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DISPERSED FAMILIES: LEGAL AND PRACTICAL BARRIERS TO REFUGEE FAMILY REUNIFICATION

Dağılmış Aileler: Uygulamada ve Hukuk Sisteminde Mülteci Ailelerin Birleşmesinin Önündeki Engeller

Prof. Dr. Mesut Hakkı CAŞİN*
Türkan Melis PARLAK**

Research Article

Abstract

The right to marry and found a family is integral to human rights pursuant to international conventions and therefore, is assured at an international level. However, the international law and international conventions further ensure that any state has the absolute sovereignty whether or not to admit 3rd country nationals within their borders, by virtue of which states stipulate strict conditions for such admissions in the case of family reunification; that is, family reunification is not considered an absolute right, and is at the sole discretion of states. As a consequence, family reunification, which is a legally difficult and arduous procedure, puts much heavier burden on refugees, having or to have left their families and homelands due to various causes. At their destination, in full force, both bureaucratic and legal barriers await refugees who merely intend to reunite with their families and be together in a new phase of their life.

Keywords Family reunification, right to family reunification, respect for family life, international law, refugees

Özet

Uluslararası sözleşmeler uyarınca evlenme ve aile kurma hakkı insan hakları arasında yer almakta ve uluslararası güvence altına alınmaktadır. Ancak, uluslararası hukuk ve sözleşmeler 3. ülke vatandaşlarının ülkelerine girişlerine onay vermeleri noktasında devletlere mutlak egemenlik tanımıştır. Devletler de, aile birleşimi noktasında öne sürdüğü bazı gerekçelere dayanarak sıkı şartlara bağlanmıştır. Aile birleşimi henüz mutlak bir hak olarak güvence altına alınmayarak devletlerin takdir yetkisine bırakılmıştır. Zaten, yasal olarak zor ve meşakkatli bir süreç olan aile birleşiminin faturası değişik nedenlerle evini, yuvasını, vatanını terk etmek zorunda kalmış mültecilere çok daha ağır kesilmektedir. Varış noktasına geldiklerinde en azından ailelerini yeniden bir araya getirerek yeni hayatlarında bir arada olmak isteyen mültecileri uygulanan hem yasal hem de bürokratik engeller beklemektedir.

Anahtar Kelimeler Aile birleşimi, aile birleşimi hakkı, aile hayatına saygı gösterme, uluslararası hukuk, mülteci

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INTRODUCTION

Regardless of whether it was early homo sapiens or it is modern day human, with the basic instinct of survival, mankind has always endeavored to fulfill its needs despite the scarce resources of the Earth. As has the mankind, international law, with its self-revising and responsive nature, has revised itself for certain issues, which led the 20th century redescribed as the age of "human rights" and "migration".

Migration is a phenomenon with various causes such as economic, social, natural or political, as a consequence of which people leave their country, either voluntarily or forcibly, and move to other countries. This, on the other hand, causes other consequences to emerge, most observably legal.

The right to family life stands as one of the fundamental human rights, with the implication that it is also essential to safeguard the fundamental human rights of refugees and asylum seekers, who are considered to be vulnerable groups. The idea of human rights is raised on the fundamentals that every human being is born equal. Pursuant to the Article 1 of the European Convention on Human Rights, rights and freedom of everyone, with no exception of stateless persons, within the jurisdiction of the contracting states, shall be secured, bound by which, the contracting states have the obligation to respect the family life of the foreigners within their borders.

The term "family" lacks a universally agreed definition, wherefore the individuals of whom a family should be constituted, is a matter of dispute, which is perceived differently by various countries; for instance, the USA and Canada recognize the concept of extended family, whereas the European countries tend to limit the extent thereof. In a broader sense, the right to family reunification refers to foreigners right to demand, upon their admission to a respective country, that their family members are also granted admittance to said country and given permission to reside therein. Although the right to marry and found a family is secured under international conventions, states stipulate strict conditions, on certain grounds such as economy, security etc., on the side of family reunification, and therefore, the right to family reunification is not absolute and international law recognizes the sole discretion of states in this respect.

This study reviews refugees and asylum seekers right to family reunification in the lights of legal texts and evaluates how international judicial organs approach to the right to family life.

1. HISTORICAL AND CONCEPTUAL FRAMEWORK

To conceptualize family reunification, initially, the phenomenon of migration is to be laid on a foundation in the context of international law. Mankind, an entity superior to any given state and the laws thereof, assigns a fragment of its rights to a higher authority through the "social contract", with the motive to transition from chaos to cosmos.[1] In this respect, theoreticians argue that the rights and freedoms that had been integral to the individual during the natural-rights era, that is, the pre-states era, are to be immune from governmental conduct and should be respected by the states,[2] and that the states have to honor these fundamental human rights, in other words, the natural rights.[3] Whereas any given national law intends to conserve the state it is in effect, the international law intends to stand by the individual, and the fact that human rights are under the assurance of international law defends the individual against the state.[4]

"The other", conceptualized in parallel with the rise of nation states and well-construed, has imposed the requirement to lay the phenomenon of "migration" on legal grounds.[5] The nation-state perception led to the responsibility of such states for their own citizens, and therefore, such states initiated legal arrangements regarding the migrants/immigrants they avoid to assume responsibility for.[6] The United Kingdom, to have taken the very first step towards this issue, introduced the Aliens Act in 1905 to minimize the immigration to the country.[7] The principles of sovereignty and non-intervention became well-established and was legitimized in international law by the Charter of the United Nations in 1945.[8] Migration, a phenomenon almost as old as the human history, is nevertheless a matter of national law rather than that of international law when considered in the context of the law of nations. Hence, despite its characterization as an international matter, had remained

1 Kapani,M. (1993). Kamu Hürriyetleri, Yetkin Yayınları, pp. 30-31.
2 Akad, M. (1984) Teori ve Uygulama Açısından 1961 Anayasası'nın 10. Maddesi. İÜHFY, p. 9.
3 Hakyemez, Y. (2000) Toplum Sözleşmesi Kavramı ve Günümüz İnsan Hakları Kuramına Etkisi: İdare Hukuku ve İlimleri Dergisi 13, (1), p. 212.
4 Lahav, G. (1997) International Versus National Constraints in Family-Reunification Migration Policy: Global Governance 3, (3). p. 353.
5 Şahin, Y.S. Avrupa Birliği Mülteci Hukukunda Üye Devletlerin İltica Başvurusunu Değerlendirme Yetkisinin Çerçevesi (MSc Thesis, Istanbul University 2013) p.8.
6 Şahin Y.S. (2013), ibid, p. 9.
7 Pellew, J. (1989) The Home Office and the Aliens Act, 1905: The Historical Journal 32, (2), p. 373.
8 1945 United Nations Charter §§ 2(1)- 2(7)

under national jurisdictions and at nations' sole discretion, due to the lack of arrangements at international level and the status quo. In the post-WWII period, the humanitarian tragedies suffered during the war led not only to an awareness of human rights but also migrations to gain momentum. During and subsequent to the War, millions of people, having left their home, had to migrate either voluntarily or compulsorily. During the War, Europe had been devastated and for the reconstruction thereof, there had been a lack of male workforce for heavy manual work, which, specifically, resulted from the heavy casualties caused by the War. Europe, now considering migrants as lifesavers, made major compromises with migration policies. However, with the energy crisis in the 1970s, which had a world-wide impact, many countries ceased to offer what they had so far and were highly reluctant.[9] The swift rise of anti-migrant attitudes and changing patterns of migration resulted in a decline in welcoming asylum seekers and further, a rise in governmental interventions.[10] The open-door policy, once adopted by the countries, was now replaced by closed-door policy, a change of attitude, which had the utmost impact on the refugees; regardless of the motives behind refugees' arrival from their country of origin to another, the restrictive policies of the country of destination constituted a dead-end for family reunification, when it comes to the demands of refugees to be with family members. Having fortified the European Stronghold with the Schengen Agreement, effective as of 1995, the EU member states foresaw the irregular migration and the migrants as the greatest threat. Since then, the EU, so as to defend this Stronghold against such designated threats, further fortified that Stronghold through the legal arrangements.[11]

Another notable issue is how the terms used in this study are defined: migration, the fundamental subject matter of the study, is defined as *"... a phenomenon where individuals or masses move from a country or settlement of origin to another, with economic, social or political motives..."*.[12] The United Nations, on the other hand, approaches with a different perspective, length of

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9 Speech of Dr. Auguste R. Lindt, United Nations High Commissioner for Refugees, at the 10th meeting of the Council of the Inter-Governmental Committee for European Migration (ICEM), Naples, 5 December 1960 https://www.unhcr.org/admin/hcspeeches/3ae68fb820/speech-dr-auguste-r-lindt-united-nations-high-commissioner-refugees-10th.html, accessed on 20/03/2020.

10 Lahav, G. (1997), ibid. p. 354.

11 Akgün, A. Avrupa Birliği'nin Değişen Göç Politikalarının Sığınma Hakkı Kapsamında Değerlendirilmesi, (MSc Thesis, Maltepe Üniversitesi 2016) p. 90

12 Kırlı, Ö. (2009) Yasadışı Göç Sorunu: Uluslararası Davraz Kovgresi Bildirileri/Küresel Diyalog, Süleyman Demirel Üniversitesi İktisadi Ve İdari Bilimler Fakültesi Yayınları, pp. 2817-2825.

stay, to define migration: accordingly, individuals residing in a foreign country for over one year, regardless of whether it is regular or irregular, or voluntary or involuntary, are migrants.[13] Therefore, along with the definition of migration, that of the migrant is comprehensive of the act of moving from one place to another, by refugees and displaced persons.[14]

For the purposes of international law, a refugee is a person who *"...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country..."*.[15] Therefore, being legally recognized as a refugee requires fulling certain eligibility conditions. Inevitably, the individual should be a foreigner, in other words, outside the borders of the country of origin, which may not only be grounded on oppression, threat to the right to life, war, poverty and civil unrest but also Article 1 of the 1951 Convention Relating to the Status of the Refugees, a well-founded fear of being persecuted for reasons of membership of a particular social group or political opinion.[16] The Convention also states that a person ceases to be a refugee if *"...he has voluntarily re-availed himself of the protection of the country of his nationality; or having lost his nationality, he has voluntarily re-acquired it; or he has acquired a new nationality, and enjoys the protection of the country of his new nationality; or he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or he can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality..."*.[17]

The said Convention does not apply to persons who are currently under the protection or assistance of organs or agencies[18] of the United Nations; who *"... has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; ... has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a*

13 UN, Definitions, https://refugeesmigrants.un.org/definitions, accessed on 27.11.2020
14 Güneş, Ö. Türkiye İle Bağlantılı Yasadışı Göç ve İnsan Kaçakçılığının Analizi, (MSc Thesis, Turkish Military Academy 2004) p. 10.
15 1951 Convention Relating to the Status of the Refugees § 1/A/(2) & 1967 Protocol Relating to the Status of Refugees, § 1/A/(2)
16 Weissbrodt, D. (2008) The Human Rights of Non-citizens, Oxford University Press, p. 152.
17 1951 Convention Relating to the Status of the Refugees, § 1
18 With the exception of United Nations High Commissioner for Refugees

refugee; ... has been guilty of acts contrary to the purposes and principles of the United Nations.[19] *"*[20]

The Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa defines the term refugee, throughout the Article 1 thereof, as follows: "...every person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership

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[19] The Purposes and Principles of the Charter of the United Nations, § 1
The Purposes of the United Nations are:

1. *To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;*
2. *To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;*
3. *To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and*
4. *To be a center for harmonizing the actions of nations in the attainment of these common ends.*

Purposes and Principles of the Charter of the United Nations, § 2
The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. *The Organization is based on the principle of the sovereign equality of all its Members.*
2. *All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.*
3. *All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.*
4. *All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*
5. *All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.*
6. *The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.*
7. *Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.*

[20] 1951 Convention Relating to the Status of the Refugees, § 1

of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."[21]

The Article 1 of AALCO's 1966 Bangkok Principles on Status and Treatment of Refugees, a regional instrument, defines 'refugee' as *"... a person who, owing to persecution or a well-founded fear of persecution for reasons of race, colour, religion, nationality, ethnic origin, gender, political opinion or membership of a particular social group: (a) leaves the State of which he is a national, or the Country of his nationality, or, if he has no nationality, the State or Country of which he is a habitual resident; or, (b) being outside of such a State or Country, is unable or unwilling to return to it or to avail himself of its protection ..."*.[22]

The term 'asylum seeker' is defined as *"someone who leaves their own country, often for political reasons or because of war, and who travels to another country hoping that the government will protect them and allow them to live there"*[23] in the Cambridge Dictionary, and is, therefore, not identical to a refugee: asylum refers to a right whereas the status of refugee may be construed to result from the phenomenon itself.[24] An asylum seeker is a person leaving his/her country forcibly, taking sanctuary within the land, diplomatic missions or consulate facilities, or on warships or state-owned aircraft of a state, and seeking for the protection of that country.[25] In this respect, an asylum, being a body of protection, differs from the status of a refugee, being referred to as the category of people who avail such protection.[26]

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21 The Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems, § 1 https://au.int/sites/default/files/treaties/36400-treaty-oau_convention_1963.pdf, accessed on 03.07.2020.

22 1966 Bangkok Principles on the Status and Treatment of Refugees, https://www.refworld.org/docid/3de5f2d52.html, accessed on 03.07.2020.

23 Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/asylum-seeker, accessed on 03.07.2020.

24 Büyükçalık, M.E. (2015) Mülteci Hukuku'nun Gelişimi ve Türkiye'de Mültecilerin Sosyal Hakları, Oniki Levha Yayınları, p. 224.

25 Pazarcı, H. (2005) Uluslararası Hukuk Dersleri, Turhan Kitabevi, p. 186.

26 Gil-Bazo, M.T. (2015) Asylum as a General Principle of International Law: International Journal of Refugee Law 27, (1), p. 7.

International law does not define family conclusively, either. Some countries adopt the definition of extended family whereas some do that of nuclear family. An immediate family consists of a partner and unemancipated minors, while an extended family consists of other family members. For the purposes of no prejudice to the principle of non-discrimination, a fundamental principle of international law, states are encouraged to adopt the definition of extended family.[27] Human Rights Committee, General Comment 19 on the Article 23 of International Covenant on Civil and Political Rights, refers to an implication that being a family should not be delimited by marriage but the possibility of procreation and living together[28], and to establish economic bonds along with a regular and strong relationship.[29] European Court of Human Rights also highlights that family life is rooted from not only legal civil relationships but also genuine relationships.[30] It has been long that informal and religious marriages are recognized under the Article 8[31] of the European Convention on Human Rights.[32]

Family/members of the family is referred to as "… persons married to migrant workers or having with them a relationship that, according to applicable law, produces effects equivalent to marriage, as well as their dependent children and other dependent persons who are recognized as members of the family by applicable legislation or applicable bilateral or multilateral agreements between the States concerned …" in the Article 4 of International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.[33] To the same Convention, family reunification refers to the demand

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27 Council of Europe Commissioner for Human Rights. (2017) Realising the right to family reunification of refugees in Europe, p. 15.

28 UN Human Rights Committee (HRC), CCPR General Comment No. 19§ 23 Protection of the Family, the Right to Marriage and Equality of the Spouses, https://www.refworld.org/docid/45139bd74.html, accessed on 03.07.2020.

29 Elçin, D. (2017) Yabancılar ve Uluslararası Koruma Kanunu'nda Aile İkamet İzni: Aile Hayatı Hakkı Mı? Aile Birleşimi Hakkı Mı?: Türkiye Adalet Akademisi Dergisi 30, p. 122.

30 Council of Europe Commissioner for Human Rights. (2017), ibid. p. 15.

31 § 8: Right to respect for private and family life
1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

32 Council of Europe Commissioner for Human Rights. (2017), ibid. p. 15.

33 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
Adopted by General Assembly resolution 45/158 of 18 December 1990. https://www.ohchr.org/Documents/ProfessionalInterest/cmw.pdf, accessed on 03.07.2020.

by the members of a family, who settled in different countries due to voluntary or involuntary migration, for entrance or stay to reunite in a country other than their country of origin or domicile. Family reunification, a legal procedure by nature, is at the discretion of the states; however, it is a right secured under international conventions. The Appendix to the European Social Charter of 1961, for the purposes of the Article 19, paragraph 6 thereof, sets forth that the term "family of a foreign worker" is construed to consist of "at least the worker's spouse and unmarried children, as long as the latter are considered to be minors by the receiving State and are dependent on the migrant worker.".[34]

Notwithstanding such approach of international law, states stipulating the condition, especially for the migrants, to present proofs of family bonds, causes tension and makes family reunification practically void. The Third-Country National Policy imposed not only lacks reasonable grounds but also violates the Article 1, Paragraph 3 of the Charter of the UN and ECHR Article 14 on the prohibition of discrimination,[35] as migrants are very likely to stay in a country of transit for long periods and some to found family there.

2. OVERVIEW OF THE INTERNATIONAL AND EU LEGISLATIVE FRAMEWORK ON FAMILY REUNIFICATION

Pacta sunt servanda constitutes one of the core principles of international law. Vienna Convention on the Law of Treaties[36] stipulates that every treaty in force is binding upon the parties and must be performed in good faith.[37] Thereof further sets forth that a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.[38] Therefore, any and all treaties addressed in this section are binding upon and put the contracting states under obligation.

The Article 16 of Universal Declaration of Human Rights,[39]published in 1948 and binding upon all members states of the United Nations, identifies 'family' as the natural and fundamental group unit of society. The same Article also states that family is entitled to protection by the society and the State and men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.

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34 European Social Charter, Strasbourg, 3.V.1996, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007cde4, accessed on 03.07.2020.

35 Council of Europe Commissioner for Human Rights. (2017), ibid. p. 15.

36 Vienna Convention on the Law of Treaties, https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf, accessed on 28.11.2020.

37 Vienna Convention on the Law of Treaties § 26

38 Vienna Convention on the Law of Treaties § 26

39 The Universal Declaration of Human Rights, https://www.un.org/en/universal-declaration-human-rights/, accessed on 05.07.2020.

The 1949 Geneva Conventions,[40] considered to be constitution of the humanitarian treatment, addresses the protection of human rights in armed conflicts. Armed conflicts disperse the families of internees and civilians. Article 26 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War[41] regards the dispersed families. Accordingly: *"Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible (...)"*

Article 8 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms,[42] on the other hand, addresses the right to right to respect for private and family life. Accordingly, *"everyone has the right to respect for his private and family life, his home and his correspondence."*

The major criticism against the 1951 Convention Relating to the Status of Refugees the lack of arrangements towards family reunification. It is unfortunate that this Convention, as the most important legal arrangement towards refugees, bears not even a single reference to family reunification. However, Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons considers *"the unity of the family, ..., is an essential right of the refugee ..."* and recommends the governments to the necessary measures for the protection of the refugee's family.[43]

Long after, the UN High Commissioner for Refugees published a series guideline.[44] The Executive Committee of the High Commissioner's Programme, also known as ExCom, formed of intergovernmental officials, insistently highlighted the significance of family reunification.[45] ExCom,

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40 Geneva Convention Relative To The Protection Of Civilian Persons In Time Of War Of 12 August 1949, https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf, accessed on 28.11.2020.

41 Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/7f15bb724290e0f8c12563cd0042b8ca, accessed on 05.07.2020.

42 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, https://www.echr.coe.int/documents/convention_eng.pdf, accessed on 28.11.2020.

43 UNHCR, "Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons", A/CONF.2/108/Rev.1 (25 July 1951), accessed on 10.07.2020.

44 UNHCR, Note on family reunification (UNHCR, August 1981) and UNHCR, Guidelines on reunification of refugee families (UNHCR, July 1983), available at www.unhcr.org/3bd0378f4.pdf, accessed on 17.08.2020.

45 UNHCR. (2014) A Thematic Compilation Of Executive Committee Conclusions, pp. 223-229.

which is quasi-legal – not legally binding – and construed to reflect "Soft Law", adopted five principles in support of family reunification, in 2001.[46]

The 1966 International Covenant on Civil and Political Rights[47] pertains to the right to privacy in the Article 17 thereof, as follows: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation …" and therefore, the contracting states are to secure everyone against such interferences. The Article 23 thereof is specifically dedicated to the protection of family, as per the provisions whereof: "… States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution …". It is of great importance to note that UN Human Rights Committee also recommends the term "family" should be interpreted as "extended family" for the purposes of the International Covenant on Civil and Political Rights. The Committee also acknowledges that absence of officially recognized marriage is no prejudice to the implementation of the covenant and a family bond is sufficient. The most significant of point to highlight in the CCPR General Comment No. 15 in 1986 is the extent of the discretion of the states for the purposes of family reunification.[48] Accordingly; in principle, states have sovereignty to or not to admit entrance to their countries. However, the protection under the Covenant shall apply to foreigners in the cases of inhuman and degrading treatment and violation of the right family life.[49] As the body for the proper implementation of the International Covenant on Civil and Political Rights by the states, the UN Human Rights Committee has made decisions on numerous family reunification cases. *Byahuranga v. Denmark*[50] case, briefly stated, is with respect to the appellant, an Ugandan national, having settled in Denmark, married to a Tanzanian national and with two children. There were two options asserted: the family of the appellant, the appellant having been deported due to a drug-related crime, would either stay in Denmark or be

46 UNCHR. (2001) Background Note On Family Reunification In The Context Of Resettlement And Integration, available at www.unhcr.org/protection/resettlement/3b30baa04/background-noteagenda- item-family-reunification-context-resettlement-integration.html, accessed on 17.08.2020.

47 International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx, accessed on 19.08.2020.

48 UN Human Rights Committee (HRC), CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986, available at: https://www.refworld.org/docid/45139acfc.html, accessed on 29 September 2020.

49 Ibid. § 5.

50 Jonny Rubin Byahuranga v. Denmark, Communication no. 1222/2003, http://hrlibrary.umn.edu/undocs/html/1222-2003.html, accessed on 04.12.2018.

deported to Uganda along with the appellant. The decision of the Committee on the communication thereto was that the appellant being deported to Uganda may not be construed to be in prejudice to the right to family life due to the nature of the crime committed. *Madafferi v. Australia*[51] case, briefly stated, on the other hand, pertains to the appellant, a former convict, married to an Australian national and with children. His application for permanent stay in Australia was refused due to his past conviction, however, the Committee made a decision that appellant leaving the country with or without his family would be construed as an interference with family life. Another case, *Dernawi v. Libya*, regards to a family, having been forced to remain in Libya in spite of the decision on family reunification, as their passports were confiscated, whereby family reunification was interfered, and Libya was found to be in violation.[52] In *Gonzalez v. Guyana* case, Guyana was found to be in violation of 17/1, where Guyanese officials refused to grant residence for the spouse, a Cuban national and physician, of the appellant, and failed to deliver opinion as to what country the family may live in.[53] The decision is in further claim of such interference may not be arbitrary and has to be in reasonable accordance with the provisions of the Covenant.[54] In *Ngambi and Nébol v. France* case, the Committee attested that the Article 23 of the Covenant "… guarantees the protection of family life including the interest in family reunification".[55] In addition to these decision, the Committee also delivered opinions as to the states. For instance, in the Concluding observations of the Human Rights Committee in 1966 on Switzerland it was noted that family reunification is authorized only after 18 months of stay, and it was, in Committees view, too long.[56] Also, the Concluding observations of the Human Rights Committee in 2007 on France, expressed the concerns on the length of family reunification procedures for recognized refugees.[57] In another Concluding observations of the Human Rights Committee in 2016, on Denmark, the Committee stated to be concerned about the restrictions that require a residence permit for more

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51 Madafferi v. Australia, Communication no. 1011/2001, http://www.bayefsky.com/pdf/australia_t5_iccpr_1011_2001.pdf, accessed on 04.12.2018.

