the next step.

C. *The Classification of Commercial Objects under International Humanitarian Law*

This section focuses on the classification of tangible economic objects under IHL. The discussion below, first, analyses the wording of Art. 52 (2) AP I, which prescribes the binding definition of military objectives; and second, on two classes of targets that originate therefrom. This section demonstrates that the wide definition of 'military objectives' potentially allows for the deliberate destruction of objects, *inter alia*, for the economic sector in which the object operates and, for the financial contribution and profits that the object generates.

Schreuer, 'The protection of investments in armed conflicts' in Freya Baetens (ed), *Investment Law within International Law: Integrative Perspectives* (CUP 2013) 6.

27 Dolzer and Schreuer, *Principles of Investment Law* (n 12) chapter VI.

28 Subject to the provisions of the relevant treaty and issues of jurisdiction and admissibility.

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Whereas 'investment' lies at the heart of investment law, the principle of distinction is the cornerstone of all IHL instruments. It mandates that attacks may be directed 'only against military objectives', while 'civilian objects shall not be the object of attack'.[29] Notwithstanding the centrality of this term, IHL defines 'civilian objects' *a contrario*, thus a civilian object is one which is not a 'military objective'.[30] This means that to learn what a protected object is, it is first necessary to identify what is a targetable objective. Art. 52 (2) AP I, which is widely recognized as customary law,[31] sets out the two-pronged definition of 'military objectives', whereby:

> [M]ilitary objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[32]

Under the first prong of Art. 52 (2) AP I, the targetability of an object is determined by the examination of its use and function with the armed forces.[33] In this sense, an object can offer an 'effective contribution' to the military in four possible ways – nature, location, purpose, or use.[34] The

29 Art. 48, 51 (2), 52, AP I.

30 Art. 51 (1), AP I.

31 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, vol. II: Practice (CUP 2009) practice on Rule 8. The most updated version of this authority is fully available online https://ihl-databases.icrc.org/customary-ihl/eng/docs/home accessed 23 November 2017 (hereafter ICRC Customary IHL Study). See also Horace B Robertson Jr., 'The Principle of the Military Objective in the Law of Armed Conflict' (1998) ILS 197, 201-4 (hereafter Robertson, 'The Principle of the Military Objective'); Julie Gaudreau, 'The reservations to the Protocols additional to the Geneva Conventions for the protection of war victims' (2003) 849 IRRC 143, 159-60; Yoram Dinstein, 'Legitimate Military Objectives' (n 8) 140; Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attach under AP I* (Martinus Nijhoff Publishers 2009) 51 (hereafter Henderson, *The Contemporary Law of Targeting*); Sandesh Sivakumaran *The Law of Non-International Armed Conflicts* (OUP 2012) 344 (hereafter Sivakumaran, *The Law of Non-International Armed Conflicts*); Stefan Oeter, 'Methods and Means of Combat' in Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (3rd edn, OUP 2013) 170-71.

32 Art. 52 (2) AP I.

33 Henderson, *The Contemporary Law of Targeting* (n 31) 55.

34 Michael N. Schmitt, 'Fault Lines in the Law of Attack' in Susan Breau and Agnieszka Jachec-Neale (eds), *Testing the Boundaries of International*

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criterion of 'location' concerns the geographical features of the object.[35] Civilian buildings, for instance, may become military objectives if they 'obstruct the field of fire for an attack on another valid military objective.'[36] An object that is 'owned or usually controlled' by the armed forces,[37] and possesses 'intrinsic military significance',[38] would qualify as a military objective by its 'nature'.[39] Such objects may include headquarters, military aircraft, and enemy warships.[40] 'Use' refers to the object's actual usage by the forces, i.e. whether it is presently used militarily either by the military itself or in a manner which benefits the forces.[41] Finally, 'military purpose' is construed from an established intention of the belligerent as regards 'future' use. Note, the purpose of an object refers to the adversary's known intentions, not to 'those figured out hypothetically in contingency plans'.[42]

At the next step, it is necessary to address the required level of 'effective contribution' that turns an object to a potential target. The original wording of the provision, as suggested by the ICRC, was concerned with objects that 'contribute effectively and *directly* to the military effort'. This qualifier however was deliberately omitted.[43] Beyond the drafting history of the provision, State practice indicates that 'effective contribution' comprises

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Humanitarian Law (British Institute of International and Comparative Law 2006) 277, 278-80 (hereafter Schmitt, 'Fault Lines').

