

## BOOK REVIEW

Daria Davitti, *Investment and Human Rights in Armed Conflict – Charting an Elusive Intersection*, Hart Publishing, 2019, 288 pp., ISBN 9781509911660 (hb), £70.00  
doi:10.1017/S0922156520000369

The scholarship on investment law and human rights law is peculiar and erratic. Investment lawyers and human rights lawyers seldom cross paths,<sup>1</sup> and the attempts at coherent studies of the interaction of investment protection and human rights concerns show variable levels of success, mostly at the wrong end of the spectrum. Within the wide range of causes, the main problem is the fact that most of the contributions are either written by career investment lawyers looking for the right formula to make investment law look human rights-friendly, or human rights lawyers whose methodological approach is rather activist at the detriment of rigour. Either way, most contributions in the field are severely flawed by the prejudices of their authors, and rarely provide new (or even just worth reading) ideas to this long-standing debate.

It is also due to this stagnant context that Daria Davitti's '*Investment and Human Rights in Armed Conflict*' is to be welcomed as an original, innovative and insightful contribution to the debate on the relationship between foreign investment regulation and human rights. Davitti's monograph primarily addresses how international investment law and international human rights law are implemented in conflict countries, with particular attention to the question of the extraction and exploitation of natural resources. The core of the volume is focused on how provisions in Bilateral Investment Treaties (BITs) and other rules of international investment law affect the protection of economic, social and cultural rights in the host state. Davitti's perspective is rather unique in the international legal scholarship, in the sense that the shortcomings of both the investment legal regime and international human rights law are not only highlighted and addressed, but also identified as problematic per se rather than only in the interaction with one another.<sup>2</sup>

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<sup>1</sup>See recently J. Fahner and M. Happold, 'The Human Rights Defence in International Investment Arbitration: Exploring the Limits of Systemic Integration', (2019) 68(3) *International and Comparative Law Quarterly* 741–59; N. Zugliani, 'Human Rights in International Investment Law: the 2016 Morocco-Nigeria Bilateral Investment Treaty', (2019) 68(3) *International and Comparative Law Quarterly* 761–70; J. Perelman, 'Human Rights, Investment and the Rights-ification of Development: the Practice of "Human Rights Impact Assessments" in large-scale Foreign Investments in Natural Resources', in K. Young (ed.), *The Future of Economic and Social Rights* (2019), at 434–69; F. Baetens, 'Invoking Human Rights', in M. Scheinin (ed.), *Human rights norms in "other" international courts* (2019), at 227–62; E. de Brabandere, 'Human rights and international investment law', in M. Krajewski and R. Hoffmann (eds.), *Research Handbook on Foreign Direct Investment* (2019), at 619–45; Y. Radi (ed.), *Research Handbook on Human Rights and Investment* (2018).

<sup>2</sup>See generally J. Lacroix and J. Pranchère, *Human Rights on Trial: A Genealogy of the Critique of Human Rights* (2018); J. Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (2019); D. Brinks, J. Dehm and K. Engle, 'Introduction: human rights and economic inequality', (2019) 10 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 363–75; J. Dehm, 'Righting Inequality: Human Rights Responses to Economic Inequality in the United Nations', (2019) 10 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 443–59; J. Dehm,

In a way, Davitti's book is the by-product of the tradition, of which M. Sornarajah is the most prominent representative,<sup>3</sup> that looks at the greater picture of the relationship between investment and human rights from a critical standpoint; however, *Investment and Human Rights in Armed Conflict* also tackles the complex topic of the implementation in practice and the shortcomings of both economic, social and cultural rights and of international investment law, when intersecting with each other. More specifically, Davitti acutely underscores how the international investment legal regime, by design, isolates and protects foreign investment from the interference of the host state, withdrawing investment regulation from any democratic process and claims of wealth and resources redistribution,<sup>4</sup> at the same time, basic human rights narratives are subjected to an incisive critique that highlights how such approach is not sufficiently ambitious to overcoming the *status quo* and promoting more radical instances, such as regionalisms, redistribution of power, or serious discourses on the responsibility of businesses under human rights law.<sup>5</sup> Davitti's case-study of choice – the right to water in the context of the conflict in Afghanistan – is particularly effective in unveiling the barrier created by the traditional human rights discourse to efforts against the commodification of basic and common resources.

The choice of Afghanistan as case-study makes Davitti's book quite compelling. Afghanistan is a country where, in spite of the formal withdrawal of foreign troops in 2014, the armed conflict continues to affect the larger part of the territory. Attempts at the reconstruction of the economy are carried out, largely behind closed doors and outside of the public scrutiny, with the goal of creating an investor-friendly environment. Centring the research on Afghanistan allows Davitti to present two main claims in her book: first, 'existing research and energy would be better directed into redefining alternative purposes for the [international investment law] and [international human rights law] projects';<sup>6</sup> second, the Framework for business and human rights may not be the most appropriate route to settle the clash between international investment law and international human rights law.<sup>7</sup> With regard to the first claim, Davitti criticises the mainstream approach of trying to identify interpretive approaches that allow to integrate investment law and human rights concerns, as well as reform proposals that do not question the very foundations of the two fields of international law in question. In this context, attempts at integrating human rights concerns in investment law and investment disputes are to be intended as mere endeavours to confer legitimacy to the investment legal regime, without challenging a legal regime – and, in fact, a conception of international law and international relations – inherently grounded on systemic inequalities and unbalanced distribution and access to resources. The second claim, although not as trailblazing as the first, is enriched by Davitti's harsh criticism of the Framework's failure to encompass the investor's home state's obligation to regulate the activities of their nationals abroad, crippling the possibility to reach further objectives in terms of human rights protection and rather maintaining the infrastructure that makes substantive inequality and corporate abuses possible in the first place.