52 Farag El Dernawi v. Libya, No. 1143/2002, CCPR/C/90/D/1143/2002, § 6.3.

53 Gonzalez v. Republic of Guyana, Communication No. 1246/2004, https://www.refworld.org/cases,HRC,4c1895262.html, accessed on 16.08.2020

54 Gonzalez v. Republic of Guyana, ibid, § 14.3.

55 Benjamin Ngambi and Marie-Louise Nébol v. France, CCPR/C/81/D/1179/2003, UN Human Rights Committee (HRC), 16 July 2004, available at: https://www.refworld.org/cases,HRC,4162a5a46.html, accessed on 17.08.2020.

56 Consideration of Reports Submitted By States Parties Under Article 40 Of The Covenant, Switzerland, CCPR/C/79/Add. 70 (1996) § 18.

57 Consideration of Reports Submitted By States Parties Under Article 40 Of The Covenant, France, CCPR/C/FRA/CO/4 (2008) § 21.

than the last three years for family reunification.[58] The fact that the committee handles the issue differently in its decisions despite all these suggestions is a clear indication that it still does not had a clear approach to family reunification.

American Convention on Human Rights of 1969, in Article 17, refers to family as "… the natural and fundamental group unit of society and is entitled to protection by society and the state …"[59]

The Article 9 of the 1989 UN Convention on the Rights of the Child pertains to family bonds as well.[60] Accordingly; *"States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately, and a decision must be made as to the child's place of residence."*[61] Article 10 thereof, referring to the Article 9, states *"... applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family..."*[62] The Article 16, merely reflecting the provisions of Article 17 of the International Covenant on Civil and Political Rights, prohibits the arbitrary and unlawful interference with the child's family life.[63] The Committee on the Rights of the Child, with the authority and power to admit and intergovernmental and individual appeals, also publishes General Comments. The General Comment No. 6 concerning the treatment of unaccompanied and separated children outside their country of origin attests that family reunification for an unaccompanied or separated child is a must unless otherwise is to the best interests of such child.[64] "the best interest" referred to therein is the presence of a reasonable risk that the fundamental human rights of the child may be violated in the case of family

58 Consideration of Reports Submitted By States Parties Under Article 40 Of The Covenant, Denmark, CCPR/C/DNK/CO/6 (2016) § 35.

59 American Convention On Human Rights, see https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm for full-text, accessed on 19.08.2020.

60 Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, see https://www.ohchr.org/en/professionalinterest/pages/crc.aspx for full-text, accessed on 17.08.2020.

61 CRC, § 9/1.

62 CRC, §10.

63 Council of Europe Commissioner for Human Rights, (2017), ibid. p. 19.

64 UNCRC, (2005) General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin, 39th Session, UN Doc CRC/GC/2005/6, § 81.

reunification in the country of origin.[65] The Committee reports concerns about certain countries failing to ensure or adopt restrictions towards family reunification and highlights the legal gaps in the protection children.[66] In this respect, the Committee had specific criticism against the procedures Poland adopts for family reunification.[67]

In the European Social Charter, in item 6 of Article 19, states undertake "… to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory …". Another conclusion is by the European Committee of Social Rights that requirements for language proficiency or integration exams and courses hinder family reunification, and is therefore not in conformity with item 6 of Article 19 of the European Social Charter.[68] Pursuant to the European Union Law, citizens of the member states of European Economic Community[69] and their family members have the right to travel to and reside and work within any member state as per the Schengen Agreement. On the other hand, in relation to family members who are not part of the core family, the CJEU held that EU Member States have a wide discretion in selecting the factors to be considered when examining the entry and residence applications of the persons.[70] According to the Dublin II Regulation, any applications seeking asylum can be examined by a single Member State[71], wherefore members of a family dispersed to different countries may not seek for asylum in those countries, with the exception of Humanitarian Clause[72] thereof, where any Member State, regardless of whether it is responsible under

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65 UNCRC, (2005), § 82.

66 Hodgkin, R. and Newell, P. (2007) Implementation Handbook for the Convention on the Rights of the Child, UNICEF, p. 126,https://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf, accessed on16.08.2020.

67 UNCRC, (2015) Consideration of reports submitted by states parties under Article 44 of the Convention – Concluding Observations: Poland, 70th Session, UN Doc CRC/C/POL/CO/3-4, § 44-45.

68 ECSR. (2015) "Conclusions Article 19-6", Austria, available at http://hudoc.esc.coe.int/eng?i=2015/def/AUT/19/6/EN, accessed on 17.08.2020

69 See https://www.schengenvisainfo.com/schengen-visa-countries-list/ for the list of Member States, accessed on 06.12.2018.

70 FRA, Handbook on European law relating to asylum, borders and immigration, European Union Agency for Fundamental Rights, Belgium, 2015, p. 130, https://fra.europa.eu/sites/default/files/fra_uploads/handbook-law-asylum-migration-borders-2nd-ed_en.pdf, accessed on 21.08.2020.

71 Dublin II Regulation, Regulation (EC) No 343/2003 of 18, § 3/2, https://www.asylumlawdatabase.eu/en/content/en-dublin-ii-regulation-regulation-ec-no-3432003-18-february-2003, accessed on 17.08.2020.

72 Humanitarian ground defined in the article is the dependency on the assistance of the other on account of pregnancy or a new-born child, serious illness, severe handicap or old age. Dublin II Regulation, (2003), ibid, §15

the criteria set out in the Regulation or not, may bring together family members, as well as other dependent relatives, on humanitarian grounds, at the request of another Member State and upon the consent of the persons concerned may examine an application. The Regulation limits the family members of an applicant to the spouse of the asylum seeker or his or her unmarried partner in a stable relationship, the minor children, the father, mother or guardian when the applicant or refugee is a minor and unmarried.[73] Such limitation of family members in the Dublin Regulation is a serious impediment to family reunification of dispersed asylum seekers.[74] This, inevitably, leads to the violation of provisions set forth in the Article 8 of the European Convention on Human Rights. According to the Qualification Directive,[75] beneficiaries of refugee status are to be granted a residence permit, which must be valid for at least 3 years and renewable[76], applicable to the family member of such as well, for which such residence permit may be valid for less than 3 years, without prejudice to assurance of family unity,[77] but renewable.[78] Within the EU Law, the right to family is regulated by Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification and protected under the Article 8 of the European Convention on Human Rights.[79] Accordingly; "… "family reunification" means the entry into and residence in a Member State by family members of a third country national residing lawfully in that Member State in order to preserve the family unit, whether the family relationship arose before or after the resident's entry…"[80] They shall apply where the sponsor is holding a residence permit issued by a Member State for a period of validity of one year or more who has reasonable prospects of obtaining the right of

73 Dublin II Regulation, (2003), ibid, §(i)(i)-(iii). https://www.asylumlawdatabase.eu/en/content/en-dublin-ii-regulation-regulation-ec-no-3432003-18-february-2003, accessed on 17.08.2020.

74 Ergül, E. (2013) Avrupa Birliği Muktesabatında Yabancıların Aile ve Özel Hayat Hakkı Çerçevesinde Korunması: Ankara Barosu Dergisi 3, p. 203.

75 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, https://eur-lex.europa.eu/eli/dir/2011/95/oj, accessed on 22.08.2020.

76 Directive 2011/95/EU, ibid, § 24/1.

77 Directive 2011/95/EU, ibid, § 23/1.

78 Directive 2011/95/EU, ibid, § 24/1/ 2.

79 Van Reisen M. and others. (2019) Refugees' Right to Family Unity in Belgium and the Netherlands: 'Life is Nothing without Family. In: Van Reisen, M., Mawere, M., Stokmans, M., & Gebre-Egziabher, K. A. (eds), Mobile Africa: Human Trafficking and the Digital Divide, Langaa Research & Publishing CIG, p. 456.

80 Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, § 2/(d), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32003L0086&from=EN, accessed on 18.08.2020.

permanent residence, if the members of his or her family are third country nationals of whatever status.[81] According to the Guidance for Application of Directive 2003/86/EC on the right to family reunification even when a situation is not covered by European Union law, MSs are still obliged to respect Article 8 and 14 ECHR.[82] Recommendation No R (99) 23 of the Council of Europe Committee of Ministers states "The rights and entitlements to be granted by member states to joining family members should in principle be the same as those accorded to their family member who is a refugee or another person in need of international protection, respectively." The Qualification Directive also states that not only the persons with refugee status but also their family members have the right to protection and the member states are to ensure the family unity.[83] However, the statistics of admission on such basis seems to be in conflict with this attitude of the EU organs. In this respect, states, in an attentive manner, should stipulate more favorable conditions for the family reunification of refugees. The case of *Abdülaziz, Cabales and Balkandalı v. the UK*[84] pertains to Mrs Cabales, a British citizen who is a lawful resident of the UK, married a Philippine citizen. However, her husband was denied entry to the UK by the British authorities. In the case filed for the violation of Article 8, the court stated that the term "family" expresses a lawful and genuine relationship and that the couple wanted to live a normal family life, however there was no violation as states have no obligation to admit citizens of non-member states to their country. The case is the British legal system grants British men the right to family reunification in the UK if they are married to wives of foreign nationality but not vise-versa, on the grounds whereof the Court ruled that the immigration policies of the UK are not compliant with the Articles 14 and 8 of the Convention; that is the national laws and discretion of the states on family reunification must be in no prejudice to the other provisions of the Convention and to the right to family life. That is, the decision ruled a violation not due to the denial of family reunification demand but discriminatory practices, and therefore, can be deemed to admit "the wide margin of appreciation" of nations for family reunification, in comparison to family life.[85]

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81 Council Directive 2003/86/EC, ibid, § 3/1.

82 Communıcation From The Commission To The European Parliament And The Council on guidance for application of Directive 2003/86/EC on the right to family reunification, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014DC0210, accessed on 01.12.2018.

83 Reisen and others. (2019) ibid., p. 456.

84 Case Of Abdulaziz, Cabales And Balkandali v. The United Kingdom, Application no. 9214/80; 9473/81; 9474/81, http://hudoc.echr.coe.int/eng?i=001-57416, accessed on 01.12.2018.

85 Rohan, M. (2014) Refugee Family Reunification Rights: A Basis in the European Court of Human Rights' Family Reunification Jurisprudence, Chicago Journal of International Law, 15(1), p.360.

Another important ruling of the Court is on *Gül v. Switzerland.*[86] Accordingly; Mr. Gül, a Turkish national, left Turkey for Switzerland in 1983 and applied for asylum.[87] His wife also left Turkey for Switzerland in 1987 due to an incident.[88] The following year, they had a child, but the physicians refused to allow her to return to Turkey, due to her illness.[89] In 1989, the application to seek asylum was rejected, but a residence permit was granted in Switzerland on humanitarian grounds.[90] However, their later application to bring their two sons remained in Turkey to Switzerland was also rejected.[91] On the basis of this, the ECtHR ruled that residence permits are not for settlement purposes and that persons having such status are not entitled to family reunification in accordance with the Swiss law; further ruling that states have the discretion to control entry into their territory and whether or not to approve the request of non-citizens to bring their families into their lands, depending on the public interest and the situation of the persons, and that there was no violation.[92] In this judgment, The Court clearly distinguished between the legal justification and the moral consideration. This decision is one of the most typical decisions narrowing of the right to family reunification.[93]

In *Ahmut v. The Netherlands*[94] case, the applicant, a Moroccan citizen, settled in the Netherlands upon divorce.[95] Two of the five children of the applicant moved with the applicant on a student visa.[96] Upon the death of applicant's ex-wife, the elderly grandmother took care of the children.[97] However, as the grandmother was of old age the applicant requested to take his children with him, where such request was rejected by the Dutch authorities.[98] The Court ruled that there was nothing hindering the applicant from returning to Morocco, as he was both a Moroccan and a Dutch national, and therefore, that there was no violation of family reunification in terms of immigration.[99] This

86 Case of Gül v. Switzerland, Application no. 23218/94, http://hudoc.echr.coe.int/eng?i=001-57975, accessed on 01.12.2018.
87 Case of Gül v. Switzerland §§ 6-7
88 Case of Gül v. Switzerland § 8
89 Case of Gül v. Switzerland § 9
90 Case of Gül v. Switzerland § 11
91 Case of Gül v. Switzerland § 14
92 Case of Gül v. Switzerland §§§ 36-38
93 John, A., Family Reunification for Migrants and Refugees: A Forgotten Human Right?, p. 20. http://www.igc.fd.uc.pt/data/fileBIB2017724164832.pdf, accessed on 21.11.2020.
94 Case of Ahmut v. The Netherlands, Application no. 21702/93, http://hudoc.echr.coe.int/eng?i=001-58002, accessed on 01.12.2018.
95 Case of Ahmut v. The Netherlands §§§§ 7-10
96 Case of Ahmut v. The Netherlands § 16
97 Case of Ahmut v. The Netherlands § 12
98 Case of Ahmut v. The Netherlands § § 17-18
99 Case of Ahmut v. The Netherlands §§ 70 -71

profoundly controversial ruling is recognized by the emphasis that Article 8 (of the Convention) cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorize family reunion in its territory.[100] The *Gül* and *Ahmut* decisions imply that, in order for a person to successfully appeal a rejection of family reunification, it must be impossible or at least extremely difficult for them to continue elsewhere the family relation they experienced prior to migration.[101] That is, the Court ruled that the States have a margin of appreciation as to whether the dual citizen may or may not benefit from the right to family reunification.

Another case of the same nature but different ruling is *Şen v. The Netherlands*,[102] where Şen moved to the Netherlands, leaving her daughter in Turkey, and Dutch authorities rejected his application to bring his daughter.[103] Upon the application, the Court ruled it was violation on the basis of the facts that the applicant's family had been living in the Netherlands for long period of time and had children born and grown there.[104] What is critical to this ruling is the Court's acknowledgment of the existence major obstacle to the rest of the family's return to Turkey.[105] This decision is an indication that the Court has softened its approach five years after Gül.[106]

Tuquabo-Tekle and Orhers v. the Netherlands[107] is a reflection of Court's opinion towards the respect to family life, specifically the respect thereto inclusive of children. In 1989, Mrs. Tuquabo-Tekle fled to Norway. In 1992, she married Mr. Tuquabo, who was living in the Netherlands, the next year, in 1993, she moved there to live with Mr. Tuquabo. Their application in 1997 for a residence visa for their 15-year-old (step) daughter, which was rejected on the grounds that to authorize family reunion in the Netherlands since the close family ties between Mrs. Tuquabo-Tekle and her daughter were considered to have ceased to exist and such ties had never existed between Mr. Tuquabo and his stepdaughter.[108] The Court ruled that it is a violation of the Article 8 on the

100 Case Of Ahmut V. The Netherlands § 67(c)
101 Rohan, ibid., p. 362.
102 Case of Sen v. The Netherlands, Application no. 31465/96, http://hudoc.echr.coe.int/eng?i=001-64569, accessed on 04.12.2018.
103 Case of Sen v. The Netherlands § 22
104 Case of Sen v. The Netherlands §§ 41-42
105 Roagna, I. (2012) Protecting the right to respect for private and family life under the European Convention on Human Rights, Council of Europe Human Rights Handbooks, Strasbourg, p. 89.
106 Roagna, ibid, p. 89.
107 Case Of Tuquabo-Tekle And Others V. The Netherlands, Application no. 60665/00.
108 Case Of Tuquabo-Tekle And Others V. The Netherlands §12.

grounds of a previous decision[109] having held that parents who leave children behind while they settle abroad cannot be assumed to have irrevocably decided that those children are to remain in the country of origin permanently and to have abandoned any idea of a future family reunion.[110]

In the case of *Osman v. Denmark*,[111] the Court ruled that Denmark's rejection of the application for residence permit by Sahro Osman, who moved to Denmark as a refugee and lived there with her father and sister, to return to her family two years after leaving for Kenya to care for her grandmother, was a violation of the Article 8 of the Convention.[112]

Another ruling of precedent nature is the one of the *Pajić v. Croatia*[113] case. The Court held that there had been a violation of Article 14 taken in conjunction with Article 8 of the Convention, as the family reunification rules in Croatia did not allow same-sex couples to apply.[114] The Court holds that Croatian legal system recognizes extramarital relationship of same-sex couples, whereas only different-sex couples, regardless of whether married or unmarried, are allowed to residence permit for family reunification purposes.[115] Assessed carefully, the Court's ruling does not address the rights of same-sex couples to application for family residence permit but rather holds that the Alien's Act of Croatia, where relationship of same-sex couples are recognized regardless of whether it is marital or extramarital, not allowing such couples to apply for a family residence permit is in violation of ECHR.[116] This, on the other hand, implies that States not recognizing relationship of same-sex couples in their domestic law may not be imposed an obligation to allow for family residence permit with respect to such couples.

Boultif v. Switzerland[117] case pertains to non-renewal of residence permit of Mr. Boultif, married to a Swiss national, due to criminal involvement.[118] On the grounds that the applicant's wife did not speak Arabic, and Boultif completed his sentence, the court ruled that the Swiss authorities' policy and their interference was not proportionate to the aim pursued, in violation of

109 See. Şen v. the Netherlands, no. 31465/96, § 40.
110 Case Of Tuquabo-Tekle And Others V. The Netherlands § 45.
111 Case of Osman v. Denmark, Application no. 38058/09, http://hudoc.echr.coe.int/eng?i=001-105129, acccessed on 04.12.2018.
112 Case of Osman v. Denmark §§ 55-56
113 Case of Pajić v. Crotia, Application no. 68453/13, http://hudoc.echr.coe.int/eng?i=001-161061, accessed on 09.09.2020.
114 Case of Pajić v. Crotia §§ 79-84
115 Case of Pajic v. Croatia § 72.
116 Elçin, ibid., p. 134.
117 Case of Boultif v. Switzerland, Application no. 54273/00, http://hudoc.echr.coe.int/eng?i=001-59621, accessed on 04.12.2018.
118 Case of Boultif v. Switzerland § 14

Article 8.[119] This ruling is of great importance, as the criteria for expelling foreigners are now known as Boultif Criteria,[120] which are:

- the nature and seriousness of the offence committed by the applicant;
- the duration of the applicant's stay in the country from which he is going to be expelled;
- the time which has elapsed since the commission of the offence and the applicant's conduct during that period;
- the nationalities of the various persons concerned; the applicant's family situation, such as the length of the marriage;
- other factors revealing whether the couple lead a real and genuine family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship; and
- whether there are children in the marriage and, if so, their age.

Not least, the Court will also consider the seriousness of the difficulties which the spouse would be likely to encounter in the applicant's country of origin.[121] Occasionally, for some rulings, criteria may include the best interests and welfare of the child.

The 2011 Qualifications Directive ensures the right to family unity of persons eligible for subsidiary protection, who do not qualify for family reunification along with the refugees, along with that of the refugees.[122] In the cases of temporary protection, there is a consensus on the need for prompt reunification during temporary protection, as the refugee status may take long to be determined.[123] To qualify for family reunification the family ties should have existed already in the country of origin, such the ties should have been disrupted due to circumstances surrounding the mass influx, and that the family

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119 Case of Boultif v. Switzerland § 48

120 Thym, D. (2008) Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?: International & Comparative Law Quarterly 57, (1), p. 93

121 Peker, A. AİHM' nin Geliştirdiği İlkeler Bağlamında Aile Hayatına Saygı Gösterilmesi Hakkı, (MSc Thesis, Gazi University 2015) p. 81.

122 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, https://eur-lex.europa.eu/eli/dir/2011/95/oj, accessed on 17.08.2020.

123 Jastram, K. and Newland, K. "Family Unity and Refugee Protection", in Feller, E. Türk, V. and Nicholsonc, F. (eds) (2003) Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge University Press, p. 589. https://www.refworld.org/pdfid/4bed15822.pdf, accessed on 04.09.2020.

members must be either beneficiaries of temporary protection themselves (but present in another member state) or in need of protection,[124] in the context of which, a previous Council Directive[125] considers "… the spouse of the sponsor or his/her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens; the minor unmarried children of the sponsor or of his/her spouse, without distinction as to whether they were born in or out of wedlock or adopted …" as a part of the family.

3. RESTRICTIVE ATTITUDES TOWARDS FAMILY REUNIFICATION FOR REFUGEES

For refugees, family reunification is a legally and practically challenging procedure. The arduous procedures hinder families, adding to which, the states in Europe, developing policies based on various economic concerns, have challenging restrictions towards family reunification. For instance, German authorities restricted family reunification for certain beneficiaries of subsidiary protection with a two-year suspension in order to minimize the impact of refugee crisis in 2016.[126] Likewise, Hungary, Cyprus and Greece did not grant those benefiting from subsidiary protection the right to family reunification. In 2015, Sweden introduced restrictions to the right to family reunion for persons granted subsidiary protection.[127]

Another issue concerns the child refugees. Failure to determine the age of the child, especially of those from countries with poor birth registration, poses problematic consequences that may end up with the child taken into custody. Age examination should be carried out in multidisciplinary manners, in accordance with medical ethical standards and inevitably with the consent of the child or his guardian. In addition, both length of wait and arduous procedures have devastating effects on unaccompanied children. Moreover, some countries such as Luxembourg require DNA testing to prove the lineage. One specific sub-problem is with the adopted children. States generally agree to child's right to family reunification, if official procedures as to adoption

124 Council of Europe Commissioner for Human Rights, (2017) ibid, p. 31.

125 Council Directive 2001/55/EC of 20 July 2001, https://eur-lex.europa.eu/eli/dir/2001/55/oj, accessed on 04.09.2020.

126 Janne Grote, Family Reunification of third-country nationals in Germany, Focused study by the German National Contact Point for the European Migration Network (EMN), Federal Office for Migration and Refugees 2017, available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/11a_germany_family_reunification_en_final.pdf, accessed on 04.09.2020

127 UNHCR Official Website, https://www.unhcr.org/neu/27059-unhcr-welcomes-swedens-decision-to-re-introduce-access-to-family-reunion.html, accessed on 09.09.2020

are complete. Another controversial issue is with children of the spouse from another partnership. Above all, it is still at the discretion of the states as to who is considered as the part of the family. On the other hand, certain countries recognize the right to family reunification for unofficial partnerships, provided that they meet certain criteria.[128]

The most prominent challenge in family reunification is the length of qualification. Long periods for qualification pose risk of losing rights for children who are close to the age of majority. Although the 1951 Convention explicitly sets forth that such periods would not apply to family reunification of refugees, states generally impose a two-year suspension procedure for applications with regard thereto, where such suspension period may be longer, especially for the beneficiaries of subsidiary protection.[129]

Many states stipulate short-term deadlines for family reunification applications. However, it is literally impractical to expect most refugees to meet such deadlines,[130] as the applicants have difficulty in collecting the necessary documents while tracing their family members. One of the current debates on the resolution of this issue is to extend this period from three months to six months. Furthermore, family reunification procedures for the beneficiaries of international protection are extremely lengthy, usually taking several years.[131] This delay is the consequence of embassies, especially in those countries with the largest influx of refugees, with insufficient resources and lacking accessible and up-to-date information and support for applicants.[132] However, states extending this period of time make it more challenging for families as long periods of separation have a severe psychological impact on the whole family. Moreover, it worsens the risks for family members who face the danger of persecution that caused them to seek international protection in the first place, and unfavorable living conditions pose threat to the health of the

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128 For instance, Ireland. Nicholson, F. (2018) The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification: UNHCR, p. 165.

129 Suspension period is 3 years in Austria, Denmark and Switzerland. EMN (2017) Family Reunification of Third-Country Nationals in the EU plus Norway: National Practices: EMN Synthesis Report for the EMN Focussed Study 2016, p. 20, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_family_reunification_sr_final.pdf, accessed on 29.11.2020

130 In 2012, UNHCR reported that the three-month restriction is exploited by the states to hinder refugees from family reunification. Luxemburg, Sweden and Hungary are among such states. For detailed information see https://www.unhcr.org/ro/wp-content/uploads/sites/23/2016/12/Family_Rseunification.pdf, accessed on 10.09.2020

131 4 years, in the case France.