35 Ibid, 280.

36 Robertson, 'The Principle of the Military Objective' (n 31) 209.

37 Yaves Sandoz et al (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff 1987) 2020 (hereafter Sandoz et al, *AP I Commentary*)

38 Schmitt, 'Fault Lines' (n 34) 280.

39 Sandoz et al, *AP I Commentary* (n 37) 2020-2021; Dinstein, 'Legitimate military objectives' (n 8) 145-47; Henderson, *The Contemporary Law of Targeting* (n 31) 55-56.

40 Unless these objects were specifically exempt eg if aircrafts are used for medical transport.

41 Schmitt, 'Fault Lines' (n 34) 280; Henderson, *The Contemporary Law of Targeting* (n 31) 59.

42 Sandoz et al, *AP I Commentary* (n 37) 2022; Schmitt, 'Fault Lines in the Law of Attack' (n 34) 280; Dinstein, 'Legitimate military objectives' (n 8) 148; Henderson, *The Contemporary Law of Targeting* (n 31) 59-60; Sivakumaran, *The Law of Non-International Armed Conflicts* (n 31) 344.

43 Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Second Session, Geneva, 3 May-3 June 1972), vol. I, 146-47, para 3.141 (emphasis added).

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not only direct, but indirect contributions to the military action.[44] Thus, 'effective' does not denote a linear correlation or a direct causation, between the object and its military contribution.

Under the second-prong of Art. 52 (2), it is necessary to determine that given the circumstances 'ruling at the time', the 'total or partial destruction, capture or neutralization' of the objective 'offers a definite military advantage' to the military 'action'. The language 'circumstances ruling at the time' is inherent to IHL and to the notion that a conduct in warfare is to be assessed in consideration to all factors and existing possibilities as they appeared to the commander at the time.[45] A definite military advantage, in turn, is a term of limitation that requires a 'concrete' and perceptible military advantage rather than a 'hypothetical and speculative one'.[46] This means that there should be a reasonable connection between the destruction of property and the overcoming of the enemy forces.[47]

As regards the threshold 'definite', the drafting history of Art. 52 (2) AP I teaches that an 'extensive discussion took place' before agreement was

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44 Human Rights Watch, 'Needless Deaths in the Gulf War: Civilian Casualties during the Air Campaign and Violations of the Laws of War', part 1, chapter 1 (1991) <https://www.hrw.org/reports/1991/gulfwar/CHAP1.htm> accessed 29 March 2017; Human Rights Watch, 'Off Target: The Conduct of the War and Civilian Casualties in Iraq II' (11 December 2003) <https://www.hrw.org/report/2003/12/11/target/conduct-war-and-civilian-casualties-iraq> accessed 30 July 2017.

45 *The United States of America v Wilhelm List, et al* (Judgment (Military Tribunal V)) (1948) case No 47 in Michael N. Schmitt (ed), *Yearbook of International Humanitarian Law – 2010* (Springer 2010) 234; Eric Jensen, 'Article 58 and Precautions against the Effects of Attacks in Urban Areas' (2016) 98 IRRC 147, 166.

46 Henderson, *The Contemporary Law of Targeting* (n 31) 63; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (2nd edn, CUP 2010) 106 (hereafter Dinstein, *The Conduct of Hostilities*); Sivakumaran, *The Law of Non-International Armed Conflicts* (n 31) 346; Michael Bothe et al, *New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949* (2nd edn, Martinus Nijhoff 2013) 367 (hereafter Bothe et al, *New rules for victims of armed conflicts*).

47 Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (adopted 11 December 1868, entered into force 29 November/11 December 1868) 138 Consol TS 297 (hereafter St. Petersburg Declaration) Preamble; Bothe et al, *New rules for victims of armed conflicts* (n 46) 367; Henderson, *The Contemporary Law of Targeting* (n 31) 62; Sivakumaran, *The Law of Non-International Armed Conflicts* (n 31) 346-47.

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reached on the word 'definite'. Among the qualifiers that had been considered and rejected at the Diplomatic Conference were: 'distinct', 'direct', 'clear', 'immediate', 'obvious', 'specific', and 'substantial'.[48] The intentional rejection of these adjectives indicates that Art. 52 (2) AP I aims at a lower standard. As for its scope, a military advantage is not restricted to 'tactical gains'; the spectrum is necessarily wide, and it extends to the security of the attacking force.[49] Importantly, Art. 52 (2) AP I clarifies that any such 'definite advantage' ought to be of a 'military' category, character, or nature. This 'military' modifier excludes economic, civil, political, or national advantages from the scope of Art. 52 (2) AP I.[50] In sum, the definition of military objectives leaves a lot to be desired. In practice, this ambiguity resulted in several contentious classes of targets, namely dual-use and revenue-generating targets that are addressed below.