Perhaps the most captivating aspect of Davitti's book is its imaginative force. Rather than trying to finding a point of convergence between international investment law and international human rights law, Davitti questions whether such convergence is actually an achievable objective and, should that be the case, whether it is the direction the debate should even take. *Investment and Human Rights in Armed Conflict* presents a strong argument against such direction by underscoring the neoliberal tradition whence international investment law comes from – a tradition based on the alleged recognition by developing countries of (i) the benefits of globalization and the free circulation of capital, and (ii) the existence of a *de facto* universal system of

<sup>1</sup>Highlighting inequalities in the histories of human rights: Contestations over justice, needs and rights in the 1970s', (2018) 31 *Leiden Journal of International Law* 871–95; B. Golder, 'On the genealogy of human rights: an essay on nostalgia', (2016) 22(2) *Australian Journal of Human Rights* 17–36.

<sup>3</sup>M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (2015).

<sup>4</sup>See also Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018), at 21–145.

<sup>5</sup>D. Davitti, *Investment and Human Rights in Armed Conflict* (2019), at 45–9, 106, 229.

<sup>6</sup>*Ibid.*, at 3.

<sup>7</sup>*Ibid.*, at 4.

international investment law. Investment arbitration is thus seen not merely as a neutral forum for the settlement of disputes between foreign investors and host states, but rather as the place where the structural inequalities at the basis of the investment legal regime come to light: being it inappropriately based on a model used by private actors to settle disputes based on the breach of privately contracted provisions, investment arbitration is defined by Davitti as lacking the necessary transparency, public participation, and judicial independence to be acceptable as a forum for the review of laws and measures adopted by states in accordance with democratic processes. In her analysis, Davitti<sup>8</sup> pushes the arguments towards a critique of Simma's theory of the entry points of human rights in investment arbitration, vigorously arguing how even the least neoliberal proposals leave the foundations of international investment law unchallenged – thus proving insufficient to reach that elusive interaction of investment protection and human rights.<sup>9</sup>

Davitti's monograph is likely to stir controversy. It is a partisan book, in the purest Gramscian tradition,<sup>10</sup> and it is not, by any means, a comforting read: Davitti aims at shattering the foundations of both investment law and the international human rights law-based approaches to investor-state relationships, and proceeds to do so unapologetically throughout her book. There is no room, in Davitti's vision, for the preservation of the current investment legal regime – nor for the international human rights orthodoxy, for that matter – as there is no way to overcome inequality and corporate abuse without abandoning the infrastructure that supports them in the first place. What *Investment and Human Rights in Armed Conflict* presents to the reader is a push for a brand-new approach – one that rejects the instances for de-politicization, and vigorously submits instead the need for a re-politicization of the investment and human rights debate. Such re-politicization would allow to rethink the relationship between international investment law and international human rights law, as it would depart from the attempts to simply recalibrate investment agreements from a human rights-friendly perspective – as the proposals addressed in the book suggest.<sup>11</sup> The debate, Davitti argues, should instead move in the direction of redefining the salient issues of the relationship between investment activities and human rights concerns, and re-conceptualizing the obligation and responsibilities of home states, host states, and business actors involved.<sup>12</sup> Revolution, rather than reform; but a revolution that, instead of promoting utopic objectives, recognizes that foreign investment will not cease to exist: its regulation, however, must be reconceived from its core foundations. Whilst Davitti is not alone in submitting such a claim, it is without doubt a minority position<sup>13</sup> – but nonetheless one, as she points out throughout the book, that has solid public international law foundations. Without such conceptualization of the debate, any attempts at changing the *status quo* would prove not only futile, but also counter-productive, for reform of the regime would amount to little more than a fig leaf hiding the perpetuation of a regime that, through its accepted dispute settlement mechanism, can effectively destroy any host state's chances at enhancing their economic development or recovering from conflict. Davitti's book is a mandatory read to understand and master where the debate on investment and human rights should be directed.

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<sup>8</sup>*Ibid.*, at 178–85.

<sup>9</sup>See also B. Simma, 'Foreign Investment Arbitration: A Place for Human Rights?', (2011) 60 *International and Comparative Law Quarterly* 573, at 577–8.

<sup>10</sup>A. Gramsci, 'Odio gli indifferenti', *La città futura*, 11 February 1917; an English translation is available at [overland.org.au/2013/03/i-hate-the-indifferent/](http://overland.org.au/2013/03/i-hate-the-indifferent/) (accessed 22 April 2020).

<sup>11</sup>D. Davitti, *Investment and Human Rights in Armed Conflict* (2019), chs. 3 and 4.

<sup>12</sup>*Ibid.*, at 230–1.

<sup>13</sup>See generally D. Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (2008); S. Pahuja and A. Saunders, 'Rival Worlds and the Place of the Corporation in International Law', in J. von Bernstorff and P. Dann (eds.), *The Battle for International Law in the Decolonization Era* (2019).

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