132 Red Cross EU Office, (2016) Disrupted Flight: The Realities of Separated Refugee Families in the EU, p. 12. https://redcross.eu/positions-publications/disrupted-flight-the-realities-of-separated-refugee-families-in-the-eu.pdf, accessed on 10.09.2020

family members. The education of the children and the social costs incurred by the states are not exempt from this situation.[133]

Another problem posed to the refugees is the verification of family link, which is denied international organizations in consideration of the refugee status.[134] Researches carried out revealed that many applications were rejected due to outstanding documents; for instance, the UK adopts strict rules towards that issue, which hinder families from family reunification due to the high-standard expectations for identifying documents.[135] Moreover, it is highly risky and impractical to demand identifying documents from war zones.

Although UNHCR calls for waivers from fees, and for financial support to enable family reunification, the financial burden is still on refugees due to the fees charged for the applications. Visa and embassy fees, translation costs, travel and accommodation expenses for refugees residing away from the embassies and DNA tests are quite costly.[136]

4. ACCESS TO RIGHTS AFTER REUNIFICATION IN EUROPEAN UNION

The problems that await refugees are not limited to the legal difficulties before family reunification only; after the family reunification various problems await them beginning with the integration to a new society. Certain problems are likely to arise regarding the rights to education, employment, vocational training, and application for residence permit.

In most member states of the European Union, migrant children have access to the resources of compulsory education.[137] Moreover, some states have specific support such as language learning for such children.[138] However, certain states such as Greece do not have regulations to support such access to education for third-country nationals reuniting with their families. In cases where family

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133 Council Of Europe, (2017) Ending restrictions on family reunification: good for refugees, good for host societies, https://www.coe.int/en/web/commissioner/-/ending-restrictions-on-family-reunification-good-for-refugees-good-for-host-societies, accessed on 29.11.2020

134 UNHCR's ExCom Conclusion No. 24, Council of Europe Committee of Ministers Recommendation No. R (99) 23, § 4

135 Beswick, J. (2015) Not so Straightforward: The Need for Qualified Legal Support in Refugee Family Reunion: British Red Cross, pp. 37-39.

136 For Norway, the application fee is NOK 7.800 alone. Other expenses may be as costly as thousands of euros. For detailed information see https://www.udi.no/en/word-definitions/fees/#link-3593, accessed on 29.11.2020

137 Belgium, Bulgaria, Czechia, Germany, Estonia, Greece, Spain, Finland, France, Hungary, Ireland, Italy, Luxembourg, Latvia, Netherlands, Norway, Sweden, Slovakia and United Kingdom. For detailed information see https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_family_reunification_sr_final.pdf, accessed on 07.09.2020

138 Czechia, Belgium, Estonia, France, Lithuania, Luxembourg, Netherlands, Slovenia. EMN, ibid, p. 38.

members exceed the compulsory education age, language learning classes and integration support are still available. Beneficiaries of international protection are also offered social and integration counseling.

Certain states allow family members to obtain work permits following family reunification without requiring any additional administrative formalities, depending on residence permits.[139] However, family members may be restricted from access to certain public service due to the nationality requirements in such services.[140] In certain cases, family members may be required to apply for a work permit or qualify for a labor market within a certain period of time, which is usually 1 year, after family reunification.[141] Hungary is one EU Member State with the most restrictive policies for the employment of refugees and beneficiaries of subsidiary protection.

As to the right to access healthcare services, majority of the states offer refugee family members a health insurance identical to that offered to local citizens. However, in the UK, for example, access to public healthcare requires an additional 'immigration healthcare fee'.

Such differences are also prominent for residence permits. A majority of countries grant residence permit for the purposes of family reunification only, whereas Austria grants a residence permit for refugees, valid for three years, initially, and extensible for an indefinite period. Likewise, certain countries do not claim application fees from family members when applying for a residence permit,[142] whereas others do.[143]

TURKISH LAWS IN RESPONSE TO FAMILY REUNIFICATION

Turkey had long remained as a country of origin until 1990s, contrary to which, now, it is also a country of transit and destination.[144] The increase in the flow of third-country nationals to the country mandated a revision of law to accommodate the refugee issues[145], as not until recently there had been a comprehensive law on foreigners and to issues in relation to foreigners, two

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139 Czechia, Germany, Greece, Spain (requires work permit except the spouse and the children), France, Italy, Lithuania, Poland, Sweden and Slovenia. EMN, ibid, p. 38.

140 Countries such as Cyprus have specific requirements for public service personnel. ELTOMA, Why Foreign Workers Can't Work in the Public Sector in Cyprus, http://www.eltoma-property.com/why-foreign-workers-cant-work-in-the-public-sector-in-cyprus/, accessed on 29.11.2020

141 For example, Belgium and Hungary. IOM (2009) Comparative Study of the Laws in the 27 EU Member States for Legal Immigration: IOM, p.160 and 318.

142 Austria, Germany, Belgium, Estonia, Cyprus, Greece.

143 For example, Spain, Finland, France. EMN, ibid, p. 41.

144 Ekşi, N. (2018). Yabancılar ve Uluslararası Koruma Hukuku, Beta Yayıncılık, p. 7.

145 Bayındır Goularas, G. And Sunata, U. (2015) Türk Dış Politikasında Göç Ve Mülteci Rejimi: Hacettepe Üniversitesi İletişim Fakültesi Kültürel Çalışmalar Dergisi, 2, (1), p. 20.

quasi-competent laws, the Passport Law No 5682 of 1950 and the Law on the Residence and Travel of Foreigners in Turkey No. 5683 of 1950, applied.[146] Therefore, driven by the requirement for a conforming regulation, the Turkish legislature enacted the Foreigners and International Protection Law No. 6458, in 2013.

Turkey has been a party to the 1951 Convention relating to the Status of Refugees since 1961, as well as to its 1967 Protocol, which revoked any geographical limits[147], since 1968, and is the only European Council Member State to still retain a geographical limitation to its ratification of the Convention[148]; accordingly, the term refuges applies to any person who "… As a result of events occurring in *Europe* before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[149], which is also applicable in the Foreigners and International Protection Law. This geographic limitation is justified by the likelihood that the political unrest in Middle East and Asia may lead to refugee movements towards Turkey, due to its characteristics of a country of transit, as a result of which the European countries may consider Turkey to be a buffer zone.[150] [151] In this respect, the Foreigners and International Protection Law is a revision to Turkey's domestic law as a response, introduces the term 'conditional refugee', which refers to the non-European refugees and allows such refugees to reside in Turkey temporarily until they are resettled to a third country.[152] Moreover, a foreigner

146 GNAT, Bill on the Foreigners and International Protection Law, https://www2.tbmm.gov.tr/d24/1/1-0619.pdf, Retrieved on 20.11.2020.

147 The Protocol rules that the declarations to the Convention by the States Parties to the Convention shall remain applicable under the Protocol as well, which grants Turkey the right to retain the said limitations. See. Art. 1/3 of Protocol relating to the Status of Refugees. https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolStatusOfRefugees.aspx, Retrieved on 26.11.2020

148 Amnesty International, https://www.amnesty.org.tr/icerik/turkiye-65-yil-once-imzalanan-cenevre-multeci-sozlesmesine-koydugu-sinirlamayi-kaldirmalidir, Retrieved on 20.11.2020.

149 The Foreigners and International Protection Law, § 61/1.

150 For a legal text with similar remarks, see. Regulation on the Procedures and Principles related to Possible Population Movements and Aliens Arriving in Turkey either as Individuals or in Groups Wishing to Seek Asylum either from Turkey or Requesting Residence Permission in order to Seek Asylum from Another Country, § 3.

151 Çiçekli,B. (2003), Yabancılar ve Polis: Seçkin Yayınları, p. 132

152 The Foreigners and International Protection Law, § 62.

or a stateless person, who neither could be qualified as a refugee nor as a conditional refugee, shall nevertheless be granted subsidiary protection because if returned to the country of origin or country of habitual residence would be sentenced to death or face the execution of the death penalty; face torture or inhuman or degrading treatment or punishment; face serious threat to himself or herself by reason of indiscriminate violence in situations of international or nationwide armed conflict.[153]

Another status is temporary protection, which is applicable to foreigners, who are forced to leave their country [of residence/of citizenship/of origin] and are unable to return to such country and as a result whereof arrive at or cross the borders of Turkey in groups seeking urgent or temporary protection.[154] The current and concrete example where this status applies is the Syrians having had to flee to Turkey due to the Syrian Civil War. The number of Syrians under temporary protection in Turkey are officially reported to be 3,642,517 as of October 21, 2020.[155]

The Foreigners and International Protection Law does not have a definition of family residence permit whereas it defines family members. Accordingly, family members are the minor child(ren) and the dependent adult child(ren) of the applicant or the beneficiary of international protection.[156] The Law grants family residence permit for a maximum duration of three years at a time to the foreign spouse; foreign children or foreign minor children of their spouse; dependent foreign children or dependent foreign children of their spouse of Turkish citizens; of those who were formerly natural-born Turkish citizens but renounced their citizenship and their third degree lineal descendants[157], and of foreigners holding one of the residence permits as well as refugees and subsidiary protection beneficiaries.[158] However, the Law rules such duration of the family residence permit may not exceed that of the sponsor under any circumstances whatsoever. In cases of a polygamous marriage pursuant to the regulation in the foreigner's country of citizenship, only one of such spouses is issued a family residence permit, whereas the foreigner's children from other spouses may be granted a family residence permit.[159] With regard to family residence permit applications, sponsors are eligible only if they have a monthly income in any case not less than the minimum wage in total

153 The Foreigners and International Protection Law § 63.
154 Temporary Protection Regulation § I
155 Association for Refugees, https://multeciler.org.tr/turkiyedeki-suriyeli-sayisi/, Retrieved on 20.11.2020.
156 The Foreigners and International Protection Law, § 3/1(a).
157 Turkish Citizenship Law No. 5901 § 1/1.
158 The Foreigners and International Protection Law § 34/1.
159 The Foreigners and International Protection Law § 34/1.

corresponding not less than one third of the minimum wage per each family member; live in accommodation conditions appropriate to general health and safety standards corresponding to the number of family members and to have medical insurance covering all family members; submit proof of not having been convicted of any crime against family during the five years preceding the application with a criminal record certificate; have been residing in Turkey for at least one year on a residence permit, and have been registered with the address based registration system.[160] Such conditions, however, may not be sought for refugees and subsidiary protection beneficiaries who are in Turkey.[161] Foreigners protected under the Temporary Protection Regulation may also request family reunification in Turkey.[162]

Despite the clarification of some essential matters, the Foreigners and International Protection Law lacks a clear distinction between the organization of a family and family reunification.[163] However, Turkey, in compliance with its obligations under its national law and the conventions it is a party to pursuant to the international law, has been respectful to and flexible in terms of family and family reunification. In this respect, this approach of Turkey serves as a model for respect to family life, specifically in consideration of EU Acquis and the decisions held by ECtHR.

CONCLUSION

Family reunification is a legally difficult and arduous procedure. However, it puts much heavier burden on refugees. Having or to have left their families and homelands due to various causes, refugees would at least seek for new life with their family members, after struggles survived. However, both bureaucratic and legal barriers await refugees who are already dispersed by pains suffered. This is where the dilemma that states both have the positive responsibility to ensure and maintain the unity of families and have the absolute sovereignty whether or not to admit the right to family reunification. As a matter of fact, the practices vary between the states based on their policies. However, considering both the importance of the family and the best interests of the child, if any, then the decision-making mechanisms of international law should, to some extent, prevail the discretion of states.

As to who is considered a part of the family is also a controversial issue. It is not always practical to assert that families should be considered in the context of "nuclear family", as the cultures and traditions of the countries of origin may vary. Escapes and long-term exiles also have impact on family unity. The

160 The Foreigners and International Protection Law § 35/1.
161 The Foreigners and International Protection Law § 35/4.
162 Temporary Protection Regulation § 49/1
163 Elçin, ibid., p. 187.

European Court of Human Rights is a court with precedent judgments on family reunification, and not limiting family life to officially recognized marriages only, rules that partnership affairs must be considered for family reunification. In its rulings, the Court considers commitment factors, contrary to which a majority of states solely recognize official marriages for family reunification. In this century of human rights, such narrow perspective towards the family, contradicts the spirit of the conventions. In this respect, it is of the essence that international organization intervene and adopt a universal definition of "family" on a binding Convention. Furthermore, regardless of the discretion of the states, the right to family reunification should be defined in compliance with the Article 14 of the ECHR. Majority of the applications to the ECtHR for the violation of the Article 8 of European Convention on Human Rights concerning respect to family life, have been mostly submitted by foreigners having committed crimes in the country of residences and have been deported. However, in such cases, the Court usually considers proportionality of the decision to the lawful purposes and does not rules for the non-compliance of the contracting states. Specifically, "Boultif Criteria" apply to such incidents. For such incidents, the Court considers the nature and seriousness of the crime, the risks to the spouse in the destination country, and if any, the best interests and welfare of the child. However, the Court does not rule for violation on the party of the states, in consideration of their discretion, in the cases of drug-related crimes. Even at this point, such discretion should be minimal, for the purposes of family unity, and states should adopt other options such as rehabilitation and integration, instead of literally punishing the whole family, for the sake of protect their own interests. Finally, states should not ignore the beneficiaries of subsidiary protection and should recognize their right to family reunification, respecting their family life.

BIBLIOGRAPHY

Academic Articles, Books and Newspaper Articles

- Bülent Çiçekli, Yabancılar ve Polis (Seçkin Yayınları, 2003)
- Daniel Thym, "*Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay?"* (2008) International & Comparative Law Quarterly 57 (1)
- David Weissbrodt, *The Human Rights of Non-citizens* (Oxford University Press, 2008)
- Doğa Elçin, "*Yabancılar ve Uluslararası Koruma Kanunu'nda Aile İkamet İzni: Aile Hayatı Hakkı Mı? Aile Birleşimi Hakkı Mı*?" (2017) Türkiye Adalet Akademisi Dergisi 30
- EMN, *Family Reunification of Third-Country Nationals in the EU plus*

Norway: National Practices (EMN Synthesis Report for the EMN Focussed Study 2016, 2017)

- Engin Ergül,"*Avrupa Birliği Müktesabatında Yabancıların Aile ve Özel Hayat Hakkı Çerçevesinde Korunması*" (2013) Ankara Barosu Dergisi 3
- Gallya Lahay, "*International Versus National Constraints in Family-Reunification Migration Policy*" (1997) Global Governance 3(3)
- Gökçe Bayındır Goularas and Ulaş Sunata, "*Türk Dış Politikasında Göç Ve Mültecı̇ Rejimı*" (2015) Hacettepe Üniversitesi İletişim Fakültesi Kültürel Çalışmalar Dergisi 2(1)
- FRA, *Handbook on European law relating to asylum, borders and immigration, European Union Agency for Fundamental Rights*, (2015)
- Frances Nicholson, *The "Essential Right" to Family Unity of Refugees and Others in Need of International Protection in the Context of Family Reunification* (UNHCR 2018)
- Hüseyin Pazarcı, *Uluslararası Hukuk Dersleri* (Turhan Kitabevi, 2005)
- IOM, *Comparative Study of the Laws in the 27 EU Member States for Legal Immigration* (IOM, 2009)
- Ivana Roagna, *Protecting The Right To Respect For Private And Family Life Under The European Convention On Human Rights,* (Council of Europe Human Rights Handbooks, 2012)
- Kate Jastram and Kathleen Newland, "*Family Unity and Refugee Protection*", in Erika Feller, Volker Türk, Frances Nicholson, (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003)
- Jacob Beswick, *Not so Straightforward: The Need for Qualified Legal Support in Refugee Family Reunion* (British Red Cross, 2015)
- Janne Grote, *Family Reunification of third-country nationals in Germany*, European Migration Network, Working Paper 73 (2017)
- Jill Pellew, "*The Home Office and the Aliens Act, 1905"*(1989) The Historical Journal 32(2)
- Maria Teresa Gil-Bazo, "*Asylum as a General Principle of International Law*" (2015) International Journal of Refugee Law 27 (1)
- Mark Rohan, "*Refugee Family Reunification Rights: A Basis in the European Court of Human Rights' Family Reunification Jurisprudence*" (2014) Chicago Journal of International Law 15(1)
- Mehmet Akad, *Teori ve Uygulama Açısından 1961 Anayasası'nın 10. Maddesi* (İÜHFY, 1984)

- Mirjam Van Reisen, Eva Berends, Lucie Delecolle, Jakob Hagenberg, Marco Paron Trivellato & Naomi Stocker, *Refugees' Right to Family Unity in Belgium and the Netherlands: 'Life is Nothing without Family'* in Mirjam Van Reisen, Munyaradzi Mawere, Mia Stokmans, Kinfe Abraha Gebre-Egziabher, (eds), *Mobile Africa: Human Trafficking and the Digital Divide* (Langaa Research & Publishing CIG, 2019)
- Mürvet Ece Büyükçalık, *Mülteci Hukuku'nun Gelişimi ve Türkiye'de Mültecilerin Sosyal Hakları* (Oniki Levha Yayınları, 2015)
- Münci Kapani, *Kamu Hürriyetleri* (Yetkin Yayınları, 1993)
- Nuray Ekşi, *Yabancılar ve Uluslararası Koruma Hukuku* (Beta Yayıncılık, 2018)
- Özlem Kırlı, "*Yasadışı Göç Sorunu*" Uluslararası Davraz Kovgresi Bildirileri/Küresel Diyalog, (Süleyman Demirel Üniversitesi İktisadi Ve İdari Bilimler Fakültesi Yayınları 2009)
- Rachel Hodkin and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF, 2007)
- Red Cross, *Disrupted Flight: The Realities of Separated Refugee Families in the EU* (2016)
- Yusuf Hakyemez, "*Toplum Sözleşmesi Kavramı ve Günümüz İnsan Hakları Kuramına Etkisi*" (2000) İdare Hukuku ve İlimleri Dergisi 13(1)

Thesis

- Abdülkadir Peker, AİHM'nin Geliştirdiği İlkeler Bağlamında Aile Hayatına Saygı Gösterilmesi Hakkı, (MSc Thesis, Gazi University 2015)
- Adem Akgün, Avrupa Birliği'nin Değişen Göç Politikalarının Sığınma Hakkı Kapsamında Değerlendirilmesi, (MSc Thesis, Maltepe Üniversitesi 2016)
- Özkan Güneş, Türkiye İle Bağlantılı Yasadışı Göç ve İnsan Kaçakçılığının Analizi, (MSc Thesis, Turkish Military Academy 2004)
- Yusuf Sidar Şahin, Avrupa Birliği Mülteci Hukukunda Üye Devletlerin İltica Başvurusunu Değerlendirme Yetkisinin Çerçevesi (MSc Thesis, Istanbul University 2013)

Court Decisions

- Abdulaziz, Cabales And Balkandali v. The United Kingdom, Application no. 9214/80, ECtHR
- Ahmut v. The Netherlands, Application no. 21702/93, ECtHR

- Benjamin Ngambi and Marie-Louise Nébol v. France, CCPR/C/81/D/1179/2003, ECtHR
- Boultif v. Switzerland, Application no. 54273/00, ECtHR
- Farag El Dernawi v. Libya, No. 1143/2002, CCPR/C/90/D/1143/2002, ECtHR
- Gonzalez v. Republic of Guyana, Communication No. 1246/2004, ECtHR
- Gül v. Switzerland, Application no. 23218/94, ECtHR
- Jonny Rubin Byahuranga v. Denmark, Communication no. 1222/2003, ECtHR
- Madafferi v. Australia, Communication no. 1011/2001, ECtHR
- Osman v. Denmark, Application no. 38058/09, ECtHR
- Pajić v. Crotia, Application no. 68453/13, ECtHR
- Sen v. The Netherlands, Application no. 31465/96, ECtHR
- Tuquabo-Tekle And Others V. The Netherlands, Application no. 60665/00, ECtHR

Legislation, Reports

- 1945 United Nations Charter
- 1966 Bangkok Principles on the Status and Treatment of Refugees
- 1967 Protocol Relating to the Status of Refugees
- 5901 sayılı Türk Vatandaşlığı Kanunu
- 6458 sayılı Yabancılar ve Uluslararası Koruma Kanunu
- American Convention On Human Rights
- Charter of the United Nations
- Consideration of Reports Submitted By States Parties Under Article 40 Of The Covenant, CCPR/C/DNK/CO/6, Denmark
- Consideration Of Reports Submitted By States Parties Under Article 40 Of The Covenant, CCPR/C/FRA/CO/4, France
- Consideration Of Reports Submitted By States Parties Under Article 40 Of The Covenant, CCPR/C/79/Add. 70, Switzerland
- Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification
- Council of Europe Commissioner for Human Rights. Realising the right to family reunification of refugees in Europe
- Convention on the Rights of the Child

- Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.
- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted
- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted
- Dr. Auguste R. Lindt, United Nations High Commissioner for Refugees, at the 10th meeting of the Council of the Inter-Governmental Committee for European Migration (ICEM), Naples, 5 December 1960 https://www.unhcr.org/admin/hcspeeches/3ae68fb820/speech-dr-auguste-r-lindt-united-nations-high-commissioner-refugees-10th.html
- Dublin II Regulation, Regulation (EC) No 343/2003 of 18
- European Social Charter, Strasbourg, 3.V.1996
- ECSR, Conclusions Article 19-6", Austria, 2015/def/AUT/19/6/EN, 2015
- Geçici Koruma Yönetmeliği
- Grand National Assembly of Turkey, Draft Law on Foreigners and International Protection
- International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976
- International Convention on the Protection of the Rights of All Migrant Workers and Members of
- The 1951 Refugee Convention
- The Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems
- The Universal Declaration of Human Rights
- UNHCR, A Thematic Compilation Of Executive Committee Conclusions, 2014
- UNCHR, Background Note On Family Reunification In The Context Of Resettlement And Integration, 2001

- UNCRC, Consideration of reports submitted by states parties under Article 44 of the Convention – Concluding Observations: Poland", 70th Session, UN Doc CRC/C/POL/CO/3-4, 2015
- UNHRC, CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986
- UNCRC, General Comment No 6: Treatment of unaccompanied and separated children outside their country of origin, 39th Session, UN Doc CRC/GC/2005/6, 2005
- UNHCR, "Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons", A/CONF.2/108/Rev.1
- UNHCR, Note on family reunification (UNHCR, August 1981) and UNHCR, Guidelines on reunification of refugee families, 1983
- UN Human Rights Committee (HRC), CCPR General Comment No. 19 Protection of the Family, the Right to Marriage and Equality of the Spouses

Websites

- https://www.amnesty.org.tr/icerik/turkiye-65-yil-once-imzalanan-cenevre-multeci-sozlesmesine-koydugu-sinirlamayi-kaldirmalidir
- https://www.coe.int/en/web/commissioner/-/ending-restrictions-on-family-reunification-good-for-refugees-good-for-host-societies
- https://dictionary.cambridge.org/dictionary/english/asylum-seeker
- https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_family_reunification_sr_final.pdf
- http://www.eltoma-property.com/why-foreign-workers-cant-work-in-the-public-sector-in-cyprus/
- https://multeciler.org.tr/turkiyedeki-suriyeli-sayisi/
- https://refugeesmigrants.un.org/definitions
- https://www.schengenvisainfo.com/schengen-visa-countries-list/
- https://www.unhcr.org/neu/27059-unhcr-welcomes-swedens-decision-to-re-introduce-access-to-family-reunion.html

ENTRUSTING THE SECRETARY TO THE TRIBUNAL WITH THE PREPARATION OF THE ARBITRAL AWARD: TAKING THE AIM AT THE ARBITRATOR'S OWN ASSESSMENT OF *COÛT D'OPPORTUNITÉ*

Hakem Heyeti Sekreterinin Hakem Kararının Hazırlanmasıyla Görevlendirilmesi: Hedefi Hakemlerin Kendi Fırsat Maliyeti Değerlendirmesine Almak

Berk Hasan ÖZDEM*

Research Article

Abstract

Given the overwhelming workload, particularly in large international arbitrations, it is not uncommon for a tribunal to appoint an arbitral secretary who works with the arbitrators for the purpose of contributing to the process by carrying out the tasks entrusted by them. Although it is generally accepted that such assistance may be beneficial both for the parties and the tribunal, the lack of consensus is on the permissible scope of secretaries' activities. Amongst many other tasks that raise concerns as to an improper derogation of responsibilities, the crux of the controversy centres on the practice of entrusting the secretary with the drafting of the arbitral award. Following the explanation of three different views on the issue, this paper offers a practical solution for the parties who do not wish to encounter secretary-related problems in the enforcement of their awards and assessments for the arbitrators of some situations that might occur in practice.