For the purpose of the present discussion, suffice it to explain that, in warfare particularly, the military also uses civilian infrastructure, telecommunications, and logistics. Objects which have both a civilian and a military application are commonly known as 'dual-use objects'. To illustrate, power-generating stations are used not only to grant civilians the access to clean water, but also to provide power to war industries.[51]

It is not plentifully clear that Art. 52 (2) AP I covers these targets. The provision focuses on the military contribution of the object, but pays no attention to the object's contribution to civilian life. This arguably indicates that the civilian benefits of an object are of little to no significance to its

48 Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974–7) vol XV, CDDH/215/Rev. l, 277, para 64.

49 James Burger, 'International humanitarian law and the Kosovo crisis: Lessons learned or to be learned' (2000) 82 IRRC 129, 132; Dinstein, 'Legitimate military objectives' (n 8) 144; US General Counsel of Department of State, *Department of Defence - Law War Manual* (June 2015, revised February 2016) section 5.7.7.3 (hereafter DoD LOAC Manual); ICRC Customary IHL Study (n 31) practice relating to Rule 8.

50 St. Petersburg Declaration (n 47) Preamble, prohibits any forms of economic activities; Sandoz et al, *AP I Commentary* (n 37) 2018 et seq; Henderson, *The Contemporary Law of Targeting* (n 31) 61; Dinstein, *The Conduct of Hostilities* (n 46) 108; Michael N. Schmitt, 'Targeting Narcoinsurgents in Afghanistan: The Limits of International Humanitarian Law' (2009) 12 YbIHL 30, 314.

51 Leslie C. Green, 'The Environment and the Law of Conventional Warfare' (1991) 29 Canadian Yearbook of International Law 222, 233; Michael N. Schmitt, 'Future War and the Principle of Discrimination' (1998) 28 IYHR 51, 68; Henderson, *The Contemporary Law of Targeting* (n 31) 129-42.

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classification. Additionally, the term 'use' in the provision is not modified by any adjectives (e.g. 'primary'). Arguably, this suggests that any degree of military use may lead to the classification of an object as a military objective. In practice, bridges, factories, industrial plants, ports, mines, broadcasting stations, etc., are often treated as dual-use targets.[52]

As regards 'revenue-generating objects', these are any economic infrastructure that generate revenue for an enemy's armed forces,[53] such as production, transportation, storage, and distribution facilities of petroleum,[54] energy resources,[55] and generally any form of profit.[56] Note, the justification for targeting, say, oil assets does not arise from the military usage of the infrastructure as in the case of dual-use objects; the reasoning rather lies with the potential revenues from the object, which may (or may not) be transferred to the armed forces, who may (or may not) use the money to sustain their war-fighting.

Although revenues are not mentioned in Art. 52 (2) AP I, the ambiguity over the requirement that the object offers an 'effective' – but not 'direct' – contribution to the military action, arguably allows for this practice.[57] In the past, this doctrine justified the destruction of cotton storages and opium facilities. In today's warfare, revenue-generating targets mostly comprise petroleum infrastructure and bulk cash storage sites.[58] This is the most contentious, yet fast-growing, class of targets in modern warfare.

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52 Dinstein, 'Legitimate military objectives' (n 8) 154-58; Marco Sassòli, 'Legitimate Targets of Attacks under International Humanitarian Law' (2004) HPRC 1, 6-8 <http://www.humanrightsvoices.org/assets/attachments/documents/Session1.pdf> accessed 20 October 2016.

53 Ryan Goodman 'The Obama Administration and Targeting "War-Sustaining" Objects in Non international Armed Conflict' (2016) 110 AJIL 663, 664 (hereafter Goodman, 'War-sustaining Objects').

54 DoD LOAC Manual (n 49) section 5.7.8.5 – 'Examples of Military Objectives – Economic Objects Associated with Military Operations'.

55 The White House, Office of the Press Secretary, 'Fact Sheet: Maintaining Momentum in The Fight against ISIL' (15 January 2016) <https://obamawhitehouse.archives.gov/the-press-office/2016/01/15/fact-sheet-maintaining-momentum-fight-against-isil> accessed 12 May 2017.

56 The speech of DoD General Counsel, Jennifer O'Connor at NYU Law School, published in Just Security, 'Applying the Law of Targeting to the Modern Battlefield' (*Just Security*, 28 November 2016) <https://www.justsecurity.org/34977/applying-law-targeting-modern-battlefield%E2%80%8E-full-speech-dod-general-counsel-jennifer-oconnor/> accessed 5 May 2017.

57 Goodman, 'War-sustaining Objects' (n 53) 663 et seq.

58 Ibid.

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In sum, the definition of 'military objective' is broad and ambiguous enough to allow in practice for the classification of varied economic assets as military objectives, which may be subject to direct attack.

D. The Classification of Investments into Protected Civilian Objects and Permissible Military Targets

Building on the foregoing analyses, this section puts forth a twofold examination. First, the discussion outlines the instances when an object may constitute a covered and protected investment but at the same time be classified as a military objective susceptible of targeting. Alongside, the section outlines the implications of any such classification on the standards of treatment that the host State confers upon investments before and during hostilities, and the possible invocation of the international responsibility of the host State thereof.

I. Foreign Investments and the Language of Article 52 (2) AP I

Like any other civilian object, which may be targetable if it meets the two-prong test of Art. 52 (2) AP I, foreign investments may too be lawfully attacked. Thus, if a plant is used as headquarters or if it obstructs the line of fire, its military use or location may justify its targeting. The same is true if the plant is a foreign investment. Take the case of *AAPL v Sri Lanka*. Insofar and for so long as the shrimp farm at the heart of the dispute was in fact used militarily by the LTTE in a manner that offered an 'effective' contribution to their military action, the total or partial destruction of the investment may have been lawful under IHL,[59] regardless of the BIT's definition of 'investment'.

At the same time, the classification of this object as an 'investment' generates certain international obligations for the host State. In reality, the *AAPL v Sri Lanka* Tribunal held that by failing to use less-deadly means and methods in its military operation, the State failed to take the precautionary measures that a well-administered government would have taken in these circumstances.[60] Accordingly, the Tribunal found that the

59 Subject to additional conventional and customary constraints and limitations.
60 *AAPL v Sri Lanka* (n 2) 85(B).

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State breached the FPS standard. To be sure, there is no IHL rule obliging States not to eliminate a military objective if it can be neutralized in other less-lethal means.[61] Arguably, here the rules on the treatment of the same object in the same situation may yield contradictory results.

II. Foreign Investments as Dual-Use Targets

In practice, foreign investments are often made in economic sectors which are prone to dual-use classification.[62] Investment in the form of, say, hydroelectric power plants,[63] airport security services,[64] telecommunications,[65] and certainly weapons production, are of primarily civilian nature, use, and purpose. But, these investments also possess secondary military qualities that may serve the armed forces in armed conflicts. Under certain circumstances such investments are legitimate targets. This classification generates international obligations for the host State. Under Art. 58 AP I, States are required, even before the outbreak of hostilities, to remove civilians and civilian objects from the vicinity of military objectives, to avoid locating military objectives within, or near, densely populated areas, and to take all other practicable precautions so as

61 This standard is rather taken from human rights law. See HCJ 769/02 *The Public Committee against Torture in Israel et al v Israel* (2006) 33, 40. Cf Marko Milanovic, 'Lessons for human rights and humanitarian law in the war on terror: comparing Hamdan and the Israeli Targeted Killings case' (2007) 89 IRRC 373, 389 et seq.

62 To illustrate, at least 153 disputes were focused on investments in electricity, gas, steam, and air conditioning supply; some 36 claims concerned investments in water supply, sewerage, waste management and remediation activities; 30 investment disputes concerned agriculture, forestry and fishing; 129 cases concerned mining and quarrying; (UNCTAD, Investment Dispute Settlement Navigator, Economic sector and subsector <http://investmentpolicyhub.unctad.org/ISDS/FilterByEconomicSector> accessed 14 May 2017).

63 Eg *Amlyn v Croatia* (pending) ICSID case No ARB/16/28. The dispute concerns investments in the construction of a biomass power plant.

64 Eg *Abed El Jaouni v Lebanon* (pending) ICSID case No ARB/15/3. The dispute concerns ownership of a company that operates a fleet of private jets for charter and lease throughout Europe and the Middle East.