Keywords Arbitration, Arbitral Award, Arbitral Secretary, Delegation, Draft, Intuitu Personae, Mandate, Secretary to the Tribunal.

Özet

Özellikle büyük uluslararası tahkimlerde söz konusu olabilen çok yoğun iş yükü nedeniyle, hakem heyetlerinin kendisine verilecek görevleri yerine getirerek tahkim yargılaması sürecine katkıda bulunmak amacıyla çalışacak bir hakem heyeti sekreteri ataması nadir rastlanılan bir durum değildir. Bu tür yardımların hem uyuşmazlığın tarafları hem de hakem heyeti açısından yararlı olabileceği genel olarak kabul edilmekle birlikte, bu konudaki tartışmalı mesele hakem heyeti sekreterlerinin faaliyetlerinin uygun kapsamına ilişkindir. Hakemlerin sorumluluklarının uygun olmayan bir şekilde derogasyonuna ilişkin endişe uyandıran diğer birçok görev arasında, ihtilafın özü, hakem kararlarının hazırlanmasını sekreterlere emanet etme uygulamasında toplanmaktadır. Konuyla ilgili üç farklı görüşün açıklanmasının ardından bu makale hakem kararlarının uygulanmasında hakem sekreterlerinin faaliyetleri ile ilgili sorunlar yaşamak istemeyen taraflar için pratik bir çözüm ve uygulamada karşılaşılabilecek bazı durumlar için hakemlere değerlendirmeler sunmaktadır.

Anahtar Kelimeler Tahkim, Hakem Kararı, Hakem Sekreteri, Delege Etme, Hazırlama, Arbitration, Intuitu Personae, Görev, Hakem Heyeti Sekreteri.

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INTRODUCTION

Arbitration is a dispute resolution process where parties agree to settle the disputes that have arisen or may arise between them by persons called arbitrators instead of state courts.[1] As a foundational principle that the contemporary arbitration is predicated on, 'party autonomy' reflects the ultimate power of the parties to determine the character, administration and other details of the arbitration.[2] As an outcome of this principle, parties are entitled to designate their arbitrator.[3] Since appointments are made based on the arbitrators' personal qualifications and reputation, parties' choice of an arbitrator is considered to be *intuitu personae*[4]; in other words, it is 'in view of the person' or 'because of the

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1 Saim Üstündağ, *Kanun Yolları ve Tahkim* (İstanbul Üniversitesi 1968) 68; Rasih Yeğengil, *Tahkim (L'Arbitrage)* (Cezaevi Matbaası 1974) 94; Ziya Akıncı, *Milletlerarası Tahkim* (Vedat Kitapçılık 2010) 5.

2 Julian D.M. Lew, Loukas A. Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 4; Tracey Timlin, 'The Swiss Supreme Court on the Use of Secretaries and Consultants in the Arbitral Process' (2016) 8 Yearbook on Arbitration Mediation 268, 268; See, İbrahim Doğan Takavut, *Milletlerarası Ticari Tahkimde Doğrudan Uygulanan Kurallar* (On İki Levha Yayıncılık 2018) 7–31; As regards the limits of such autonomy see generally, Burak Huysal, 'Milletlerarası ticari tahkimde hakemlerin müdahaleci kuralları uygulama yükümlülüğü' Maltepe Üniversitesi Hukuk Fakültesi Dergisi, 1(1-2) Maltepe Üniversitesi Hukuk Fakültesi Dergisi 129; See also, as regards party autonomy and multiparty arbitration, Pelin Akın, 'Uluslararası Tahkimde Çok Taraflılık' 18(3-4) Gazi Üniversitesi Hukuk Fakültesi Dergisi 299.

3 Pierre Lalive, 'Le choix de l'arbitre' in Mélanges Jacques Robert, *Libertés*, (Montchrestien 1998) 353, 363; Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, 'Secretaries to International Arbitral Tribunals' (2006) 17 American Review of International Arbitration 575, 586; Cevdet Yavuz, 'Türk Hukukunda Tahkim Sözleşmesi ve Tabi Olduğu Hükümler' in *Marmara Üniversitesi Hukuk Fakültesi II. Uluslararası Özel Hukuk Sempozyumu "Tahkim"* (Istanbul 2009) 133, 133 <http://dosya.marmara.edu.tr/huk/Sempozyumyayınları/ll.%20Uluslararası%20Özel%20Hukuk%20Sempozyumu/3prof.dr.cevdet_yavuz.pdf> accessed 15 January 2020; Selvi Nazlı Güvenç Uluçlar, 'Tahkim Anlaşmasının Hukuki Niteliği', T.C. İstanbul Ticaret Üniversitesi Dış Ticaret Enstitüsü Tartışma Metinleri WPS NO/ 47/2016/08 <https://www.ticaret.edu.tr/uploads/dosyalar/921/TAHKİM%20SÖZLEŞMESİNİN%20HUKUKİ%20NİTELİĞİ.pdf> accessed 15 January 2020; For the theories concerning the mandate of arbitrators see, Hong-Lin Yu and Masood Ahmed, 'Keeping the Invisible Hand under Control? -Arbitrator's Mandate and Assisting Third Parties' (2016) 19(2) Vindobona Journal of International Commercial Law and Arbitration 213, 216–220.

4 'It is axiomatic say of an arbitrator's mission that it is 'intuitu personae'.' Constantine Partasides, 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration' (2002) 18 Arbitration International 147, 147, citing Frédéric Eisemann, 'Déontologie de L'Arbitre Commercial International' (1969) 4 Revue de I'Arbitrage 217, 229; Pierre Lalive, 'Mission et Démission des Arbitres Internationaux' in Marcelo Kohen, Robert Kolb and Djacoba Liva Tehindrazanarivelo (eds) *Perspectives of International Law in the 21st Century / Perspectives du Droit International au 21e Siecle: Liber Amicorum Professor Christian Dominica in Honour of His 80th Birthday* (Bilingual edn, Brill-Nijhoff 2011) 269, 277; Guy Keutgen and Georges-Albert Dal (avec la collaboration de Marc Dal

person'.[5] Hence, the arbitrators 'must fulfil their mandate personally, without delegation to a third party'.[6]

However, particularly in large international arbitrations, the tremendous amount of evidence submitted, as well as the voluminous size of the memorials exchanged and the considerable length of multiple witness hearings, may leave the sole or the presiding arbitrator with an ample workload.[7] When sufficient administrative support is not provided by an arbitral institution,[8] the facilities available to the representatives of the parties in handling such extensive documentation are often disproportionate to those at the tribunal's disposal.[9] In view of this overwhelming workload that tribunals comprised of one or three human beings hardly have the means to manage,[10] it becomes old-fashioned to dwell on 'the idea of the lone arbitrator sitting among a mass of files and papers in a stuffy office somewhere churning out flawless legal prose with a fountain pen.'[11]

et Gautier Matray), *L'arbitrage en droit belge et international* (3rd edn, Bruylant 2015) para 264; Damien Charlotin, 'Identifying the Voices of Unseen Actors in Investor-State Dispute Settlement' in Freya Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (Cambridge University Press 2019) 392, 408; cf. As to possibility that the identity of the arbitrator may not be a subjectively essential element of the arbitration agreement and that the appointment may not be *intuitu personae* see, Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *International Arbitration: Law and Practice in Switzerland* (3rd edn, Oxford University Press 2015) 158–159; Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007) 245ff.

5 Michael Polkinghorne and Charles Rosenberg, 'The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard' (2014) 8 Dispute Resolution International 107, 107–108; Timlin (n 2) 268.

6 Lalive (n 4) 274; Kaufmann-Kohler and Rigozzi (n 4) 235; Francisco Blavi and Gonzalo Vial, 'The Tribunal Secretary in International Arbitrations' (2017) 30 New York International Law Review 1, 4; James U. Menz and Anya George, 'How Much Assistance Is Permissible? A Note on the Swiss Supreme Court's Decision on Arbitral Secretaries and Consultants' (2016) 33 Journal of International Arbitration 311, 313; Gary Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) 2043.

7 Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999) 683; Alan Redfern and others, *Law and Practice of International Arbitration* (4th edn, Sweet & Maxwell 1999) 224.

8 See, United Nations Commission on International Trade Law 'Draft Notes on Organizing Arbitral Proceedings: report of the Secretary-General (A/CN.9/423)' in *Yearbook of the United Nations Commission on International Trade Law Vol. XXVII (A/CN.9/SER.AI)* (United Nations 1996) 45, 50.

9 Gaillard and Savage (n 7) 683.

10 Lalive (n 4) 270

11 Zachary Douglas, 'The Secretary to the Arbitral Tribunal' in Bernhard Berger and Michael E. Schneider (eds) *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions (ASA Special Series No. 42)* (Juris 2014) 87, 88–89.

Secretary to the Arbitral Tribunal and the Bitter Controversy

The secretary to the arbitral tribunal/arbitral secretary[12] is generally a junior lawyer[13] who works with the tribunal for the purpose of contributing to the process by carrying out the tasks entrusted to him/her by the arbitrators. According to the 2014 Young ICCA Guide,[14] these tasks in practice charge the secretaries with many different functions concerning both the case file and the hearings. Some case file related tasks that are enumerated in the 2014 ICCA Guide may be listed as follows:

a. Handling correspondence and evidence
b. Communicating with the parties on behalf of the arbitral tribunal
c. Reminding deadlines to the parties
d. Performing legal research
e. Analysing parties' submissions
f. Drafting part of the award
g. Drafting the entire award
h. Participating in the deliberations for the chairperson
i. Giving his/her view on the matter to the arbitral tribunal and
j. Taking part in the decision-making process of the arbitral tribunal[15]

In addition to these, there are other tasks which are especially related to the hearings, for instance:

a. Organising the hearings with the parties[16] and
b. Taking the minutes

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12 As to the terminology of the present paper, the author would like remark that the terms 'secretary', 'secretary to the arbitral tribunal' 'arbitral secretary' and 'assistant' are used interchangeably. See, Sofia Andersson, 'A Fourth Arbitrator or an Administrative Secretary? A Study on the Appointment and Authority of Arbitral Secretaries in Swedish Arbitral Proceedings' (Master's Thesis in Arbitration Law, Uppsala University 2015) 8–10; Yu and Ahmed (n 3) 221; For Russia's allegations regarding the difference between an 'arbitral secretary' and an 'arbitral assistant' in the annulment process of *Yukos* awards see, Writ of Summons (28 January 2015), 181ff <https://www.italaw.com/sites/default/files/case-documents/italaw4158_0.pdf> accessed 19 September 2019.

13 According to a survey conducted as part of the 2012 International Council for Commercial Arbitration (ICCA) Congress in Singapore, junior lawyers (%89.8), trainee lawyers (%26.5), experienced lawyers (%26.5) young arbitrators (%25.5), law students (%9.2), paralegals (%6.1) and office secretaries or assistants (%1) are sought for as secretaries to the tribunals. International Council for Commercial Arbitration, *Young ICCA Guide on Arbitral Secretaries* (The ICCA Reports No.1) (International Council for Commercial Arbitration 2014) 57; See, Keutgen and Dal (n 4) para 264; Partasides (n 4) 147.

14 International Council for Commercial Arbitration (n 13) 62.

15 Ibid.

16 Ibid.

Furthermore, arbitral secretaries may also be appointed for dealing with financial and tax-related issues particularly in the absence of an arbitral institution.[17]

While it is generally accepted that both the parties and the arbitrators would benefit from the assistance of a properly appointed, supervised and diligent secretary to keep the arbitral proceedings organized and on schedule,[18] there is a lack of consensus on the question of which tasks should a secretary be allowed to perform.[19] Arbitrators from different legal systems, and even within the same jurisdiction, hold contradictory views on the appropriate scope of secretaries' activities.[20] While there are arbitrators who restrict the involvement of their assistants exclusively to simple non-substantive clerical tasks, there are others who assign their assistants to more substantive duties such as analysing the parties' submissions, collecting case law or published commentaries, participating in the tribunal's deliberations and preparing the drafts of portions or even the entirety of awards.[21]

It is uncontroverted that a secretary should not be able to influence the decision of the tribunal; nevertheless, it is less clear is what kind of functions should be deemed risky.[22] While there are authors who put forward their concern about functions such as legal research,[23] drafting a summary of the research on points of law,[24] drafting factual chronologies and memoranda summarizing the parties' submissions and evidence,[25] compiling resources, and handling sole documentation of proceedings,[26] it would not be inaccurate to state that

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17 See, infra (n 18).

18 Guillermo Aguilar-Alvarez, 'Foreword' in International Council for Commercial Arbitration, *Young ICCA Guide on Arbitral Secretaries* (The ICCA Reports No.1) (International Council for Commercial Arbitration 2014) vii, vii; This may be provided by the secretaries' help with various administrative matters such as 'the coordination of funds, preparation of the arbitral tribunal's statements of fees and expenses, tax matters related to the fees of the tribunal and the distribution of submissions, orders and awards to the parties.' International Council for Commercial Arbitration (n 13) 12.

19 The 2012 International Council for Commercial Arbitration Survey indicates that respondents have divergent views on the question of 'What should the tasks of a secretary be?', International Council for Commercial Arbitration (n 13) 63.

20 Arthur W. Rovine, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill - Nijhoff 2010) 142.

21 Partasides (n 4) 149; Rovine (n 20) 142; Doug Jones, 'Ethical Implications of Using Paralegals and Tribunal Secretaries' (2014) 17 Hors Serie 251, 251.

22 Peter Ashford, *Handbook on International Commercial Arbitration* (Juris 2009) 143.

23 United Nations Commission on International Trade Law (n 8) para 27.

24 Yu and Ahmed (n 3) 224.

25 See, Aguilar-Alvarez (n 18) vii; Ashford (n 22) 143.

26 Courtney J. Restemayer, 'Secretaries Always Get a Bad Rep: Identifying the Controversy Surrounding Administrative Secretaries, Current Guidelines, and Recommendations' (2012) 4 Yearbook on Arbitration Mediation 328, 338–339; Michael Feit and Chloé

inter alia, the most controversial debate surrounding such delegation is on the preparation of a draft award.[27]

An arbitral award is a final decision issued by a sole arbitrator or an arbitral tribunal with regard to the merits of the dispute that is subject to the claims that are put forward by the parties.[28] Given that an incorrect drafting of the role of facts and the parties' arguments may lead to misunderstanding and misstating the award,[29] before examining the issue, it may be beneficial to briefly explain why this kind of a delegation with 'such importance resting on the pen of the secretary'[30] may occur. Like any method of alternative dispute resolution, international arbitration endeavours to increase the speed and lower the costs of the proceedings; in other words, it seeks to maximize the efficiency of the justice that it offers.[31] Leaving aside situations where some arbitrators accept too many cases concurrently and are thus led to delegate the duty of drafting to secretaries due to their lack of time,[32] Restemayer explains that 'the prominence grew, simply through necessity to the future of arbitration.'[33] Since the old reputation of arbitration proceedings as 'quick and cheap' is no longer sufficient in view of the fact that arbitrations are getting more and more expensive, it becomes necessary for practitioners and arbitral institutions to come up with cost-effective methods in order to survive in today's business.[34] Where the arbitrators are paid on an *ad valorem* basis, drafting every single word of every single award may not be time-efficient; where they are remunerated on

Terrapon Chassot, 'The Swiss Federal Supreme Court Provides Guidance on the Proper Use of Arbitral Secretaries and Arbitrator Consultants under the Swiss lex arbitri: Case Note on DFC 4A_709/2014 dated 21 May 2015' (2015) 33 ASA Bulletin 897, 897.

27 Yu and Ahmed (n 3) 222.

28 Hereby, it should be mentioned that in practice there are different types of awards that are issued by arbitral tribunals. These include final, partial, interim, consent and default awards. For the distinctions between types of awards as well as discussions regarding the "final" *(endgültig)* character of arbitral awards see, Ersin Erdoğan, *Hakem Kararlarının Kesin Hüküm Etkisi* (2nd edn, Yetkin 2020) 93ff.

29 See, Kyriaki Karadelis, 'The Role of the Tribunal Secretary' (Global Arbitration Review 21 December 2011) <www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/> accessed 19 September 2019;

30 Restemayer (n 26) 329.

31 Partasides (n 4) 156; Restemayer (n 26) 329; See generally, Loukas A. Mistelis, 'Efficiency. What Else? Efficiency as the Emerging Defining Value of International Arbitration: between Systems theories and party autonomy' (15 April 2019) Queen Mary School of Law Legal Studies Research Paper No. 313/2019 <https://ssrn.com/abstract=3372341> accessed 19 September 2019.

32 Pierre Lalive, 'On the Reasoning of International Arbitral Awards' (2010) 1 Journal of International Dispute Settlement 55, 57; Lalive (n 4) 274.

33 Restemayer (n 26) 329.

34 ibid 329; See also, generally, Pierre Lalive, 'Dérives arbitrales (II)' (2006) 24 ASA Bulletin 2, 8.

an hourly basis, it may not be cost-efficient.[35] Therefore, benefitting from the assistance of secretaries is a widely utilized method to lower costs in drafting awards.[36]

Three Different Approaches: the Strict, the Popular and the Liberal.

In answering the question of whether it is appropriate to entrust the secretary with the preparation of the draft award, the strictest –yet, the most risk-free– approach dictates that the tribunal should in no circumstances be released from its duty to personally draft the award and notes that the tribunal's responsibilities include the preparation of the award as part of its own personal mandate without drawing a distinction between substantive and non-substantive or adjudicative and non-adjudicative parts.[37] For instance, Professor Lalive –who is said to be '[a]n outspoken champion of the use of secretaries over the years'[38]– explains his view on the issue as follows:

> '[H]ow can the arbitrator be satisfied with indicating to his/her secretary or "*law clerk*" in what sense he/she should draft the sentence? How to admit that the form of the award would be independent of the substance and thus left to the activity of the secretary? Clearly, its content and expressions are inseparable and interdependent, and it is ultimately in the choice of words during the final drafting that the arbitrator will reach a relative certainty as to the correctness, and justice, of his decision. The "*intuitu personae*" mission of the international arbitrator, therefore, in principle does not allow any dichotomy, no delegation of this kind.'[39]

In parallel with Professor Lalive, Maynard notes that while a conscientious arbitrator, eager to fulfil his/her mandate responsibly, should have little difficulty in applying the clear distinction between appropriate delegation and irresponsible derogation, the secretaries' role in drafting awards should be

35 Polkinghorne and Rosenberg (n 5) 125.
36 Rovine (n 20) 139.
37 Yu and Ahmed (n 3) 222.
38 See, Partasides (n 4) 148.
39 ('[C]omment en effet l'arbitre pourrait-il se contenter d'indiquer à son secrétaire ou « *law clerk* » dans quel sens il doit rédiger la sentence? Comment admettre que la forme de celle-ci serait indépendante du *fond* et donc laissée à l'activité du secrétaire? À l'évidence, contenu et expressions de celui-ci sont inséparables et interdépendants, et c'est finalement lors de la rédaction finale, dans le choix des mots, que l'arbitre parviendra à une relative certitude quant à la justesse, et à la justice, de sa décision. La mission de l'arbitre international « *intuitu personae* », ne permet donc en principe aucune dichotomie, aucune délégation de ce genre.') Lalive (n 4) 277.

restricted.[40] Onyema likewise mentions that the task of writing portions of the award should not delegated to the arbitral secretaries.[41]

According to the authors sharing this view, the secretary might be regarded as influencing the tribunal when he/she is given writing assignments as to the award.[42] For instance, Souleye states that 'any research performed or draft prepared by the arbitral secretary necessarily finds its roots in the secretary's perspective, and thus might improperly influence the arbitrator's own evaluation.'[43] Such delegation was also mentioned to be inappropriate in the context of investor-state arbitration by Professor Dalhuisen via his additional opinion in the case of *Compañía de Aguas v Argentina*, where he criticised the expanded role of tribunal secretaries in ICSID arbitrations with the following words:

> "During cross-examination it was asked why and questioned how some arbitrators could do so many cases. One way is to farm out the drafting to others, in the case of ICSID to the Secretariat. There appears to be much appreciation for this by busy arbitrators, but it is improper."[44]

While the first approach strictly restricts the involvement of a third party in the drafting process, there are authors who are of the view that such an absolute prohibition is not necessary[45] and that, although they should never be permitted to draft the substantive portions, secretaries may be allowed to draft non-substantive parts of the awards.[46] According to those who advocate this view,

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40 Simon Maynard, 'Laying the fourth arbitrator to rest: re-evaluating the regulation of arbitral secretaries' (2018) 34 Arbitration International 173, 182.

41 Emilia Onyema, 'The Role of the International Arbitral Tribunal Secretary' (2005) 3 Transnational Dispute Management para 4 <https://www.transnational-dispute-management.com/article.asp?key=452> accessed 19 September 2019.

42 Lawrence W. Newman and David Zaslowsky, 'The Yukos Case: More on the Fourth Arbitrator' (New York Law Journal 28 May 2015) <www.private-dispute-resolution.com/uploads/Newman_Zaslowsky_2015_The%20Yukos%20Case.pdf> accessed 19 September 2019.

43 Alexandre-Yacine Souleye, 'Fourth chair: the controversial role of arbitral tribunal secretaries' (Young ICCA Blog 16 February 2017) <http://www.youngicca-blog.com/fourth-chair-the-controversial-role-of-arbitral-tribunal-secretaries/> accessed 19 September 2019.

44 *Compañía de Aguas del Aconquija SA & Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3 (Annulment Proceeding), Additional Opinion of Professor Jan Hendrik Dalhuisen under Art 48(4) of the ICSID Convention, 30 July 2010, [8].

45 Partasides (n 4) 158.

46 Blavi and Vial (n 6) 12; For instance Polkinghorne and Rosenberg (n 5) 125–126; This view was criticized by a practitioner during a Global Arbitration Review event in London suggesting even limited merely to the 'mechanistic' parts of award, such as the facts or procedure, delegating the duty of drafting to the secretary constitutes a problem since the act of intellect through the facts and the parties' arguments is 'key' to the arbitrator's

unlike non-substantive parts, it is the essential duty of drafting the substantive portion of an award which 'goes to the heart of the arbitration' and must remain with the arbitrators due to the principle of *intuitu personae*.[47] Authors who share this view also underline the risk that if drafting substantial portions are left to the secretary, the evaluation of the arbitrators may be improperly influenced by the latter's perspective, which may be sunk into the reasoning or dispositive section of the award.[48] For instance, according to Partasides

> 'in those cases where jurisdiction has not been disputed, an arbitrator might legitimately ask a secretary to produce a first draft of those parts of an award identifying the parties and describing the basis of the arbitral tribunal's jurisdiction without sacrificing decision-making control. Similarly, in those cases where the procedural decisions taken by the tribunal have not been controversial, an arbitrator might responsibly charge a secretary to produce a first draft of that part of the award in which the procedure is described. In exceptional cases, where the facts of a dispute or even its outcome are in the tribunal's view sufficiently clear and uncontroversial, decision-making control may not be sacrificed even by having a secretary produce a first draft of that part of the award in which the dispute is described or the merits discussed. An absolute prohibition would ignore such distinctions in a way that could only undermine its legitimacy.'[49]

This view is also shared by Waincymer, who states that a secretary should be able to draft the introductory part of an award which may consist of outlining the identities of the parties and counsel, the procedural history and a brief summary of the non-controversial facts.[50] Waincymer expresses that these latter merely concern non-contentious information on certain agreed or uncontested matters.[51] Polkingthorne and Rosenberg support this view as well, provided that two conditions are fulfilled: the secretary must be provided with detailed instructions before drafting and the draft must be subjected to

decision-making. See, Karadelis (n 29).