65 Eg *Lauder v Czech Republic* (Final Award) (2001) IIC 205, UNCITRAL, and *CME v Czech Republic* (Final Award and Separate Opinion) (2006) 9 ICSID Rep 264. These disputes concerned an investment in the field of information and communication, and programming and broadcasting activities.

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to protect the civilian population under its control from the effects of attacks.[66]

To illustrate, since the Second Lebanon War of 2006, Hezbollah leader *Hassan Nasrallah* repeatedly insisted that in any future armed conflict with Israel Hezbollah will target Haifa's ammonia storage tank, which mainly serves the agriculture sector; such an attack is alleged to have an effect tantamount to an atomic bomb.[67] True, a deliberate attack against a civilian industry plant is in breach of the principle of distinction and a war crime.[68] However, aside from its civilian usage, ammonia is also used militarily as an alternate fuel, namely for combat jets. Hence, the tank is prone to dual-use classification. Considering that the tank is located in the Haifa metropolitan area, the probability of an attack against it as evidenced in repeated threats by Hezbollah, and the magnitude of anticipated civilian damage thereof, the closure of the investment is not only permitted, but mandated, by Art. 58 AP I.

The same is true if the object is a foreign investment. In fact, this 12,000-ton storage container of ammonia is part a longstanding US investment in Israel.[69] If this foreign investment is a military objective, then Israel is obliged under Art. 58 AP I, 'already during peacetime',[70] to remove and avoid locating it within, or near, densely populated areas.[71] Indeed, on 28 May 2017 the Israeli Supreme Court instructed the government to discontinue the permit for the operation of the tank and ordered its closure, citing grounds of *inter alia* security concerns.[72] At the same time, this regulatory interference in the form of a revocation of a license unfavourably changed the regulatory environment in which the investment has operated for decades. This also caused the investor to lose control of the investment and enjoyment of the benefits thereof. In this instance, Israel's compliance

66 Art. 58 AP I. This provision is widely recognised as a rule of customary law and as such applies to IACs and NIACs. See ICRC Customary IHL Study (n 31) rule 22; Sivakumaran, *The Law of Non-International Armed Conflicts* (n 31) 351 et seq.

67 Noa Shpigel, 'Tens of Thousands of Israelis Could Die if Key Security Weak Spot Exploited, Experts Warn' Haaretz (Israel, 30 January 2017).

68 Art. 8 (2) (B) (I) ICC-Statute.

69 Haifa Chemicals is owned by the American holding company Trance-Resource Inc., which is controlled by the Trump Group, where Jules Trump, a US national, serves as chairman of the board.

70 Sandoz et al, AP I Commentary (n 36) 2244, 2247, and 2251.

71 Art. 58 (a) and (b) AP I.

72 PCA 2841/17 Haifa Chemicals v The City of Haifa et al (2017).

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with what is required under IHL may give rise to an investment treaty claim.[73]

III. Foreign Investments as Revenue-Generating Targets

This category may prove the most challenging for investments. In fact, a closer examination reveals that the very first use of this doctrine concerned the destruction of British foreign investments by Union forces during the American Civil War.[74] In that case, the UK brought a claim against the US, arguing that the destruction of cotton was in breach of the FPS provision in the applicable treaties of amity.[75] The primary defence of the US was that, 'cotton in the insurrectionary States was peculiarly and eminently a legitimate subject for such destruction' because the revenues from cotton sustained the war-fighting of the Confederacy against the Union.[76] From its birth, the notion that the destruction of objects 'due' to their revenue-generating abilities is permissible, conflicted with the concurrent obligation to protect these objects 'for' their revenue-generating abilities.

Today, the doctrine of revenue-generation continues to challenge investment protection. Recently, this class of targets justified counter-narcotics operations in poppy-growing areas of Afghanistan. These operations aimed at collapsing the Taliban's financial base, which relied on

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73 Namely, expropriation and fair and equitable treatment.

74 The 1980 US Air Force Commander's Handbook on the Law of Armed Conflict, 25 July 1980 (AFP 110-34); US Department of the Navy – JAG, 'Annotated Supplement to the Commanders Handbook on Naval Operations', NWP 1-14M (1989) 8.1.1; Ralph Thomas and James Duncan (eds), *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, (1999) 73 ILS 403; Bothe et al, *New rules for victims of armed conflicts* (n 46) 2.4.3.