47 Polkinghorne and Rosenberg (n 5) 126.

48 ibid; Similarly, Rovine explains that 'any function beyond the purely administrative carries with it the possibility of influencing the tribunal's decision, despite the fact that the ultimate decision maker remains the tribunal.' Rovine (n 20) 142.

49 Partasides (n 4) 158.

50 Jeff Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012) 446; See also, 'These specific tasks could be required to be undertaken by an assisting third party in order to furnish purely descriptive information to the tribunal which would *not* include the third party's interpretation, analysis or application of the law to the issues in dispute.' Yu and Ahmed (n 3) 239–240.

51 ibid 446.

the meticulous examination of the tribunal before finalization.[52] It may be said that this approach, which draws a distinction between substantive and non-substantive, is also indicated by Hon. Mr Justice Popplewell in the case of *P v Q*,[53] where he noted that:

> '[c]are must be taken to ensure that the decision-making is indeed that of the tribunal members alone. The safest way to ensure that that is the case is for the secretary not to be tasked with anything which involves expressing a view on the substantive merits of an application or issue. If he is so tasked, there may arise a real danger of inappropriate influence over the decision-making process by the tribunal, which affects the latter's ability to reach an entirely independent minded judgment. The danger may be greater with arbitrators who have no judicial training or background, than with judges who are used to reaching entirely independent adjudicatory decisions with the benefit of law clerks or other junior judicial assistants. However, the danger exists for all tribunals. Best practice is therefore to avoid involving a tribunal secretary in anything which could be characterised as expressing a view on the substance of that which the tribunal is called upon to decide. If the secretary's role is circumscribed in this way, the parties can have confidence that there is no risk of inappropriate influence on the personal and non-delegable decision-making function of the tribunal.'[54]

A survey conducted by White & Case and Queen Mary University of London, which surveyed 710 respondents (including private practitioners, arbitrators, in-house counsel, counsel from arbitral institutions, academics, and expert witnesses), indicates that this view is favoured by the participants since 75 percent of them were of the opinion that tribunal secretaries should be able to prepare 'non-substantive parts of awards.'[55] This tendency is also

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52 Polkinghorne and Rosenberg (n 5) 126.

53 [2017] EWHC 194 (Comm).

54 Nevertheless, Justice Popplewell continued as follows 'However a failure to follow best practice is not synonymous with failing properly to conduct proceedings within the meaning of s. 24(1)(d) of the [Arbitration] Act. Soliciting or receiving any views of any kind from a tribunal secretary on the substance of decisions does not of itself demonstrate a failure to discharge the arbitrator's personal duty to perform the decision-making function and responsibility himself. That is especially so where, as in this case, the relevant arbitrator is an experienced judge who is used to reaching independent decisions which are not inappropriately influenced by suggestions made by junior legal assistants.' ibid [68].

55 White & Case and Queen Mary University of London School of International Arbitration, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, 43 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf> accessed 19 September 2019.

confirmed by the results of another survey conducted by the International Council for Commercial Arbitration, where amongst 63.4 percent of the respondents who considered that an arbitral secretary should draft some part or parts of the award, 84.9 percent of them were comfortable with the preparation of the 'Procedural Background'; 69.4 percent with the 'Factual Background' and 65.3 percent with the 'Parties' Positions' as a first draft by the secretary.[56] Furthermore, a survey of a small number of highly prominent international arbitrators conducted by the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association reveals that 50 percent of the participants (11 out of 22) state that '[i]t is common for secretaries to draft certain portions of awards, which the chair considers to be "descriptive" or "non-substantive," namely, the procedural history of the arbitration, the description of the parties, and sometimes also the summary of the parties' contention.'[57]

Finally, according to a 'more liberal'[58] –yet, apparently less favoured[59]– approach, as long as it reflects the tribunal's decision, drafting the award should be acceptable. This practice is advocated[60] as 'reflecting a conversation'[61] 'rather than an invitation for secretaries to give opinion'.[62] It is stated that the Swiss Federal Supreme Court also anchored itself 'at the more liberal end of the spectrum'[63] with an *obiter dictum* in its decision[64] dated 21 May 2015 where it expressed some opinions on the issue:

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56 International Council for Commercial Arbitration (n 13) 15, 79.

57 International Commercial Disputes Committee and Committee on Arbitration of the New York City Bar Association (n 3) 584–585.

58 Blavi and Vial (n 6) 13.

59 Delegating secretaries the duty to prepare drafts of substantive parts of awards received the support of only 13 percent of the participants in the survey of White & Case and Queen Mary University. White & Case and Queen Mary University of London (n 55) 43; In the 2013 survey conducted by International Council for Commercial Arbitration 67 percent of respondents opposed to an arbitral secretary being tasked with drafting the entirety of the award. International Council for Commercial Arbitration (n 13) 15, 79. In the survey of International Commercial Disputes Committee and Committee on Arbitration of the New York City Bar Association only 3 participants out of 22 agreed that '[i]n some cases, secretaries prepare a first draft of the award in its entirety.' International Commercial Disputes Committee and Committee on Arbitration of the New York City Bar Association (n 3) 584–585.

60 Jerry Yulin Zhang, 'Arbitration Award' in Daniel R. Fung and Wang Sheng Chang (eds) *Arbitration in China: a practical guide* (Sweet & Maxwell 2004) 215, 11-05(d).

61 See, Karadelis (n 29).

62 Restemayer (n 26) 339.

63 Menz and George (n 6) 311; See generally Timlin (n 2).

64 Tribunal Federal 4A_709/2014 21 May 2015. English translation available at <http://www.swissarbitrationdecisions.com/sites/default/files/21%20mai%202015%204A%20709%202014.pdf> accessed 19 September 2019.

> 'The role of the legal secretary is comparable to a clerk in state proceedings: to organize the exchange of briefs, to prepare the hearings, to keep the minutes, to prepare the statements of costs, etc. They do not exclude certain assistance in drafting the award under the control of and in accordance with the directives from the arbitral tribunal, or if it is not unanimous, from the majority arbitrators, which presupposes that the secretary participates in the hearings and the deliberations of the arbitral tribunal.'[65]

Feit and Chassot state that this passage should be construed to mean that the duty of drafting substantial parts of the award can also be entrusted to the arbitral secretary, since it would make little sense to require the arbitral secretary's participation in the hearings and deliberations if his/her tasks were limited to the non-substantive portion of the award.[66] According to Feit and Chassot, the references given by the Federal Court, namely those to Göksu[67] and Kaufmann-Kohler and Rigozzi,[68] further support such interpretation given the fact that while the possibility for taking assistance in drafting the award is accepted in both publications, neither of these authors mention that the function of the arbitral secretary should be restricted to the particular sections.[69] This view is also held by Heuman, who contends that should the appointment of a secretary is confirmed by the parties, the parties can be deemed to have accepted that the duty of preparing the draft may be delegated as long as the tribunal provides guidance on how the rationale must be written.[70]

Such 'more liberal' opinion more or less reminds of the case of *Oliva v Heller,*[71] where the United States Court of Appeals for the Second Circuit held that:

> ' [...] the work done by law clerks is supervised, approved, and adopted by the judges who initially authorised it. A judicial opinion is not that of the law clerk, but of the judge. Law clerks are simply extensions of the judges at whose pleasure they serve.'[72]

Applying a similar reasoning to international arbitration, one may ask: Does it make a difference who drafted the award as long as secretary is supervised

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65 ibid 3.2.2.

66 Feit and Chassot (n 26) 908.

67 Tarkan Göksu, *Schiedsgerichtsbarkeit* (Dike 2014) n. 879.

68 Gabrielle Kaufmann-Kohler and Antonio Rigozzi, *Arbitrage international : droit et pratique à la lumière de la LDIP* (2nd edn, Bern 2010) 678.

69 Feit and Chassot (n 26) 908.

70 Lars Heuman, *Arbitration Law of Sweden: Practice and Procedure* (Juris 2003) 493; See also Andersson (n 12) 57ff.

71 839 F.2d 37 (2d Cir. 1988).

72 839 F.2d 37 (2d Cir. 1988) [40].

by the arbitrator and the draft award is subsequently carefully reviewed by the tribunal? After all, if an arbitrator is eager to delegate the decision-making process to a third party, would not this willingness to derogate from his/her duty by adjudicating without having sufficiently worked on the case constitute a problem on its own, regardless of the appointment of a secretary?[73] However, the issue may not be that simple.[74]

First, notwithstanding the guidance provided by the tribunal, an award which is initially drafted by a secretary may unavoidably contain this latter's own assessment of the issues,[75] and even the tribunal's subsequent scrutiny of this draft does not entirely eliminate the ability granted to the secretary to make decisions as to what to emphasize and what to omit since an arbitrator reviewing the draft may not even be able to identify these decisions.[76] A similar concern also found voice in the expert opinion[77] of Professor Bermann offered in the DC Circuit proceedings of the flamboyant *Yukos* saga. Bermann explained that irrespective of the degree of care a tribunal brings to its subsequent review:

> '[a]s a general rule, the drafting of the substantive parts of the final award, which include its operative part, must be reserved for the arbitral tribunal. *It is particularly in this substantive section where writing one's own text instead of reading the text prepared by someone else remains the ultimate means of intellectual control of the tribunal's decision of the dispute* as the essential tool for safeguarding the proper performance of the arbitrators' personal decision-making duty owed to the parties that have appointed them, thereby preserving the integrity of the arbitral process as such.'[78]

Authors who consider drafting the award the 'ultimate safeguard of intellectual control'[79] over the decision-making process believe that writing at least the substantial parts of the award is the only way to avoid any influence

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73 Partasides (n 4) 158.

74 ibid 158ff.

75 Waincymer (n 50) 446; Yu and Ahmed (n 3) 224–225.

76 Partasides (n 4) 158.

77 D.C, *Hulley Enterprises Ltd., Yukos Universal Ltd*., and *Veteran Petroleum Ltd., v. The Russian Federation*, Case No. 1:14-cv-01996-ABJ, Document 24-7, Expert Opinion of Professor George A. Bermann, Filed on 20 October 2015.

78 ibid [94]; Klaus Peter Berger, Part III, '27'th Scenario: Deliberation of the Tribunal and Rendering of the Award' in Klaus Peter Berger, *Private Dispute Resolution in International Business Negotiation, Mediation and Arbitration* (3rd revised edn, Kluwer Law International 2015) 613, para 27-19.

79 See, Partasides (n 4) 158; Charlotin (n 4) 408; cf Despite strongly believing that the act of writing is the ultimate safeguard of intellectual control of the tribunal's decision of the dispute, Douglas appreciates that there may also be other legitimate ways to satisfy the parties in an arbitration.' Douglas (n 11) 89.

on the part of the secretary and thus fulfil the *intuitu personae* mandate of the tribunal.

Moreover, delegating the duty of drafting may significantly affect the quality of the award. Charlotin emphasizes the crucial role of 'the act of writing' by citing Sir Frank Kitto, who was a Justice of the High Court of Australia from 1950 to 1970, when he left to become Chancellor of the University of New England.[80] In his paper presented to a 'Convention of Judges of the High Court and of the Supreme Courts of the States and Territories' in 1973, Sir Kitto explains that:

> 'only in the throes of putting ideas down on paper, altering what has been written, altering it a dozen times if need be, putting it away until the mind has recovered its freshness, even tearing it up and starting again, can most of us hope to get, in a difficult case, the fruits of the requisite intensity of penetrating thought.'[81]

Accordingly, it matters that the arbitrators hold the pen of the decision not only because of the *intuitu personae* mandate that they have, but also due to the expectation of the parties to receive the most compelling judicial outcome.[82] In other words, by delegating the draft award to their secretaries, arbitrators 'miss out on the re-thinking and re-examination of their views that flow from having to wrestle with the task of writing.'[83]

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80 Charlotin (n 4) 407–408.

81 Although it was presented in 1973, the paper was published in 1992. Sir Frank Kitto, 'Why Write Judgments?' (1992) 66 Australian Law Journal 787, 796; See Stephen Gageler, 'Why Write Judgments?' 36 Sydney Law Review 189.

82 Charlotin (n 4) 408; '[…] it seems that the multiplication of appeals based on Article 190 al. 2 PILA reflects, at least in part, an increase in low quality, confused or erroneous, and poorly drafted awards - whether by the arbitrator himself or (according to a recent mode in worrying progress) by the collaborator to whom he or she would have delegated his task' ('[…] il semble bien que la multiplication des recours fondés sur l'Article 190 al. 2 LDIP reflète, pour partie au moins, une augmentation des sentences de qualité médiocre, confuses ou erronées, et mal rédigées – que ce soit par l'arbitre lui-même ou (selon une mode récente en inquiétants progrès) par le collaborateur auquel il aurait délégué sa tâche' Pierre Lalive, 'L'Article 190 al. 2 LDIP a-t-il une utilité ?') (2010) 28 ASA Bulletin 726, 728; But see also the response from Schweizer to Professor Lalive, '[…] I will not let you say, without rebelling, even if only with an eyebrow, that a part of the mediocre quality of the Swiss awards is due to the call in question, if I may say so, to the "collaborators"!' ('[…] ne vous laisserai-je pas dire, sans me rebiffer ne serait-ce que d'un lever de sourcil, qu'une partie de la qualité médiocre des sentences suisses est due à l'appel en cause, si je puis dire, de « collaborateurs » !') Philippe Schweizer, 'Correspondance Au Sujet de L'Article 190(2) LDP: Quelques lignes en réponse à l'article du Professeur Lalive « L'article 190 al. 2 LDIP a-t-il une utilité ? »' (2011) 29 ASA Bulletin 66.

83 This view was expressed by Wiehern when criticizing the influence of the law clerks at the US Supreme Court. Nadine J. Wiehern, 'A Court of Clerks, Not of Men' (1999) 49 De Paul Law Review 621, 662.

On the other hand, could not it be argued that with the arbitrator's guidelines and subsequent scrutiny a secretary, especially an extremely competent one with excellent linguistic and rhetoric skills, can draft a flawless award, better than the one that the party-appointed arbitrator would ever be able to draft alone? Perhaps he or she can. Perhaps an award drafted by such prodigy even minimises the risk of a challenge. However, does not a party in arbitration, differently than the state courts, appoint its arbitrator already believing that he or she is the best choice amongst others to resolve the dispute? Even in the case that a party which abstains from bringing the dispute to the state courts cannot designate the arbitrator it deems the 'best' but a less desired one due to the unavailability of the former, does not the party appoint that arbitrator because it trusts that he/she is sufficiently competent to decide on the dispute? If this is the case, and if it is nothing but 'axiomatic' to say that a party's choice of an arbitrator is *intuitu personae*, do parties really need a better version of what they already believe to be the best or sufficient? Yet, what happens if the arbitrator himself/herself is absolutely sure that the draft of his/her 'miraculous secretary' is nothing but excellent?[84] In other words, what happens if the person appointed as the best choice to settle the dispute strongly believes that the best way decide on the case is to use the secretary's draft? From the contractual viewpoint, does a party designate an arbitrator because it trusts that the arbitrator *himself/herself* decides in the best way, or because it believes that no matter what he/she does and what kind of assistance he/she takes, *at the end* he/she comes with the best award? However, if the issue is the latter, what is the difference between the logic of having a secretary to draft the award and of –assuming a case where confidentiality is not invoked– calling an elite group of arbitrator friends to barbeque to jointly draft the award at the poolside afterwards? After all, is it not the arbitrator who believes that the award would be better crafted with the help of several others? After all, is it not the arbitrator who supervises everything?

According to Yu and Ahmed, it may be argued that the obligation of writing an award by the tribunal itself is implied into the appointment agreement.[85] This view seems to be indicated by the Notes for Arbitrators of the London Court of International Arbitration which mentions that:

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84 A similar case found its way into the 2018 Philip C. Jessup Moot Court problem where the arbitrator had 'nothing to add' to the draft award prepared by the secretary. International Law Students Association, Philip C. Jessup International Law Moot Court 2018 Problem with Corrections & Clarifications (*Case Concerning the Egart and the Ibra* [*People's Democratic Republic of Anduchenca v. Federal Republic of Rukaruku*]) para 33 <https://www.ilsa.org/Jessup/Jessup18/2018%20Combined%20Compromis%20and%20CandC%20final.pdf> accessed 19 September 2019.

85 Yu and Ahmed (n 3) 224.

> 'An arbitrator's confirmation as to availability imports a commitment not only to devote sufficient time to the proceedings, over an appropriate timeframe, but also to *draft* any award promptly after the last submission from the parties (oral or written) on the issues to be addressed by that award'[86] [emphasis added]

A (bit scary) Solution for the Parties and Assessments for the Arbitrators

Leaving aside those that do not provide any guidance, restrictions on the scope of the secretaries' functions vary across different arbitral institutions.[87] For instance, HKIAC Guidelines as well as the ACICA Guideline allow the tribunal secretaries to draft non-substantive parts of awards (such as procedural histories and chronologies of events)[88] whereas the ICC Note on the Conduct of Arbitrations strictly restricts secretaries from drafting with the following words:

> 'A request by an Arbitral Tribunal to an Administrative Secretary to prepare written notes or memoranda shall in no circumstances release the Arbitral Tribunal from its duty personally to review the file and/or to draft any decision of the Arbitral Tribunal.'[89]

While the London Court of International Arbitration 'does not endorse any particular tasks as necessarily being appropriate for a tribunal secretary to carry out', it notes that an Arbitral Tribunal may wish to propose to which extent, if any, the tribunal secretary prepares the drafts of the substantive part of the award.[90] The UNCITRAL Notes on Organising Arbitral Proceedings[91]

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86 London Court of International Arbitration, LCIA Notes for Arbitrators 3.13. According to the LCIA notes arbitral tribunal may delegate the draft only with the parties' consent. <https://www.lcia.org/adr-services/lcia-notes-for-arbitrators.aspx> accessed 19 September 2019.

87 Polkinghorne and Rosenberg (n 5) 107–108.

88 Hong Kong International Arbitration Center, Guidelines on the Use of a Secretary to the Arbitral Tribunal, 3.4 <https://www.hkiac.org/images/stories/arbitration/HKIAC%20Guidelines%20on%20Use%20of%20Secretary%20to%20Arbitral%20Tribunal%20-%20Final.pdf> accessed 19 September 2019; Australian Centre for International Commercial Arbitration, ACICA Guideline on the Use of Tribunal Secretaries, para 11 <https://acica.org.au/wp-content/uploads/2017/01/ACICA-Tribunal-Secretary-Guideline.pdf> accessed 19 September 2019.

89 International Court of Arbitration of International Chamber of Commerce, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration (1 January 2019) para 187 <https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf> accessed 19 September 2019.

90 London Court of International Arbitration (n 86) para 71.

91 United Nations Commission on International Trade Law, UNCITRAL Notes on Organizing

and the JAMS Guidelines for Use of Clerks and Tribunal Secretaries in Arbitrations[92] content themselves with stating that the secretary cannot perform any decision-making function of the tribunal. According to the 2014 Young ICCA Guide, with appropriate direction and supervision by the tribunal, the role of the secretary may 'legitimately go beyond the purely administrative' and include drafting 'appropriate parts' of the award.[93]

Stating that the absence of a uniform standard fuels the debate, Polkingthorne and Rosenberg see no good reason for different arbitration institutions to place considerably different restrictions and call for greater uniformity of regulation.[94] According to the authors, the discrepancy between the restrictions provided by institutions on the role of arbitral secretaries provokes the uncertainty as to the proper role of the tribunal secretary, which is a potential perturbator to the perceived legitimacy of the arbitral process and the award.[95]

On the other hand, there are authors who mention that there may be simpler ways than promulgating yet another set of guidelines[96] since the bottom line is the danger posed by the lack of transparency and the informed consent of the parties.[97] As Maynard states, not only would a uniform standard be unlikely to satisfy all parties, but, as long as there is clarity, transparency and, above all, consent as to the role of the secretary, there seems to be no principled reason why there should not be a diversity in practice, allowing arbitral secretaries to be entrusted with different tasks contingent upon the institutional rules that the parties select.[98]

Indeed, the issue should not raise much concern in a case where both (or all) parties in an arbitration clearly give their permission to the secretary to draft the substantive part of the award and there is no deficiency with regard to the subsequent examination of the tribunal; neither should it in a case where the tribunal does not delegate any task to the secretary regarding the preparation

Arbitral Proceedings (March 2012) 12 <https://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf> accessed 19 September 2019.

92 Judicial Arbitration and Mediation Services, Guidelines for Use of Clerks and Tribunal Secretaries in Arbitrations <https://www.jamsadr.com/files/Uploads/Documents/JAMS-International-Guidelines-for-Use-of-Clerks-and-Tribunal-Secretaries-in-Arbitrations.pdf> accessed 19 September 2019.

93 International Council for Commercial Arbitration (n 13) 11.

94 Polkinghorne and Rosenberg (n 5) 108, 121ff.

95 ibid, 121.

96 See, Benjamin Hughes, 'The Problem of Undisclosed Assistance to Arbitral Tribunals' in Patricia Shaughnessy and Sherling Tung, *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* (Kluwer Law International 2017) 161, para 17.03.

97 International Commercial Disputes Committee and Committee on Arbitration of the New York City Bar Association, Secretaries to International Arbitral Tribunals (n 3) 591; Douglas (n 11) 88.

98 Maynard (n 40) 183.

of the draft on the ground that only one of the parties has given its consent. However, in this latter case, problems may occur should such delegation happen.

As mentioned by Wilmot-Smith, the case *P v Q* has clarified that even in the event that a tribunal secretary engages in a more extensive function than anticipated and effectively pre-empts the role of the tribunal in decision-making, the party challenging the award may be left with very limited, if any real, rights of recourse.[99] In the case, an email from the chairman intended for the arbitral secretary was mistakenly sent to a paralegal at P's solicitors which contained a letter from P to the tribunal and asked for his 'reaction to this latest from [P]?'[100] For the removal of all three members of the tribunal, P had previously applied to the LCIA Court which appointed an LCIA Division to determine the matter.[101] Refusing to exclude the two co-arbitrators' from the tribunal, the LCIA Division had revoked the chairman's appointment; however, on different grounds relating to comments made at a conference.[102] P challenged the award in the High Court *inter alia* on the ground that the secretary was excessively involved in the decision-making process. However, since Hon. Mr. Justice Popplewell saw the test for annulment to be one of 'substantial injustice',[103] even if P could somehow prove that the secretary made the decision and wrote the award, in order to convince the court for vacatur, it would further have to show that a different conclusion would have been reached if the arbitrators themselves wrote the award.[104]

Since the appointment of the secretary was approved by the parties in *P v Q*,[105] it may be argued that seeking the annulment of the award through different grounds –such as irregular constitution of the arbitral tribunal– may be successful in cases where the party challenging the award had not consented to the use of the secretary. However, it is still not certain whether this would be sufficient. In legal writing of some jurisdictions, such as Switzerland, it is disputed whether an arbitral tribunal may retain an arbitral secretary in a manner contrary to the consent of the parties.[106] Furthermore, given the relative

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99 Claudia Wilmot-Smith, Tribunal secretaries and decision-making in arbitration (Thomson Reuters 3 August 2018) <arbitrationblog.practicallaw.com/tribunal-secretaries-and-decision-making-in-arbitration/> accessed 19 September 2019.

100 *P v Q* (n 53) [10]ff.

101 ibid [14]ff.

102 ibid [19]ff.

103 ibid [30].

104 Wilmot-Smith also states that it is hard to see on which basis can a damages claim be quantified or formulated in such circumstances. Wilmot-Smith (n 99).

105 *P v Q* (n 53) [6].

106 Even though the Federal Court noted in its abovementioned decision that 'the common will of the parties to the arbitration agreement or in a subsequent agreement must be reserved

recency of the issue and the paucity of relevant case-law, the question may never even have been discussed neither in the doctrine, nor by the courts in some other jurisdictions, such as in Turkey. This makes it even more difficult to predict the future of the award.

In view of all the above, the author believes that as to the decision-maker side, an arbitrator should not appoint a secretary without the consent of both parties both to the appointment and the clear description of the tasks the secretary can do. On the parties' side, the author is of the opinion that in view of the difficulty to prove the existence of any unwanted assistance in drafting or any improper influence on decision-making,[107] for a party that is strictly against the use of a secretary, the best way to ensure this is to take aim at the arbitrator's own assessment of *coût d'opportunité*. This can be done by adding an exceptionally strict clause to the arbitration agreement which states that the parties shall never be bound by any decision drafted by anyone else other than the appointed arbitrator(s) and which requires the arbitrator(s) to sign a paper

to exclude the appointment of a secretary' (Tribunal Federal (n 64) 3.2.2.) Feit and Chassot state that 'the Swiss Federal Supreme Court was not confronted with that scenario since there was no joint opposition of the parties to the appointment of the arbitral secretary. Against this background, we submit that the statement by the Swiss Federal Supreme Court is not specific enough to be construed as having ruled on the question as to whether the arbitral tribunal may retain an arbitral secretary on its own motion against the will of the parties (provided that the arbitral tribunal bears the costs of the arbitral secretary). In our reading, that particular question has not been addressed by the Swiss Federal Supreme Court.' Feit and Chassot (n 26) 907; See, Jean Marguerat and Tomás Navarro Blakemore, 'Note: A. SA v. B. Sàrl, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, Case No. 4A_709/2014, 21 May 2015' 2016 13 Revista Brasileira de Arbitragem 199, 203–204.

[107] In *P v Q*, P's 'disclosure application' concerning the instructions, requests, queries and comments from the arbitrators to the secretary as well as all responses from the secretary to those emails and all communications sent or received by the arbitrators regarding either the role of the secretary or the tasks delegated to the secretary was refused by the High Court. See, *P v Q* (n 53) [67]; In *Yukos*, the PCA Secretariat refused a request from counsel for the Russian Federation for further details regarding the hours worked by the assistant, on the ground that disclosing such details would invade the confidentiality of the Tribunal's deliberations: 'In the view of the Tribunal, the attached Statement of Account provides the Parties with the appropriate level of detail while assuring the confidentiality of the Tribunal's deliberations.' *The Russian Federation versus Hulley Enterprises Limited*, The Hague District Court C/09/481619 / Ha Za 15-112, Respondent's February 16, 2015 Letter, Annex 2, Writ of Summons dated November 10, 2014, filed by the Russian Federation with the District Court in The Hague on January 28, 2015, [499]–[501]; See also, *Sonatrach v Statoil* [2014] EWHC 875 (Comm) [46]ff; Supreme Court of the Netherlands decision of 29 January 2010, LJN BK 2007 related to the appeal of the decision of the Amsterdam Court of Appeal *Knowsley SK Ltd v AGJ Van Wassenaer van Catwijck*, Amsterdam Court of Appeal, 2 December 2008, LJN BG9050, case no 200.010.430/01 SKG, NJF 2009, 39.

declaring that no assistance is going to be taken in the drafting process.

In this regard, it may be interesting to have a look on a memory of Professor Douglas.

> 'Just over a year ago after I moved to Geneva I received a CV applying for the job assistant to me. I always think when I get these CVs that times must be tough because I have never advertised for such a position nor have I ever hired an assistant. Nonetheless, I opened the attachment out of curiosity and one thing caught my eye immediately. There was a heading with the formulation "Awards that I have drafted". I had never heard of this person before, but I looked down the lists of awards that he drafted and, surprise, one of the awards was in a case in which I appeared as counsel. [...] Here is where my story moves from fact to fiction. Suppose the CV is forwarded to the party who lost. It is a major case where hundreds of millions were paid out in satisfaction of the award. The seat of the arbitration is New York and a challenge proceeding is launched there. The person who drafted the award is now doing an LLM at NYU and he is subpoenaed and has to give evidence. […] Such a challenge would be very damaging –and I am talking of the perfect storm– to the reputation of international arbitration.'[108]

What is more, such a challenge would also be very damaging –'of the perfect storm'– to the reputation of an arbitrator in the presence of a clause implemented to the arbitration agreement strictly restricting such practice and of a paper he/she signed. In a market where an arbitrator who fails to take his or her duties seriously is 'black-listed by parties and peers',[109] it is even more frightening to imagine the occurrence of such a case during the annulment process of a well-known multi-billion dollar award. For instance, what would have happened to the arbitrators in *Yukos* if the scene-top forensic linguist attested with over 95% percent certainty that Mr. Valasek, who had been presented as the assistant of chairman Fortier, wrote approximately 70% of the awards[110] notwithstanding the (imaginary) existence of such a clause in the arbitration agreement and their signed declarations stating that they were not going to take any assistance in the drafting process? Would not such precaution

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108 Douglas (n 11) 87–88.

109 James U. Menz, Miss Moneypenny vs. the Fourth Musketeer: the Role of Arbitral Secretaries (Kluwer Arbitration Blog 9 July 2013) <arbitrationblog.kluwerarbitration.com/2013/07/09/miss-moneypenny-vs-the-fourth-musketeer-the-role-of-arbitral-secretaries/> accessed 19 September 2019.

110 Alison Ross, Valasek wrote Yukos awards, says linguistic expert (Global Arbitration Review 20 October 2015) <https://globalarbitrationreview.com/article/1034846/valasek-wrote-yukos-awards-says-linguistics-expert> accessed 19 September 2019.

–at least to some extent– prevent those practices which provoke Professor Lalive into using exclamation marks, such as delegating the duty of drafting to secretaries for the purpose of being able to accept more remunerative files[111] or appointing unofficial secretaries based on the 'tacit and presumed consent' of the parties?[112]

However, in the absence of such a strict clause in the arbitration agreement to solve any potential problems beforehand, then the question remains: should the secretary be able to draft the award? There are two main factors that should be taken into consideration in answering this question, namely the will of the parties and the potential efficiency in terms of time and costs. From the authors point of view, although both very important, primary concern in this regard must be the consent of the parties in the sense that in which terms they agreed to solve their dispute by means of arbitration. Therefore, instead of answering the question with a general statement, it may be more reasonable to consider some possible situations that may arise in practice and to give specific answers to them.

First of all, in view of the explanations above, the arbitral secretary should not be involved in the draft of the award at all if one of the parties has been against such involvement or the secretary's appointment was made against the consent of either one of the parties or both parties.

If nothing is mentioned about the draft of the award while there are other duties that are enumerated in the appointment of the secretary, ideally, the arbitrators who nevertheless want to delegate such duty should communicate with the parties before any involvement and ask for their consent. Without communicating with the parties and having both parties' consent, the arbitral secretary should not be entrusted with drafting any part of the award. The

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111 'In any event, the fundamental rule remains and must remain: the international arbitrator [...] has been chosen to arbitrate. And this is "*intuitu personae*" and not to delegate to anyone, whoever it is, this difficult task – in order to be able to accept a larger number of remunerative files!' ('Quoi qu'il en soit, la règle fondamentale demeure et doit demeurer: l'arbitre international [...] a été choisi *pour arbitrer*. Et ceci «*intuitu personae*» et non pas pour déléguer à autrui, quel qu'il soit, cette difficile tâche – afin de pouvoir accepter un plus grand nombre de dossiers rémunérateurs !') Lalive (n 4) 274.

112 'It is therefore astonishing that, during an interesting Symposium organized in 2009 by the *School of International Arbitration of Queen Mary College*, London, we heard one of the "*panelists*", a well-known Geneva practitioner, who supported the natural and justified character of the delegation by the arbitrator, to a collaborator, of his/her decision-making function. And this is on the basis of the *tacit* and presumed consent of the disputing parties!' ('C'est donc avec étonnement que, lors d'un intéressant Colloque organisé en 2009 par la *School of International Arbitration* de *Queen Mary College*, Londres, nous avons entendu l'un des « *panelists* », praticien genevois connu, soutenir le caractère normal et justifié de la délégation par l'arbitre, à un collaborateur, de sa fonction de décision. Et ceci sur la base du consentement, *tacite* et présumé des parties en litige !') Lalive (n 4) 277.

author believes that in this case, even if there are other tasks foreseen in the appointment that might affect the decision-making process of the arbitrators, such as performing legal research for the tribunal, these tasks do not imply that secretary can also draft the award. Even though charging the secretary with merely drafting the non-substantive portion of the award might seem time and cost efficient as well as harmless particularly when there are even substantive tasks of the secretary that the parties agreed upon, in this case it should be assumed that the parties considered to the duties of the secretary in an exhaustive manner.

If there are no tasks enumerated in the appointment but only the administrative or non-substantive character of the assistance is mentioned as in the following example

> 'The Arbitral Tribunal would be glad to count on the assistance of a Secretary. The status of the Secretary will only consist in assisting the Tribunal and its Chairman in the administrative tasks.'[113]

in this case, the author believes that such appointment would allow the secretary to be charged with the draft of the non-substantive part of the award since parties may be deemed to have envisaged such function in the appointment. The same applies in cases where some tasks are mentioned non-exhaustively after stipulating the non-substantive character of the assistance.

If both parties have consented to the appointment of the secretary but no statement was made as to his/her duties and no specific duty was enumerated in the appointment, ideally, the arbitrators should ask the parties for their consent before charging the secretary with any task relating to the award. If not, the involvement of the secretary should be limited to the draft of the non-substantive part of the award at most. The author believes that in this case, this is a question of 'best practice' rather than a question of 'to what extent can the duties be delegated to an arbitral secretary without getting the award set aside'. Not only from a theoretical point of view, but also because the latter

[113] A similar appointment was made in *Sonatrach v Statoil* [2014] EWHC 875 (Comm) where Algerian state oil company Sonatrach had applied for the vacatur of an International Chamber of Commerce award worth US$536m in favour of Norwegian state oil company Statoil: 'The Arbitral Tribunal would be glad to count on the assistance of an Administrative Secretary. The status of the Administrative Secretary will only consist in assisting the Tribunal and its Chairman in the administrative tasks for the proceedings, the organization of the hearings and the preparation of documents that may be useful for the decision. In no way the Administrative Secretary will have the right to participate in the decision.' However, in this case, the claim did not concern the draft of the award but the notes which were produced by the secretary for the deliberations of the arbitral tribunal. The challenge was dismissed by the High Court. Although the issue was different, it can be claimed that the expression 'administrative tasks for the proceedings' may be deemed to cover the task of drafting the non-substantive part of the award.

is anyways uncertain in practice considering particularly the abovementioned paucity of case-law concerning award-drafting secretaries and in view of the fact that such challenges are not very frequent as awards usually do not declare that they have been drafted by the secretaries but only contain the signatures of the arbitrators. In other words, even though normally 'a failure to follow best practice is not synonymous with failing properly to conduct proceedings'[114], nor secretaries' involvement to the draft seems entirely unsusceptible to possible annulments. Furthermore, although it can be claimed that neither national legislation nor case-law at the moment is enough to consider that delegating the draft of the substantial part to the secretary certainly constitutes a ground for setting aside an arbitral award, it is particularly difficult to legitimize the situation where the secretary's intervention to the substantial part disturbs the equitable character of the proceedings in the eyes of the losing party because an arbitrator wanted to do so in order to be able to accept more files or simply because he/she accepted the case without having sufficient time. On the other hand, from the point of view of the arbitrator, is it really a reasonable deal to delegate the draft of the substantial part to save some time considering that in case somehow known by the parties, not only the award might be challenged and even set aside but also the mere fact that he/she did not write his award may have reputational consequences in addition to the high probability of not being re-appointed by the losing party or maybe even by the winning one?

On the other hand, if the appointment states that the secretary's duties include the drafting of the award, such statement would also be deemed to cover the substantial part of the award. Particularly, in cases where the sole arbitrator or all arbitrators have no legal training as they are selected for their technical knowledge (for instance, in cases where all the arbitrators are accountants or where a sole arbitrator is appointed for a technical construction problem) appointing an arbitral secretary with a legal background can be necessary to be able to formulate the final decision. In such cases, it is crucial to explicitly empower the arbitral tribunal to delegate the task of drafting the arbitral award as this type of cases are even more vulnerable to challenges. For instance, in *Sacheri vs Robotto*[115] dated 1989, The Italian Supreme Court was confronted with a situation where arbitrators, who had no legal training appointed a lawyer to draft the award for them and did not participate in the drafting. Underlining that arbitrators cannot delegate their decision-making duty, Italian Supreme Court held that:

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114 EWHC 194 (Comm) [68].

115 *Sacheri v. Robotto*, Corte di Cassazione, 2765, 7 june 1989 available in Albert Jan van der Berg, *Yearbook Commercial Arbitration Volume XVI* (International Council for Commercial Arbitration 1991) 156–157.

> *'[d]ue to the arbitrators' professed incapacity to decide issues other than technical construction problems, it amounted to delegating a third person to formulate the final decision, which the arbitrators were not able to conceive and which they could not critically examine once it had been drafted'*[116]

The author is of the opinion that in cases where parties explicitly envisage the task of drafting the award to be delegated to the secretary, seeking for expressions that specifically cover the substantive part such as 'prepare a first draft of the award in its entirety' would be unnecessary, particularly in cases where arbitral tribunal is comprised of arbitrators with no legal training.

Conclusion

In answering the question whether it is appropriate that the task of drafting the award be delegated to the secretary, the strictest approach dictates that the tribunal should in no circumstances be released the from its duty to personally draft the award. According to this view, which does not draw a distinction between the substantive and non-substantive, even delegating the draft of merely mechanistic parts to the secretary constitutes a problem since the act of intellect through the facts and the parties' arguments is 'key' to the arbitrator's decision making. While this approach is the most risk-free one on the bright side, on the not-so-bright side, it forces the arbitrator to draft every single word of every single award which may be neither time-efficient, nor cost-efficient, where the remunerations are on an hourly basis.

The second approach rejects such an absolute restriction and suggests that a secretary may be allowed to draft non-substantive parts of the awards which may consist of outlining the identities of the parties and counsel, the procedural history and a brief summary of the non-controversial facts. According to the authors who advocate this view, such parts of the award do not belong to the heart of an arbitrator's mandate and their delegation does not pose the risk of influencing the decision-making process of the tribunal. Furthermore, surveys reveal that this view is favoured in the practice.

Finally, the authors who position themselves at the most liberal part of the spectrum argue that as long as the guidance is provided by the tribunal and the draft is subjected to the careful examination of the arbitrators, there is no point of restricting a secretary from drafting the substantive portions of the award. This approach is criticized by authors who emphasize the power of the 'act of writing' and state that such practice is not only in contrast with the *intuitu personae* mandate that an arbitrator may have but also with the expectation of the parties to receive the most compelling judicial outcome.

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116 ibid, Decision para 1.

While the surveys indicate that the second one is the most favoured and the third one is the least popular amongst these three approaches, restrictions on the scope of the secretaries' functions regarding the draft of the award vary across different rules or guidelines. While some authors call for greater uniformity of regulation in order to reduce the uncertainty as to the proper role of secretaries, others state that such a uniform standard would be unlikely to satisfy everyone and emphasize that the bottom line is the lack of transparency and the informed consent of the parties.

The author believes that if the consent of both parties is obtained, the tasks of the secretary is clearly described and there is no lack of transparency, the issue should not raise much concern. However, if one of the parties does not approve such assistance, the arbitrator should not appoint a secretary, since this may leave the objector party in a lurch with no real rights of recourse. First, it seems quite difficult to prove the existence of any unwanted assistance in drafting. Secondly, even if the party shows that the arbitrator took assistance in drafting, a state court may decide that the arbitrator has the right to appoint a secretary in a manner contrary to the consent of the parties. Additionally, even in a case where a party somehow proves the existence of the unwanted secretary assistance in drafting and convinces the state court that the this was contrary to its consent, it would further have to show that there would have been a different conclusion if the arbitrators themselves wrote the award.

To avoid such a situation, the author believes that if a party is strictly against the use of an arbitral secretary and abstains from bringing the dispute to the state courts, it should take its aim at the arbitrator's own assessment of *coût d'opportunité* by implementing an exceptionally strict clause to the arbitration agreement which states that the party shall never be bound by any decision drafted by anyone else other than the appointed arbitrator(s) and requires the arbitrator(s) to sign a declaration ensuring that no assistance is going to be taken in the drafting process. In the author's opinion this would not only prevent the arbitrators from delegating the draft to accept too many cases concurrently, but also would eliminate –to a certain extent– the unofficial appointments made without disclosure.

In the absence of this kind of strict clauses, the question whether the secretary should be able to draft the award should be answered on a case-by-case basis by taking into account primarily the consent of the parties. From the author's point of view, the secretary should only be allowed to draft the entire award in cases where parties explicitly envisage the task of drafting to be delegated to the secretary. In other cases where parties' intent about the tasks of the secretary is not crystal clear, communicating with them in order to have their consent before the drafting process is primordial for an arbitrator in providing the parties with the best practice. This is particularly

important for cases where both parties have consented to the appointment of the secretary without any statement as to his/her duties since these bring out the most difficult situation for an arbitrator to interpret the framework that the parties intended to establish for the task of the secretary. In such cases, the author believes that delegating merely the procedural part –if any– should be favored over delegating the entire award to avoid potential problems. Not only that it is not easy to claim that secretaries' involvement to the draft is entirely unsusceptible to possible annulments but also because it is very difficult to assert that every action of an arbitrator that would increase the efficiency and not lead to the annulment of the award should be deemed best practice. Because even though in many jurisdictions arbitral awards can be set-aside on a scarce number of grounds, there are many other factors to be taken into account such as reaching an entirely independent minded judgment, reputation of arbitration and satisfying both parties, even the losing one, with both the process and the arbitral award.

Bibliography

Aguilar-Alvarez G, 'Foreword' in International Council for Commercial Arbitration, *Young ICCA Guide on Arbitral Secretaries* (The ICCA Reports No.1) (International Council for Commercial Arbitration 2014) vii.

Akın P, 'Uluslararası Tahkimde Çok Taraflılık' 18(3-4) Gazi Üniversitesi Hukuk Fakültesi Dergisi 299.

Akıncı Z, *Milletlerarası Tahkim* (Vedat Kitapçılık 2010).

Andersson S, 'A Fourth Arbitrator or an Administrative Secretary? A Study on the Appointment and Authority of Arbitral Secretaries in Swedish Arbitral Proceedings' (Master's Thesis in Arbitration Law, Uppsala University 2015).

Ashford P, *Handbook on International Commercial Arbitration* (Juris 2009).

Australian Centre for International Commercial Arbitration, ACICA Guideline on the Use of Tribunal Secretaries <https://acica.org.au/wp-content/uploads/2017/01/ACICA-Tribunal-Secretary-Guideline.pdf> accessed 19 September 2019.

Berger KP, Part III, '27'th Scenario: Deliberation of the Tribunal and Rendering of the Award' in Berger KP, *Private Dispute Resolution in International Business Negotiation, Mediation and Arbitration* (3rd revised edn, Kluwer Law International 2015) 613.

Blavi F and Vial G, 'The Tribunal Secretary in International Arbitrations' (2017) 30 New York International Law Review 1.

Born G, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014).

Charlotin D, 'Identifying the Voices of Unseen Actors in Investor-State Dispute Settlement' in Baetens F (ed), *Legitimacy of Unseen Actors in International Adjudication* (Cambridge University Press 2019) 392.

Compañía de Aguas del Aconquija SA & Vivendi Universal SA v Argentine Republic, ICSID Case No ARB/97/3 (Annulment Proceeding), Additional Opinion of Professor Jan Hendrik Dalhuisen under Art 48(4) of the ICSID Convention, 30 July 2010.

D.C, *Hulley Enterprises Ltd., Yukos Universal Ltd*., and *Veteran Petroleum Ltd., v. The Russian Federation*, Case No. 1:14-cv-01996-ABJ, Document 24-7, Expert Opinion of Professor George A. Bermann, Filed on 20 October 2015.

Douglas Z, 'The Secretary to the Arbitral Tribunal' in Berger B and Schneider ME (eds) *Inside the Black Box: How Arbitral Tribunals Operate and Reach Their Decisions (ASA Special Series No. 42)* (Juris 2014) 87.

Eisemann F, 'Déontologie de L'Arbitre Commercial International' (1969) 4 Revue de I'Arbitrage 217.

Erdoğan E , *Hakem Kararlarının Kesin Hüküm Etkisi* (2nd edn, Yetkin 2020).

Feit M and Chassot CT, 'The Swiss Federal Supreme Court Provides Guidance on the Proper Use of Arbitral Secretaries and Arbitrator Consultants under the Swiss lex arbitri: Case Note on DFC 4A_709/2014 dated 21 May 2015' (2015) 33 ASA Bulletin 897.

Gageler S, 'Why Write Judgments?' 36 Sydney Law Review 189.

Gaillard E and Savage J (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999).

Göksu T, *Schiedsgerichtsbarkeit* (Dike 2014).

Güvenç Uluçlar SN, 'Tahkim Anlaşmasının Hukuki Niteliği', T.C. İstanbul Ticaret Üniversitesi Dış Ticaret Enstitüsü Tartışma Metinleri WPS NO/47/2016/08 <https://www.ticaret.edu.tr/uploads/dosyalar/921/TAHKİM%20SÖZLEŞMESİNİN%20HUKUKİ%20NİTELİĞİ.pdf> accessed 15 January 2020.

Heuman L, *Arbitration Law of Sweden: Practice and Procedure* (Juris 2003).

Huysal B, 'Milletlerarası ticari tahkimde hakemlerin müdahaleci kuralları uygulama yükümlülüğü' Maltepe Üniversitesi Hukuk Fakültesi Dergisi, 1(1-2) Maltepe Üniversitesi Hukuk Fakültesi Dergisi 129.

Hong Kong International Arbitration Center, Guidelines on the Use of a Secretary to the Arbitral Tribunal <https://www.hkiac.org/images/stories/arbitration/HKIAC%20Guidelines%20on%20Use%20of%20Secretary%20to%20Arbitral%20Tribunal%20-%20Final.pdf> accessed 19 September 2019.

Hughes B, 'The Problem of Undisclosed Assistance to Arbitral Tribunals' in Shaughnessy P and Tung S, *The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer* (Kluwer Law International 2017) 161.

International Council for Commercial Arbitration, *Young ICCA Guide on Arbitral Secretaries* (The ICCA Reports No.1) (International Council for Commercial Arbitration 2014).

International Court of Arbitration of International Chamber of Commerce, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration (1 January 2019) <https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration.pdf> accessed 19 September 2019.

International Law Students Association, Philip C. Jessup International Law Moot Court 2018 Problem with Corrections & Clarifications (*Case Concerning the Egart and the Ibra* [*People's Democratic Republic of Anduchenca v. Federal Republic of Rukaruku*]) <https://www.ilsa.org/Jessup/Jessup18/2018%20Combined%20Compromis%20and%20CandC%20final.pdf> accessed 19 September 2019.

Joint Report of the International Commercial Disputes Committee and the Committee on Arbitration of the New York City Bar Association, 'Secretaries to International Arbitral Tribunals' (2006) 17 American Review of International Arbitration 575.

Jones D, 'Ethical Implications of Using Paralegals and Tribunal Secretaries' (2014) 17 Hors Serie 251.

Judicial Arbitration and Mediation Services, Guidelines for Use of Clerks and Tribunal Secretaries in Arbitrations <https://www.jamsadr.com/files/Uploads/Documents/JAMS-International-Guidelines-for-Use-of-Clerks-and-Tribunal-Secretaries-in-Arbitrations.pdf> accessed 19 September 2019.

Karadelis K, 'The Role of the Tribunal Secretary' (Global Arbitration Review 21 December 2011) <www.globalarbitrationreview.com/news/article/30051/the-role-tribunal-secretary/> accessed 19 September 2019.

Kaufmann-Kohler G and Rigozzi A, *Arbitrage international : droit et pratique à la lumière de la LDIP* (2nd edn, Bern 2010).

Kaufmann-Kohler G and Rigozzi A, *International Arbitration: Law and Practice in Switzerland* (3rd edn, Oxford University Press 2015).