75 Art. 14 of the Treaty of Amity, Commerce, and Navigation, between His Britannick Majesty; and the United States of America, by Their President, with the advice and consent of Their Senate, 19 November 1794 (entered into force 29 February 1796); Article 1, Convention to Regulate the Commerce between the Territories of The United States and of His Britannick Majesty (3 July 1815). Both provisions contain a FPS obligation whereby, 'which stipulated that the 'merchants and traders of each Nation respectively shall enjoy the most complete protection and security for their Commerce'.

76 US Department of State, *Papers Relating to the Treaty of Washington*: *Report of the US Agent* (Washington 1874) vol. 6, 52–58.

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the taxation of the production and sale of opium.[77] The success of the anti-drug campaign however forced the Taliban to look elsewhere for revenues. Today, foreign investments fill in the gap.

Illustratively, in November 2016, the Taliban publicly pledged to 'back all national projects' and to 'direct its Mujahideen to help in the security of projects that are in the higher interest of [Afghanistan]'.[78] This pledge also enumerated several national and foreign projects, including the investment of China Metallurgical Group Corporation's (MCC) in a copper mine 40 kilometers south-east of Kabul. To be sure, the Taliban does not volunteer its protection; it levies taxes on infrastructure which it 'guards' so as to sustain itself. Therefore, investors who pay protection-taxes effectively support the belligerent's financial base and risk turning their investment into a revenue-generating target.

As for MCC, its investment was the subject of repeated deadly attacks by the Taliban, until in 2014 it withdrew from the project.[79] After the Afghan President pleaded the insurgents to 'stop pursuing objectives of outsiders',[80] the Taliban propounded the protection of its Mujahideen. Put differently, the Taliban's support of foreign investments reflects an offer of taxation in

77 Judy Dempsey and John Burns, 'NATO Agrees to Take Aim at Afghan Drug Trade', *NY Times* (New York, 10 October 2008) <http://www.nytimes.com/2008/10/11/world/asia/11nato.html> accessed 12 July 2016; Dapo Akande, 'US/NATO Targeting of Afghan Drug Traffickers: An Illegal and Dangerous Precedent?' (*EJIL: Talk!,* 13 September 2009) <http://www.ejiltalk.org/usnato-targeting-of-afghan-drug-traffickers-an-illegal-and-dangerous-precedent/> accessed 10 May 2016; Schmitt, 'Narcoinsurgents in Afghanistan' (n 50) 301-5; Emily Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict* (OUP 2015) 198-201; Goodman, 'War-sustaining Objects' (n 53) 672.

78 Islamic Emirate of Afghanistan, 'Statement of Islamic Emirate regarding backing national projects in the country' (*Islamic Emirate of Afghanistan*, 29 November 2016) <https://alemarah-english.com/?p=7766> accessed 13 December 2016.

79 Global Witness, 'Copper Bottomed? Bolstering the Aynak contract: Afghanistan's first major mining deal' (*Global Witness,* 20 November 2012) <https://www.globalwitness.org/en/campaigns/afghanistan/copper-bottomed/?> accessed 13 December 2016.

80 Afghanistan, Office of the President, Press Release, 26 October 2012 <http://www.bakhtarnews.com.af/eng/politics/item/4659-president-karzai-calls-on-taliban-to-stop-pursuing-objectives-of-outsiders-but-rather-begin-a-life-of-dignity-and-honor-under-afghanistan-constitution.html> accessed 25 July 2017.

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lieu of violence, leaving foreign investments and the State between a rock and a hard place.[81]

Modern operations against revenue-generating targets pose a particular challenge for the law and policy of foreign investment. In recent years the US launched a 'wave of strikes against oil infrastructure, tanker trucks, wells and refineries' in Iraq so as to undermine Daesh's financial base.[82] President Obama explained that 'thanks' to the American campaign, 'money is literally going up in smoke' and oil prices are reduced.[83]

The justification for these economically-motivated operations is very weak under IHL, but it is even harder to square this conduct with the law and policy of foreign investments. While the US Department of Defense cites revenue-generation as a justification for targeting oil assets in Iraq, the US State Department, simultaneously, encourages oil companies to invest in Iraq, stating that investments in petroleum represent a rewarding business opportunity for American corporations, as Iraq's economy depends mainly on the revenues from this sector.[84] Iraq on its part, with the encouragement of the international community,[85] goes to great length to promote and

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81 Anders Corr, 'Sanction China for Its Support of Taliban Terrorists' *Forbes* (New York, 21 February 2017) <https://www.forbes.com/sites/anderscorr/2017/02/21/sanction-china-for-its-support-of-taliban-terrorists/2/#1e6ae1b14b31> accessed 10 October 2017.