Keutgen G and Dal G (avec la collaboration de Marc Dal et Gautier Matray), *L'arbitrage en droit belge et international* (3rd edn, Bruylant 2015).

Knowsley SK Ltd v AGJ Van Wassenaer van Catwijck, Amsterdam Court of Appeal, 2 December 2008, LJN BG9050, case no 200.010.430/01 SKG, NJF 2009, 39.

Lalive P, 'Dérives arbitrales (II)' (2006) 24 ASA Bulletin 2.

Lalive P, 'L'Article 190 al. 2 LDIP a-t-il une utilité ?' (2010) 28 ASA Bulletin 726.

Lalive P, 'Le choix de l'arbitre' dans Mélanges Jacques Robert, *Libertés*, (Montchrestien 1998) 353.

Lalive P, 'Mission et Démission des Arbitres Internationaux' in Kohen M, Kolb R and Tehindrazanarivelo DL (eds) *Perspectives of International Law in the 21st Century / Perspectives du Droit International au 21e Siecle: Liber Amicorum Professor Christian Dominica in Honour of His 80th Birthday* (Bilingual edn, Brill-Nijhoff 2011) 269.

Lalive P, 'On the Reasoning of International Arbitral Awards' (2010) 1 Journal of International Dispute Settlement 55.

Lew JDM, Mistelis LA and Kröll S, *Comparative International Commercial Arbitration* (Kluwer Law International 2003).

London Court of International Arbitration, LCIA Notes for Arbitrators <https://www.lcia.org/adr-services/lcia-notes-for-arbitrators.aspx> accessed 19 September 2019.

Marguerat J and Blakemore TN, 'Note: A. SA v. B. Sàrl, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, Case No. 4A_709/2014, 21 May 2015' 2016 13 Revista Brasileira de Arbitragem 199.

Maynard S, 'Laying the fourth arbitrator to rest: re-evaluating the regulation of arbitral secretaries' (2018) 34 Arbitration International 173.

Menz JU and George A, 'How Much Assistance Is Permissible? A Note on the Swiss Supreme Court's Decision on Arbitral Secretaries and Consultants' (2016) 33 Journal of International Arbitration 311.

Menz JU, Miss Moneypenny vs. the Fourth Musketeer: the Role of Arbitral Secretaries (Kluwer Arbitration Blog 9 July 2013) <arbitrationblog.kluwerarbitration.com/2013/07/09/miss-moneypenny-vs-the-fourth-musketeer-the-role-of-arbitral-secretaries/> accessed 19 September 2019.

Mistelis LA, 'Efficiency. What Else? Efficiency as the Emerging Defining Value of International Arbitration: between Systems theories and party autonomy' (15 April 2019) Queen Mary School of Law Legal Studies Research Paper No. 313/2019 <https://ssrn.com/abstract=3372341> accessed 19 September 2019.

Newman LW and Zaslowsky D, 'The Yukos Case: More on the Fourth Arbitrator' (New York Law Journal 28 May 2015) <www.private-dispute-resolution.com/uploads/Newman_Zaslowsky_2015_The%20Yukos%20Case.pdf> accessed 19 September 2019.

Onyema E, 'The Role of the International Arbitral Tribunal Secretary' (2005) 3 Transnational Dispute Management <https://www.

transnational-dispute-management.com/article.asp?key=452> accessed 19 September 2019.

P v Q [2017] EWHC 194 (Comm).

Partasides C, 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration' (2002) 18 *Arbitration International* 147.

Polkinghorne M and Rosenberg C, 'The Role of the Tribunal Secretary in International Arbitration: A Call for a Uniform Standard' (2014) 8 Dispute Resolution International 107.

Poudret J and Besson S, *Comparative Law of International Arbitration* (Sweet & Maxwell 2007).

Redfern A and others, *Law and Practice of International Arbitration* (4th edn, Sweet & Maxwell 1999).

Restemayer CJ, 'Secretaries Always Get a Bad Rep: Identifying the Controversy Surrounding Administrative Secretaries, Current Guidelines, and Recommendations' (2012) 4 Yearbook on Arbitration Mediation 328.

Ross A, Valasek wrote Yukos awards, says linguistic expert (Global Arbitration Review 20 October 2015) <https://globalarbitrationreview.com/article/1034846/valasek-wrote-yukos-awards-says-linguistics-expert> accessed 19 September 2019.

Rovine A, *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Brill - Nijhoff 2010).

Sacheri v. Robotto, Corte di Cassazione, 2765, 7 june 1989 available in Albert Jan van der Berg, *Yearbook Commercial Arbitration Volume XVI* (International Council for Commercial Arbitration 1991) 156–157.

Schweizer P, 'Correspondance Au Sujet de L'Article 190(2) LDP: Quelques lignes en réponse à l'article du Professeur Lalive « L'article 190 al. 2 LDIP a-t-il une utilité ? »' (2011) 29 ASA Bulletin 66.

Sir Kitto F, 'Why Write Judgments?' (1992) 66 Australian Law Journal 787.

Sonatrach v Statoil [2014] EWHC 875 (Comm).

Souleye A, 'Fourth chair: the controversial role of arbitral tribunal secretaries' (Young ICCA Blog 16 February 2017) <http://www.youngicca-blog.com/fourth-chair-the-controversial-role-of-arbitral-tribunal-secretaries/> accessed 19 September 2019.

Supreme Court of the Netherlands decision of 29 January 2010, LJN BK 2007.

Takavut İD, *Milletlerarası Ticari Tahkimde Doğrudan Uygulanan Kurallar* (On İki Levha Yayıncılık 2018) 7–31.

The Russian Federation versus Hulley Enterprises Limited, The Hague District Court C/09/481619 / Ha Za 15-112, Respondent's February 16, 2015

Letter, Annex 2, Writ of Summons dated November 10, 2014, filed by the Russian Federation with the District Court in The Hague on January 28, 2015.

Timlin T, 'The Swiss Supreme Court on the Use of Secretaries and Consultants in the Arbitral Process' (2016) 8 Yearbook on Arbitration Mediation 268.

Tribunal Federal 4A_709/2014 21 May 2015. English translation available at <http://www.swissarbitrationdecisions.com/sites/default/files/21%20mai%202015%204A%20709%202014.pdf> accessed 19 September 2019.

United Nations Commission on International Trade Law 'Draft Notes on Organizing Arbitral Proceedings: report of the Secretary-General (A/CN.9/423)' in *Yearbook of the United Nations Commission on International Trade Law Vol. XXVII (A/CN.9/SER.AI)* (United Nations 1996) 45.

United Nations Commission on International Trade Law, UNCITRAL Notes on Organizing Arbitral Proceedings (March 2012) <https://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf> accessed 19 September 2019.

Üstündağ S, *Kanun Yolları ve Tahkim* (İstanbul Üniversitesi 1968).

Waincymer J, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012).

White & Case and Queen Mary University of London School of International Arbitration, 2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2012_International_Arbitration_Survey.pdf> accessed 19 September 2019.

Wiehern NJ, 'A Court of Clerks, Not of Men' (1999) 49 De Paul Law Review 621.

Wilmot-Smith C, Tribunal secretaries and decision-making in arbitration (Thomson Reuters 3 August 2018) <arbitrationblog.practicallaw.com/tribunal-secretaries-and-decision-making-in-arbitration/> accessed 19 September 2019.

Writ of Summons (28 January 2015) <https://www.italaw.com/sites/default/files/case-documents/italaw4158_0.pdf> accessed 19 September 2019.

Yavuz C, 'Türk Hukukunda Tahkim Sözleşmesi ve Tabi Olduğu Hükümler' in *Marmara Üniversitesi Hukuk Fakültesi II. Uluslararası Özel Hukuk Sempozyumu "Tahkim"* (Istanbul 2009) 133 <http://dosya.marmara.edu.tr/huk/Sempozyumyayınları/ll.%20Uluslararası%20Özel%20Hukuk%20Sempozyumu/3prof.dr.cevdet_yavuz.pdf> accessed 15 January 2020.

Yeğengil R, *Tahkim (L'Arbitrage)* (Cezaevi Matbaası 1974).

Yu H and Ahmed M, 'Keeping the Invisible Hand under Control? -Arbitrator's Mandate and Assisting Third Parties' (2016) 19(2) Vindobona Journal of International Commercial Law and Arbitration 213.

Zhang JY, 'Arbitration Award' in Fung DR and Chang WS (eds) *Arbitration in China: a practical guide* (Sweet & Maxwell 2004) 215.

THE REGISTRATION OF SHIPS: AN EVALUATION IN THE CONTEXT OF GENUINE LINK AND FLAG OF CONVENIENCE PRACTICES

Gemilerin Tescili: Gerçek Bağ ve Kolay Bayrak Uygulamaları Bağlamında Bir Değerlendirme

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Graduate Thesis Article

Abstract

Today, the most preferred route for international trade is by seaway. In this respect, defining the nationality of ships and registering them with the state are important in terms of international trade and especially maritime law. In this article, it is analysed the registration of ships by discussing the role of the genuine link between a ship and the state that registered it, and examining the flag of convenience practice.

In the study, after discussing the flag state jurisdiction, it is going to be discussed how the concept of genuine link can be understood in the context of international maritime law: When does a genuine link form between a ship and the state? Is it an obligation to have a genuine link between the ship and the state involved in the registration of ships? If so, are there any sanctions against a ship not flying a flag under a genuine link? In addition, the flag of convenience system, which is a relatively new practice, and is contrary to the genuine link system, is going to be discussed: How has the legal nature of the registration of ships changed as a result of that it could not be prevented the adoption and practising of the flag of convenience system in the international area more than the genuine link? What are the positive and negative aspects of this practice? Thus, in this study, it is going to be tried to answer the abovementioned questions by referring to legal authorities, case law and international regulations.

Keywords: Registration of Ships, Genuine Link, Flag of Convenience

Özet

Günümüzde uluslararası ticaret için en çok tercih edilen rota denizyoludur. Bu açıdan gemilerin milliyetlerinin tanımlanması ve onların devlet nezdinde kayıtlarının yapılması uluslararası ticaret ve özellikle deniz ticareti hukuku açısından önemlidir. İşte bu makalede, bir gemi ile onu tescil eden devlet arasındaki gerçek bağın rolü tartışılarak ve elverişli bayrak uygulaması incelenerek gemilerin tescili analiz edilmektedir.

Çalışmada, bayrak devletinin yargı yetkileri ele alındıktan sonra, gerçek bağ kavramının uluslararası deniz hukuku bağlamında nasıl anlaşılabileceği tartışılacaktır: Bir gemi ile devlet arasında ne zaman gerçek bir bağ oluşur? Gemilerin tescilinde, gemi ile ilgili devlet arasında gerçek bir bağın olması bir zorunluluk mudur? Eğer öyleyse, gerçek bağ ile bağlı olmadığı bir devletin bayrağını taşıyan gemi, yaptırıma tabi tutulur mu? Bunun yanı sıra, gerçek bağ sistemine aykırı olan ve nispeten yeni bir uygulama olarak karşımıza çıkan elverişli bayrak sistemi ele alınacaktır: Elverişli bayrak sisteminin uluslararası alanda gerçek bağa nazaran daha çok benimsenmesi ve uygulanmasının önüne geçilememesi sonucunda gemilerin tescilinin hukuki niteliği nasıl değişmiştir? Bu uygulamanın pozitif ve negatif yönleri nelerdir? İşte bu çalışmada, bahsi geçen sorular; yasal mercilere, içtihat hukukuna ve uluslararası düzenlemelere başvurularak cevaplanmaya çalışılacaktır.

Anahtar Kelimeler: Gemilerin Tescili, Gerçek Bağ, Elverişli Bayrak

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INTRODUCTION

There are various ways to transport goods today, which are by road, by air, by rail and by sea. Within this scope, one of the important theoretical and practical aspects in the carriage of goods by sea, in which the ships are the actors, which is the subject of this study, is the registration of ships. Hereunder, the legal aspect of ship registration has a unique system because maritime law is a branch that makes it necessary to reflect the developments occurring in the world to the domestic law due to its international nature. For providing the safety of life, property and environment at sea, the competent authority is the flag state; therefore, registration of ships is also important from this standpoint. Indeed, for years, maintaining good order at sea has been one of the most important subjects in the world because seas are crucial for every state in terms of security and commerce. Besides, there may be births or deaths on board, or a crime may be committed onboard.[1] The jurisdiction in these legal matters belongs to the flag state of the ship where the incident took place. Additionally, the ships naturally need to be protected by the might of the state, and on the other hand, states need ships or vehicles to be effective in world trade, especially in sea trade. These and many other reasons show how important the registration and flag state jurisdiction are.

Each state has the right to grant a ship its nationality in accordance with national and international law.[2] This cannot be expressed only as a right; there is a general agreement in international law that ships must have a nationality to prove their existence.[3] In this regard, the ships must be registered with a state, and also must have genuine link with that state. At this juncture, the genuine link which is going to examine in detail below, can be defined as a connection between the ship and the flag state, which shows the legal relationship between them.

The genuine link is a concept that has been discussed in many respects both on the theoretical and practical grounds for years and still continues to be discussed. Accordingly, first by customary law and then by international conventions, some regulations have been adopted for genuine link; however, there is still no consensus on its legal nature and applicability.

On the other hand, there is a concept that is kind of opposite to the genuine link, which is the flag of convenience. Thus, the flag of convenience provides

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1 Gotthard Mark Gauci and Kevin Aquilina, 'The Legal Fiction of a Genuine Link as a Requirement for the Grant of Nationality to Ships and Humans – the Triumph of Formality over Substance?' (2017) 17 *International Comparative Law Review* p.170.

2 H. Edwin Anderson III, 'The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives' (1996-1997) 21 *Tulane Maritime Law Journal* p.140.

3 Iain Goldrein QC (et.al), "Ship Sale and Purchase" (4th Edition 2003) p.11.

registering with a state without having genuine link for the ships, and this method is generally preferred for economic reasons.

Since these two concepts have appeared, there is a challenge in international area; it is about whether these can remain in force together, and which one is better for international trade and international security. Furthermore, the debates are also about the state's jurisdiction on the ships. At this point, the challenge or the debates form according to the benefits of powerful states; on the other hand, other states try to defend their rights. Hereunder, the discussions could not be concluded.

In the light of this information, in this research, it is going to be analysed flag state jurisdiction under heading 2 by mentioning the background of ship registration, the types of registries and the duties of flag state. Afterwards, under heading 3, genuine link is going to be examined. In this context, it is going to be discussed in the light of case law and various international law principles whether the genuine link envisaged in international conventions can be considered as a registration requirement. Last but not least, under heading 4, the concept of the flag of convenience is going to be evaluated by emphasising positive and negative aspects.

1. Flag State Jurisdiction

Flag state is the state having authority over ships[4] sailing under its flag. As regards to the flag state jurisdiction, it provides the key ways of sustaining legal order over activities occurring at sea.[5] According to Herman Meyers, by "jurisdiction" is meant that the flag State has the power to determine the rules of conduct for ship users, to threaten sanctions and to impose sanctions.[6] In other words, flag state has prescriptive and enforcement jurisdiction over a ship flying the state's flag, and so this jurisdiction is called "flag state jurisdiction". Indeed, the flag of the ship indicates the state of which jurisdiction the ship is subject to.[7] At this juncture, it can be mentioned some exceptions; in fact, flag states enjoy exclusive jurisdiction except right of hot pursuit, illegal activities at sea and Articles 99, 101, 109 and 110 of the United Nations Convention on the Law of the Sea (UNCLOS).

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4 The ship was defined in *M/V Saiga Case* (1999) ITLOS Case No 2: *"The ship, everything on it, and every person involved or interested in its operations are treated as an entity linked to the flag State."*

5 Richard Barnes, 'Flag State' (2015) *The Oxford Handbook of the Law of the Sea* p.1.

6 Herman Meyers, *The Nationality of Ships* (Martinus Nijhoff / the Hague 1967) p.41; Nivedita M. Hosanee 'A Critical Analysis of Flag State Duties as Laid Down Under Article 94 of The 1982 United Nations Convention on The Law of The Sea' (Oceans and Law of the Sea 2009) p.17.

7 Nigel Ready, *Ship Registration* (Lloyd's of London Press 1991) p.6.

1.1. Background of Ship Registration in the Context of Flag State

The practice of ship registration is first encountered in the United Kingdom (UK), accordingly in English Law, the obligation to register with the ship registry is stipulated by the "1660 Navigation Act". Indeed, this act obliged exclusively British merchant ships to be registered in the ship registry.[8] When it comes to the current regulation on ship registration in the UK, it is provided in the first part of the "Merchant Shipping Act" made in 1894.[9]

Furthermore, regarding the nationality of ships, Sweden, Norway and Denmark entered into a treaty for granting nationality to ships in 1826.[10] In 1930, International Law Commission, after discussed the nationality of persons, had extended this concept to the nationality of ships.[11] In 1940s, under the *Muscat Dhows*[12] case, the registering state had discretionary authority over the ship flying the flag of registering state.

On the other hand, with the development of the maritime industry in the twelfth and thirteenth centuries, shipowners began to register their ships in the registry of foreign states with the intention of saving.[13] Thus, the flag of convenience practice was discussed in this period.[14] Indeed, in *Lauritzen v Larsen case*[15], British ships flew Spanish flag to abandon some restrictions about trade in the sixteenth century.

Finally, although the obligation of ships to fly theirs flag and to be registered to a state became a topic for international law earlier, a comprehensive legal regulation about nationality of ships was made in the 1958 Geneva Convention on the High Seas[16]. Afterwards, 1982 United Nations Convention on the Law

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8 Ready (n 2) p.3; Zehra Şeker, 'Elverişli Bayrak ve İkinci Sicil' (Master Thesis İstanbul Üniversitesi 1992) p.5.

9 Şeker (n 2) p.5.

10 Simon W. Tache, 'The Nationality of Ships: The Definitional Controversy and Enforcement of Genuine Link' (1982) 16 *The International Lawyer* p.302.

11 Convention on Certain Questions Relating to Conflict of Nationality Laws, Hague, 179 U.N.T.S. 89 (1930).

12 (1906) Hague Court Reports 94; the court stated that: *"Generally speaking it belongs to every sovereign to decide to whom he will accord the right to fly his flag and to prescribe the rules governing such grants."*

13 Rhea Rogers, 'Ship Registration: a critical analysis' (Master Dissertation World Maritime University 2010) p.16.

14 Ibid.

15 (1953) 345 U.S. 571; the court stated that: *"Each State under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The USA has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state."*

16 In the Article 5(1), it is mentioned the nationality of ships: *"Each State shall fix the conditions*

of the Sea[17] also lay down the same regime. Accordingly, a ship flying a state's flag must have genuine link with that state. In line with this assumption, the United Nations Convention on the Conditions for Registration of Ships of 1986 was adopted, dealing both with the concept of genuine link and the general ship registration.

1.2. Nationality of Ships and Ship Registries

As briefly mentioned above, the fact that ships are registered with a state, that is, they have a flag state, is very important in terms of solving many issues that may arise in international maritime law. However, unregistered vessels or the stateless ships can still be encountered today.[18] The author David Matlin explained the importance of the flag state for ships as follows: The flag stateless ships are as though excommunicated by the commonwealth.[19] Hereunder, all states can exercise authority over a stateless ship that has no authorised flag.[20] Indeed, in *The Asya*[21] case, a ship named Asya on its way to Palestine flied the flag of Turkey although it has not right to fly this flag. In the end, Asya was seized by a British ship at the high sea. In conclusion, the court held that the ship named Asya cannot apply the protection of any states.

Registration is not the result of the ship's nationality; on the contrary, registration gives a ship its nationality.[22] Giving nationality to ships, just like

for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

17 The nationality of ships is defined in Article 91(1), which is similar to the Geneva Convention on the High Seas: *"Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship."*

18 For further information on stateless ships and the identification systems of the ships at sea that does not fly a flag, see also: Barry Hart Dubner and Mary Carmen Arias, 'Under International Law, Must a Ship on the High Seas Fly the Flag of a State in Order to Avoid Being a Stateless Vessel? Is a Flag Painted on Either Side of the Ship Sufficient to Identify it?' (2017) 29 *U.S.F. Maritime Law Journal* 99.

19 David Matlin, 'Re-evaluating the Status of Flags of Convenience under International Law' (1990) 23 *Vanderbilt Journal of Transnational Law* pp.1025-1026.

20 Derya Aydın Okur, 'Uluslararası Hukukta Gemilerin Uyrukluğu ve Gerçek Bağ Tartışması' (2006) 5 *Maltepe Üniversitesi Hukuk Fakültesi Dergisi* p.71.

21 (1947) 81 Ll.L. Rep 277.

22 Sinan Misili, 'Açık Denizlerin Serbestliği, Gemilerin Uyrukluğu ve Bayrak Devleti Münhasır Yargı Yetkisi Arasındaki İlişkinin Teamül Hukuku, Konvansiyonlar ve Mahkeme Kararları Işığında İncelenmesi' (2014) 18 *Gazi Üniversitesi Hukuk Fakültesi Dergisi* p.195-196.

persons, provides significant advantages for both ships and states in terms of international law and international trade.[23] For instance, a ship sailing on the high seas may encounter some difficulties or face with some illegal activities like theft and piracy, so the ship needs to be guarded.[24] At this point, the flag state can rescue it because the ships benefit from the protection of their flag state.[25] On the other hand, naturally, the flag state has some rights to control or to judge the ship.[26] This relationship which is between flag state and ship is going to be examined below.

As stated in UNCLOS,[27] "registration", an administrative mechanism, allows the ship to have a national character while in transit or wherever it is located.[28] There are three main conditions to be taken into account when performing the mentioned administrative mechanism, in other words, granting citizenship to a ship: First, conditions arising from the domestic law of the state whose flag will be flown. The second is that a ship that is currently registered in another state cannot be registered, in other words, it is not possible to register in two states at the same time. Third, a genuine link between the ship and the flag state is required. It should be noted that there are some exceptions to the second condition, which are stipulated in UNCLOS. Indeed, Article 92(1) points out that ships only have to fly one flag of state by saving some exceptions.[29]

With regards to the registration, to acquire nationality, the ships must be registered; accordingly, there are 3 types of ship registries:

First, national registry; according to this term, a shipowner can register the ship in a particular flag state thanks to considering the nationality. In other words, nationality of shipowner is a determining element to register the ship with a state which he has nationality. When it comes to the requirements of national registries, it would be said that these are vary with each nation. Some states only accept ship registration applications from ships whose owner is also a national of that state. On the other hand, some allow shipowners with a permanent residence permit in the country to register their ships in the ship registry of that country; in this example, the respective shipowners do not have to be citizens.[30] So, the requirements for national registries vary from state to state. For example, in the UK's regulations on ship registration, the

23 Okur (n 2) p.69.
24 McDougal, M S, and others, 'The Maintenance of Public Order at Sea and the Nationality of Ships' (1960) *Faculty Scholarship Series* p.27.
25 Ibid.
26 Okur (n 3) p.69.
27 Article 91(1) of the United Nations Convention on the Law of the Sea (UNCLOS) 1982.
28 Tache (n 2) pp.302-303.
29 Bareboat registration can be given as an example of these exceptions. See; Bita Pourmotamed, 'Parallel Registration of Ships' (Goteborg University 2008) p.37.
30 Rogers (n 3) p.20.

ships are divided into four groups: commercial or pleasure ships, fishing ships, small ships and bareboat ships.[31] Accordingly, registration requirements are stipulated separately for each ship type.[32] Besides, according to Turkish Law, ships that can be registered in the ship registry, either mandatorily or voluntarily, are divided into three: (a) Turkish merchant ships (ships owned by Turkish citizens or owned by more than one person but the majority of shares belong to Turkish citizens) (b) Ships assigned exclusively to navigation, sports, education, training and science, such as yachts or seafarers vessels. (c) Foreign ships being built in Turkey on behalf of a state or its citizens.[33] In addition, The Turkish International Ship Registry Act (TISRA) entered into force in 1999 basically allows also foreign ships to be registered with the Turkish International Ship Registry, under certain conditions.[34]

Second, open registry; it can be said that this term is relatively new practice in the trade of international shipping because companies have tried to find a way which the cost expense is as low as possible with the developing international shipping sector.[35] In this respect, more clearly, open registry system has resolved high employment costs and financing requirements of the sector.[36] Thus, in open registry, the ship can fly a flag of country other than her origin and different from her owner's country's flag as long as flying a flag of convenience. Accordingly, there may not be a genuine link between the flag state and a ship in case of open registry because it is sufficient to fly the flag of convenience.