82 Remarks by President Barack Obama on Progress Against ISIL, 25 February 2016 <https://www.whitehouse.gov/the-press-office/2016/02/25/remarks-president-progress-against-isil> accessed 24 November 2017; Statement by the President on Progress in the Fight Against ISIL, 13 April 2016 <https://obamawhitehouse.archives.gov/the-press-office/2016/04/13/statement-president-progress-fight-against-isil> accessed 7 May 2017.

83 Ibid. The current Trump Administration fully adopts this practice, see US DoD, 'US, Coalition Continue Strikes against ISIL in Syria, Iraq' <https://www.defense.gov/News/Article/Article/1056079/us-coalition-continue-strikes-against-isil-in-syria-iraq/source/GovDelivery/> accessed 16 May 2017.

84 US State Department, '2010 Investment Climate Statement – Iraq' <https://www.state.gov/e/eb/rls/othr/ics/2010/138084.htm> accessed 13 May 2017; US State Department, '2011 Investment Climate Statement – Iraq' <https://www.state.gov/e/eb/rls/othr/ics/2011/> accessed 13 May 2017; US State Department, '2013 Investment Climate Statement – Iraq' <https://www.state.gov/e/eb/rls/othr/ics/2013/204661.htm> accessed 12 May 2017; International Trade Centre, 'Iraq – Country Brief' <http://www.intracen.org/country/iraq/> accessed 12 May 2017.

85 OECD, 'Bringing Investments to Iraq' (OECD Insights, 21 September 2015) <http://oecdinsights.org/2015/09/21/bringing-investment-to-iraq/> accessed 20 October 2017.

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facilitate revenue-generating investments in the energy and petroleum sectors. To that end, the State offers concession contracts, bids, and more relaxed licensing for foreign investors.[86] Indeed, investments in oil account for some 90% of Iraq's revenues; most of these are foreign investments, many of which are US-owned. Taken at face-value, this class of targets means that the assets of ExxonMobil in the West Qurna I oil field are permissible targets that may be lawfully attacked by Daesh under certain circumstances.

Put simply, the implication of conditioning the legality of attacks on revenue-generation is that revenue-generating foreign investments may too be targeted by the adversary. This class of targets seems to directly conflict with the law and policy on the promotion, facilitation, and protection of foreign investments.

IV. Foreign Investments as Civilian Objects

Finally, the classification of investments as civilian objects and the implications thereof should be considered. If the investment is not classified as a military objective under Art. 52 (2) AP I, and whenever there is any doubt as to its classification,[87] the investment is presumed to be is a civilian object. As such, an investment cannot be the subject of direct and deliberate attacks.[88] More so, this civilian classification imposes certain obligations on war-torn host States. These obligations require States to take precautionary measures to protect investments from attacks (Art. 58 AP I), however they do not guarantee inviolability.

The case of MCC's above referenced investment in Afghanistan is illustrative. Under Art. 58 AP I, Afghanistan, as the 'attacked' party, is required to take the practicable and practical precautionary measures, given the prevailing circumstances, to protect the civilian objects under its control (including foreign investments) from the attacks of the Taliban.[89] This obligation of due diligence is assessed against the particular means and

86 This fact has been consistently emphasised in the publications of the State Department (n 84).
87 Art. 52 (3) AP I.
88 Art. 48, 51 and 52 AP I.
89 Art. 58, AP I; Sandoz et al, *AP I Commentary* (n 37) 2239; Jean-Francois Queguiner, 'Precautions under the Law Governing the Conduct of Hostilities' (2006) 88 IRRC 796, 818-19; Jensen (n 45) 162.

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circumstances of each State.[90] In this case, it may be that Afghanistan complied with Art. 58 AP I notwithstanding the damage to the investment.[91]

At the same time, it may be that the FPS obligation under investment law holds Afghanistan to a higher threshold of diligence, whereby it should have taken more or other measures than what is required under IHL.[92] In such a case, both norms prescribe different standards of vigilance with respect to the same situation.

Furthermore, IHL accepts that in the harsh reality of hostilities civilian objects, foreign investments inclusive, may be incidentally hurt during attacks against legitimate military targets. This is recognised under the customary principle of proportionality, which prohibits launching an attack against a lawful target which is 'expected' to cause incidental civilian damage that would be excessive in relation to the military advantage 'anticipated'.[93] Therefore, not all losses to investments owing to military operations invoke the international responsibility of the attacking party.

Take the situation of *Mitchell v DRC* where the investment sustained damage as a result of the State's attack. If the damaged investment was not a military objective but, say, a victim of mistaken target identification (in good faith), its destruction may have been lawful under IHL. The same is true for the damage that was caused to the investment in *AAPL v Sri Lanka*, if it was not excessive relative to the anticipated military advantage from the destruction of, assume, a permissible LTTE target. At the same time, it may be that these State measures (attacks) breach the standards of investment protection under the applicable investment treaty, as indeed the *Mitchell* and *AAPL* Tribunals found.

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90 Kimberley Trapp, 'Great Resources Mean Great Responsibility: A Framework of Analysis for Assessing Compliance with AP I Obligations in the Information Age' in Dan Saxon (ed), *International Humanitarian Law and the Changing Technology of War* (Brill Nijhoff 2013)163-64; Michael N. Schmitt, 'War, Technology, and the Law of Armed Conflict' (2006) 82 ILS 137, 163-65.

91 Afghanistan deployed armed forces to guard the investment, provided the workers with armed vehicles, built bunkers and shelters on site, and spread checkpoints around the area. Farhad Yavazi, 'Mes Aynak Archeological Project', Project Management Unit PMU (January 2014) 43 <http://mom.gov.af/Content/files/Mes-Aynak-Complete_January_2014.pdf> accessed 21 December 2017.

92 *Ampal-American Israel Corporation v Egypt* (Decision on Liability) (2017) ICSID case No ARB/12/11 283-91.

93 Art. 51 and 57 AP I; ICRC customary IHL (n 30) practice on Rule 14.

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In sum, investments may be, and are, classified as military objectives. The concrete obligations that flow from this classification may result in a conflict with applicable investment treaty standards. In each of the above discussed situations, IHL arguably permits, and even mandates, what investment law prohibits or restricts. Since in these situations both IIL and IHL norms are valid and applicable and point to incompatible decisions, a choice must be made between them.[94] For each of the above described situations, it is necessary to ascertain which of the two norms, IHL or IIL, prevails under the priority rules of international law namely, the *lex specialis* rule.[95] Any such determination must be made on a case-by-case basis, and therefore exceed this discussion. Nonetheless, for its implications of State responsibility, the recognition that a norm conflict may arise in the assessment of losses to investments owing to armed conflict has an intrinsic significance. In practical terms of State responsibility, under a conflict in the applicable law only the special rule that must be applied can be breached and, in turn, result in responsibility.

E. Concluding Remarks

This chapter was concerned with the status of investments, as tangible economic objects, in armed conflicts. In this sense, the discussion examined when, if at all, investments may be the subject of a lawful attack, and the implications for the treatment of investments and State responsibility thereof.

To that end, a twofold argument was proposed. First, the chapter demonstrated that the concept of 'investment' is broad enough to confer protection upon a very wide scope of economic assets. Further, it was established that an array of objects may be classified as permissible targets, often for the economic sector in which they operate (dual-use objects) or for their ability to generate revenues for the war-torn host State (revenue-

94 Joost Pauwelyn *Conflict of Norms in Public International Law* (CUP 2003) 278-98 (hereafter Pauwelyn, *Conflict of Norms in Public International Law*); ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion International Law. Report of the Study Group of the International Law Commission' UN Doc A/CN.4/L.682 (13 April 2006) 1.

95 Pauwelyn, *Conflict of Norms in Public International Law* (n 94) 387-89; Marko Milanovic, 'Norm Conflicts, International Humanitarian Law, and Human Rights Law' in Orna Ben-Naftali (ed) *International Humanitarian Law and International Human Rights Law* (OUP 2011) 103-15.

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generating targets). In some instances, this means that an object may be attacked as a 'military objective' precisely for the reasons for which it is protected as an 'investment'.

Second, the chapter addressed the rules that emanate from the classification of an object as a covered investment on the one hand, and as a military objective 'or' a civilian object, on the other. It was suggested that investment treaty standards often conflict with the treatment that IHL permits or mandates with respect to the same economic object. The protection of investments in armed conflict therefore may entail a conflict in the applicable law. In practical terms, only the rule that prevails in a norm conflict may be breached and invoke international responsibility.

Overall, it is suggested that in practice the protection and regulation of investments during armed conflicts is mainly a function of the principle of distinction.

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