Third, hybrid registry; it is providing a good alternative way to shipowners, which is blended with national registry and open registry. In this registry, it is tended to be maintained a nationality link but it is also provided the easier requirements compared to national link.[37] At this juncture, it is necessary to add that some claim that the UK registry is an example of hybrid registry due to the scope of foreign ownership and control possible within it.[38] In line with

31 Article 2 of The Merchant Shipping (Registration of Ships) Regulations 1993.

32 Articles 7 and 89 of The Merchant Shipping (Registration of Ships) Regulations 1993.

33 Article 10 of Turkish Ship Registry Regulation 1957; and Article 823 of Turkish Commercial Code 2011.

34 Turkish International Ship Registry Act (TISRA) 1999; see also Hayrettin Kurt, 'Türk Uluslararası Gemi Sicili Kanunu'nun Değerlendirilmesi' (2014) 2 *Ankara Barosu Dergisi*.

35 William R. Gregory, 'Flags of Convenience: The Development of Open Registries in The Global Maritime Business and Implications for Modern Seafarers' (Master Thesis Georgetown University 2012) p.1.

36 Rogers (n 6) p.41.

37 Ibid.

38 Lyudmyla Balyk, 'Crewing of Ships in Contemporary Ship Registry Systems: Safety and Socio-economic Considerations' (MSc Dissertation World Maritime University 2006) p11.

this comment, it can be also claimed that regulations in TISRA in Turkish Law can be considered as an example of hybrid registry practice. Most hybrid registries are kept for use only by national shipowners as an alternative to flagging out and as a way to compete with the open registry system. Again, one of the typical features of hybrid registries is that crew of seafarers from foreign countries are freely allowed. For example, the Norwegian International Ship Registry and the Danish International Ship Registry make it optional to enter into crew wage agreements that may or may not be acceptable to the unions of that country.[39]

1.3. Duties and Rights of Flag State

For the relations between the states and registered ships, the flag states have some duties and rights, and they are stipulated in the UNCLOS but the relevant provision is too general.[40] Accordingly; first, although this provision falls under the high seas title of the UNCLOS, its implementation is not limited to open seas; second, states are required to exercise their jurisdiction over *"administrative, technical and social matters"* that are vaguely expressed in the relevant article; third, *"jurisdiction and control"* mentioned in the provision means that flag states enjoy prescriptive and enforcement jurisdiction.[41] On the other hand, in the continuation of this article's subheadings, the duties of the flag state are again provided; however, these regulations, some of which have been left to domestic law, so, failed to specify the legal nature of the flag state.[42] Herein, as an important point for the duty of flag state, every state must maintain a register of ships flying the flags pursuant to the UNCLOS.[43] Furthermore, flag states must take safety measures for ships and must combat polluting activities.[44]

Additionally, there are clearly some shortcomings for the flag state jurisdiction although the duties and rights of the flag state and the scope of

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39 Rogers (n 6) p.41,42 and 43.

40 Article 94 of the UNCLOS which is under the heading called "Duties of the Flag State" stated the duties and rights. Hereunder, Article 94(1) of the UNCLOS provides that: *"Every state shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."*

41 Barnes (n 2) p.7.

42 Ibid p.7.

43 Article 94(2)(a) of the UNCLOS; according to this Article, "*every State shall maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size"*.

44 Articles 94(3) and 94(4) of the UNCLOS; in these Articles aforementioned measures are sorted in detail. Article 94(3) ensures some measures about safety at sea whereas Article 94(4) remarks something about navigational and communicational issues, and about marine pollution.

its jurisdiction are defined in international maritime law by conventions. For example, high seas are vast, so it is highly likely possible that the flag state is not able to exercise its jurisdiction effectively every time. Indeed, in the Articles 94(6) and 94(7), it is mentioned what can the ships do in case there is no effective exercise of jurisdiction.[45] In this sense, it would not be wrong to say that even if the practice of the flag state jurisdiction is not unsuccessful, it remains far from being effective.

2. Genuine Link

Genuine link is a connection between a ship and the flag state, which, according to international law, must exist for the ship to acquire nationality.[46] Although it is difficult to make a definition; doctrinally, what is meant by the genuine link is the relation that should exist between the ship and the state to fulfil the registration process; with this registration and relationship, the state will give its citizenship to the ship and gain effective jurisdiction and control over the ship in question. Likewise, according to Tache, genuine link can be defined as *"the legal and functional responsibilities assumed by the flag state when it confers its national character upon a ship."*[47] However, there is no clear answer against what is the meaning of "genuine", and there is no agreement on what kind of requirements should be for genuine link. In this context, genuine link is going to be tried to explain within the scope of these questions by the help of the international conventions, case law and international law doctrine.

2.1. Genuine Link in International Texts

The concept of genuine link was formalized firstly in the 1958 Convention on the High Seas. Hereunder, Article 5(1) of the Convention on the High Seas provides: *"…There must exist a genuine link between the State and the ship…"* Despite this provision, there is no any description about genuine link in terms of preconditions for the grant of nationality.[48] In addition, Convention on the

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45 Article 94(6) literally provides a route for the vessels in case of lack of enforcement: *"A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation."* In addition, for the maritime casualties, Article 94(7) states that: *"Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation."*

46 Article 91(1) of the UNCLOS.

47 Tache (n 3) p.306.

48 Edward B Watt and Richard M F Coles, "Ship Registration: Law and Practice" (3rd Edition

High Seas does not attempt to indicate whether there are any sanctions in case of the absence of a genuine link between the ship and the state.[49] When it comes to the 1982 UNCLOS, likewise, it has majorly the same statement compared to 1958 Convention for Genuine Link. Additionally, whereas 1958 Convention just mentions "effective jurisdiction over the ships" in Article 5, UNCLOS provides duties of the flag state comprehensively under Article 94.

In international treaty law, there is no progress in defining what is meant by the genuine link until the 1986 United Nations Convention on Conditions for Registration of Ships.[50] The aim of the Convention is as follows: *"For the purpose of ensuring or, as the case may be, strengthening the genuine link between a State and ships flying its flag, and in order to exercise effectively its jurisdiction and control over such ships with regard to identification and accountability of shipowners and operators as well as with regard to administrative, technical, economic and social matters, a flag State shall apply the provisions contained in this Convention."*[51] Accordingly, with this Convention, it is approached to the genuine link within the context of technical, economic and social controls.

In addition to all these, in the United Nations Conference on Trade and Development (UNCTAD), it is defined how genuine link is comprised:

> *"a. registration,*
>
> *b. substantial share of the beneficial ownership in the vessel by nationals of the flagstate,*
>
> *c. principal place of business and effective management of the legal entity which has beneficial ownership of vessel be in the flagstate, and*
>
> *d. principal officers of the legal entity beneficially owning the vessel be nationals of the flagstate."*[52]

So, these proposals can be evaluated as the standard of genuine link. In other words, genuine link must include those enumerated above. In this sense, Proposal (a) provides the legal component defined in conventions, states' rules or international doctrine before. When it comes to Proposal (b), it is not real criterion but it is kind of sentimental value and this criterion grant national character to ships. Proposal (c) ensures the control of place of business and management of ownership. Lastly, according to Proposal (d), corporate officers of the company owning the vessel must have nationality of the flag state.[53]

2018) 3.14.

49 Ibid.

50 Watt and Coles (n 3) 3.19.

51 Article 1 of United Nations Convention on Conditions for Registration of Ships (1986).

52 Tache (n 4) p.306.

53 Ibid p.307-308.

2.2. Appearance of Genuine Link

There were two approaches for granting nationality to ships.[54] Some states suggest that ships must be subject to strict rules for acquiring nationality.[55] Others claim that the nationality of ships is a *pseudo* nationality, so it should not be followed the rules which is applied for persons.[56] At this point, *Nottebohm*[57] case defines the genuine link from a new perspective. Hereunder, the ICJ held that, with regard to the granting of nationality to persons, in the context of diplomatic protection law, States could not require other States to recognize municipal citizenship rules, unless they were in line with the general purpose of providing genuine legal protection. In other words, according to this case; although, in the absence of a genuine link between the person and the state, each state can set a framework for the acquisition of its citizenship and set the conditions under its own legislation, other states do not have to recognize this citizenship. Plus, to exercise diplomatic protection, there must be a genuine link between the state and citizens in accordance with the case. In this context, the court indicated that: *"the rules it has thus laid down are entitled to recognition by another state unless it has acted in conformity with this general aim of making the legal bond of nationality accord with the individual's genuine connection with the State which assumes the defence of its citizens by means of protection as against other States."*[58] Lastly, the court defined the concept of genuine link as follows: *"Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred...is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection vis à vis another State, if it constitutes a translation into juridical terms of the individual's connection with the State which has made him his national."*[59]

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54 Ibid p.302; Tache explained these school of thoughts as follows: *"Some states consider the nationality of ships very much analogous to that of natural persons and insist on stringent standards for the conferral of that nationality upon ships. Other states consider ship nationality as pseudo-nationality and are not likely to require the same standards as those applicable to humans."*

55 For example, the flag state may require that the ship be built in a national shipyard; see P.K.Mukherjee, 'The Changing Face of the Flag State: Experience With Alternative Registries' (World Maritime University 1993).

56 Ibid; the concept of pseudo-nationality can be derived from the statement of the participants of the Versailles Peace Treaty as follows: *"nationality, the method of classifying the human race ..."*

57 [1955] ICJ Rep 4.

58 Ibid.

59 Ibid.

In witness whereof, there are mainly two aspects of nationality. First is between the state and the person, so it is completely related to domestic law. Second is state's right to protect the person who has nationality of its from other states, and it is naturally connected with international law.[60]

As is seen, *Nottebohm*[61] case formed a frame for the nationality relations between the persons and the states. On the other hand, in *Barcelona Traction*[62] case, Judge Jessup stated that: Although, in *Nottebohm* case, the concept of genuine link was evaluated within the scope of relationship between the states and the persons, the problem for genuine link can be related to persons, ships and corporations. So, according to Judge Jessup, the concept of genuine link, besides the link between the states and the persons, can be also evaluated for connection between the ships and the states.

On the other hand, within the progress of genuine link, it must be mentioned one more case which is called IMCO case[63]. The concept of genuine link was considered in the context of the Constitution of the Maritime Safety Committee of the IMCO case. This case is related to the interpretation of the phrase "the country with the most ships" in Article 28(a) of the IMCO document which is predecessor of International Maritime Organization (IMO). According to this Article, the Committee shall *"consist of fourteen members...of which not less than eight shall be the largest ship -owning nations..."* At this juncture; while the traditional great states suggested that the genuine link principle should be sought in this statement and therefore flag of convenience states (such as Liberia, Panama etc.) should not be included in this statement, flag of convenience states opposed this. As a result; the court stated that an election to the committee could be made on the basis of the total tonnage of ships registered in the registry. Thus, the concept of flag of convenience will not be questioned. Hence, it could be said that the importance of genuine link was declined due to this case; because it is clearly seen that in the court decision, almost ignoring the genuine link principle, it was stated that the selection can be made to the committee on the basis of the total tonnage of ships registered in the registry, and that the genuine link principle cannot be taken as basis.[64]

Furthermore, according to the decision given in the M/V Saiga (No.2) case[65]; The authority to determine the procedures and criteria at the point of granting nationality to ships is within the exclusive jurisdiction of the flag state. In the same judgment, the court stated that the principle of genuine link between the

60 Okur (n 4) p.74.
61 [1955] ICJ Rep 4.
62 [1970] ICJ Rep 1.
63 [1960] ICJ Reports.
64 [1960] ICJ Reports.
65 (1999) ITLOS Case No 2.

ship and the state could not be questioned in the context of the conditions or criteria for enrolment in the registry. However, the court concluded that this principle was necessary for the flag state to fulfil the duties that it was obliged to fulfil due to the ship acquired its nationality.

As can be seen from the flow above, it would not be wrong to say that the concept of genuine link is no longer valid in practical area. In this context, the field of applicability of the flag of convenience practice, which it is going to be explained below, has naturally increased.

3. Flag of Convenience

As mentioned above, there are three types of ship registries. In this context, one of these registries is open registry which is open to every vessel regardless of their nationality. It is here that the concept of open registry is more popularly referred to as the flag of convenience.[66] Although there is no clear definition, for this section, the flag of convenience will be adopted as a practice that allows vessels owned and controlled by foreigners to be registered in a state that appear to be "convenience" by these persons. Indeed, according to Boczek, a flag of convenience is defined as follows: "*functionally, a flag of Convenience can be defined as the flag of any country allowing the registration of foreign-owned and foreign-controlled vessels under conditions which, for whatever the reasons, are convenient and opportune for the persons who are registering to the vessels."*[67]

3.1. Appearance of the Flag of Convenience

The flag of convenience whose history goes back to the 17th century has been started to be popular in maritime sector in the 20th century.[68] The reason why the evolution of the flag of convenience is popular is the increase of carriage of goods by sea. Furthermore, the competition in maritime sector has been rocketed, and maritime transportation has become more international in the 20th century. Thus, naturally, the economic issues have been occurred in the sector.[69] The politics which have been established by flag states have been vital for the sector because they are the key point of the competition especially economically. At this point, especially after the second world war,

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66 Watt and Coles (n 4) 4.2; see also Hamad Bakar Hamad, 'Flag of Convenience Practice: A Threat to Maritime Safety and Security' (2016) 1 *Journal of Social Science and Humanities Research* p.208: it is stated in this article that: *"A Flag of convenience is a nickname for open registry or international registry."*

67 Boleslaw Adam Boczek, *Flags of Convenience – An International Legal Study* (Harvard University Press 1962) p.2.

68 Şeker (n 3) p.61.

69 Tina Shaughnessy and Ellen Tobin, 'Flags of Inconvenience: Freedom and Insecurity on the High Seas' (2005-2006) 5 *Journal of International Law & Policy* pp.14-15.

Panama Honduras and Liberia were pioneer to supply advantageous conditions such as affordable tax regime for shipowners. In fact, these states and their ship registries have been so popular; and they have been started to be called "PanHonLib" standing for Panama Honduras Liberia.

After genuine link was stipulated in 1958 Convention, naturally, flying the flag of convenience had been become unlawful because there is no genuine link between the ship flying the flag of convenience and flag state. However, the practice of flying the flag of convenience was going on because of the absence of the definition of genuine link and unstoppable rise of usage of the flag of convenience. Thus, in 1970, UK Government published six features for the flag of convenience, which is known as the Rochdale Report[70]:

> (1) The state that registers ships allows the purchase or control of merchant ships by non-citizens.
>
> (2) It is seen that the process of registering the ship to the registry is extremely easy.
>
> (3) The amount of taxes is low, registration fees and annual dues are calculated over the tonnage of the ships, and usually the only fee charged is these.
>
> (4) The state that makes the registration is usually a small state. However, the small amount of wages received from ships of large tonnage plays an important role by holding a large share in the national income and balance of payments of these states.
>
> (5) The State of Registry permits the employment of crew members who are not its citizens.
>
> (6) The State of Registry has neither an effective mechanism nor sufficient power to ensure compliance with international rules and standards or to control companies.

3.2. Positive and Negative Aspects of the Flag of Convenience

Since the appearance of the flag of convenience, it has been struggled in international area to abolish this practice. It is because powerful and traditional maritime states have been suffered from the flag of convenience. Indeed, with the practice of the flag of convenience, the fleets of powerful states have weakened. Moreover, for the international community, this practice is not very advantageous, as explained in detail below. Nevertheless, it would be said the flag of convenience has various positive aspects although these are just for shipowners. The positive sides are generally considered economically, so under

[70] Ebere Osieke, 'Flag of Convenience: Recent Developments' (1979) 73 *The American Journal of International Law* p.604.

the practice of the flag of convenience, some of the economic advantages can be listed as follows: (1) Increased market value of the ship. (2) Easy currency conversion. (3) Decreased cost of repairs. (4) Reduced operating costs. (5) Less national income taxation. (6) Acquiring new tonnage more easily from their increased earnings. (7) Avoidance from home country's maritime safety control.[71] There are also other advantages of the flag of convenience, such as the transparency of ownership for shipowners, the reduced likelihood of seizure of ships in times of war or other emergencies. Further, although it is debatable, the fact that the registrant country is in a commercial and stable political environment can be counted among the advantages of the flag of convenience application.[72]

On the other hand, some of the disadvantages of the flag of convenience are the potentially increased rates of port state control, less efficient consular services, and inadequate diplomatic support for shipowners.[73] Additionally, after World War II, for the maritime workers, some problems have arisen. Accordingly, seafarers, who were exploited in a way by those who work and equip the flag of convenience ships, took a strike under the roof of the ITF (International Transport Workers' Federation) to end this situation and boycotted the flag of convenience.[74] In other words, it can be said that the flag of convenience is reasonable and good for shipowners whereas it has some serious disadvantages for seafarers.

Furthermore, security problems constitute the negative side of the flag of convenience. Looking at the major maritime accidents in the 20th century, most of these accidents involve the flag of convenience ships; for example, the *Torren Canyon* in 1967, the *Amoco Cadiz* in 1978, the *Odyssey* in 1988, the *Haven* in 1991, the *Braer* in 1993, the *Sea Empress* in 1996 and the *Erika* in 1999.[75] The reason for this is that the flag of convenience states are weak

71 Shaughnessy and Tobin (n 2) pp.14-15.

72 Ibid.p.15.

73 Ibid.

74 Watt and Coles (n 5) 4.30; organized worker opposition to open registers under flags of convenience began in the United States in the 1930s as a result of the transfer of American ships to the flags of Panama and Honduras. The movement gained momentum after World War II, and in 1948, the International Transport Workers' Federation (ITF), which now unites around 700 unions in more than 150 countries and represents over four million transport workers, including about 300.000 seafarers, threatened to boycott the ships flying the Panama flag. The ITF Congress of July 1958 decided to boycott open registry ships worldwide. The first goal of the ITF campaign was to establish a genuine link between the flag flying by a ship and the nationality of its owners, managers and seafarers through an international government agreement, thus eliminating the flag of convenience system. The second goal is to ensure that seafarers serving on flag of convenience ships are protected from exploitation by ship owners, regardless of their nationality.

75 Ibid 4.21.

at checking whether ships are seaworthy.[76] In this context, the UNCTAD Secretariat explained by presenting ten reasons why it should be observed whether the open registry flags comply with the security rules or not:

> *"(1) Real owners are not readily identifiable (partly because of difficulties in identifying, partly because of lack of incentive to identify) and are therefore in a good position to take risks by comparison with owners in normal registries who are living under the eyes of a maritime administration.*
>
> *(2) Real owners can change their identities by manipulating brass-plate companies and consequently avoid being identified as repeated sub-standard operators or risk-takers.*
>
> *(3) Since the Master and other key shipboard personnel are not nationals of the flag State, they have no need or incentive to visit the flag State and can avoid legal action.*
>
> *(4) Owners who reside outside the jurisdiction of the flag State can defy the flag State by refusing to testify at an inquiry by the flag State and avoid prosecution.*
>
> *(5) Since open-registry owners do not have the same interest in preserving good relations with the flag State, they do not feel the need to co-operate with inspectors of the flag State.*
>
> *(6) Open-registry shipping lacks the union structure which is so essential to the application of safety and social standards in countries of normal registry: namely, a national trade union of the flag State representing basically the interests of national seamen on board vessels owned by owners who have economic links with the flag State.*
>
> *(7) Open-registry owners are in a better position to put pressure on Masters and officers to take risks, since there is no really appropriate government to which shipboard personnel can complain.*
>
> *(8) Port State Control is weaker because the port State can only report sub-standard vessels and practice to a flag State which has no real control over the owner.*
>
> *(9) Owners can suppress any signs of militancy among crew by virtue of their freedom to change nationalities of crew at whim.*
>
> *(10) Enforcement of standards is basically inconsistent with the operation of a registry with the sole aim of making a profit."*[77]

In addition to all these, as it is known, marine accidents are one of the

[76] Şeker (n 4) p.76.
[77] Watt and Coles (n 7) 4.22.

most important factors that increase marine pollution. In this sense, the flag of convenience practice has negative aspects when evaluated in terms of pollution. In any case, the flag of convenience system is regarded as a major obstacle to the system's lack of legal sanctions and the goal of alleviating the problem of marine pollution due to cheap, untrained crew.[78]

On the other side, in order to eliminate the negative aspects of the flag of convenience practice, the concept of the port state control found. Hereunder, besides the flag state jurisdiction, port states' rights and powers on inspection the ships were increased. Further, this system led to arose a context which is "ports of convenience".[79] Considering the trauma of the flag of convenience in the international area and its negative aspects abovementioned, the port state control has definitely caused positive development. Moreover, both port and coastal states are now empowered under various international conventions and regulations to take reasonable precautions to deal with threats, dangers and damages coming from merchant ships' operations.[80] But, the flag of convenience has continued to be discussed because strong states were still at a disadvantage and security etc. problems kept going.

3.3. Second Registry

Although the flag of convenience practice has some advantages especially economically for shipowners, it has some disadvantages in terms of security of high seas and safety of ports according to international authorities. Furthermore, with the increase of flying the flag of convenience, traditional maritime states such as United Kingdom, France and Germany have started to lose blood economically because the fleets of these countries have started to shrink seriously.[81]

Eventually, the application of second registry was established to abolish the flag of convenience.[82] As a matter of fact that the essence of this practice is both to prevent the flag of convenience and to ensure that ships operating under the flag of convenience return the national flag again. For this purpose, it was decided to establish an "international ship registry", that is, the second registry, in which exemptions for the health of the abovementioned states are stipulated to a certain extent, next to the existing national registry.[83] Thus, the ships registered for international ship registration would have several advantages,

78 Shaughnessy and Tobin (n 6) p.18.
79 Watt and Coles (n 9) 2.16.
80 Osieke (n 2) p.626.
81 Ready (n 3) p.34; see also Jessica S. Bemfeld 'States, Ships, and Secondary Registers: Examining Sovereignty and Standards in a Globalized World' (Master Thesis Cardiff University 2007).
82 Watt and Coles (n 10) 4.37-4.38.
83 Şeker (n 5) p.91.

such as the advantages of the flag of convenience. However, the wealth of the abovementioned states is high, so the seafarers' costs in these countries are also high. Moreover, when it comes to other expenses, flying the flag of convenience is better than the evolution of second registry for shipowners. Hence, it can be said that the second registration policy has been overshadowed by the flag of convenience and has failed in international area although some states succeed by this policy.[84]

Conclusion

Registration appears as a "link" attributed as a national character between the state and the ship. It is necessary to respect the freedom to determine their own maritime development in constituting the national character of ships. In addition, the exclusive interests of the states should also be taken into account. In the context of these requirements, it is obvious that there is a responsibility towards the whole world order and humanity due to the international nature of the seas. At this point, the registration of ships and the legal nature of it have started to be discussed.

The application of the flag of convenience system has started to increase especially after World War II, and it came in for criticism in international area. Obviously, this system has upset the international maritime trade balances in favour of shipowners, therefore international authorities, especially traditional maritime states, tried to make provision against the system. Thus, under the international law, *"genuine link"* was established for both maintenance of public order at sea and diluting the flag of convenience. Indeed, genuine link is the best criterion for perfect system of "nationality of ships" according to authorities. However, each state has the power to determine the necessary conditions for granting its nationality to ships, for the registration of ships on its territory, and for the right of ships to fly the flag of that state pursuant to Article 91(1) of the UNCLOS. So, some states have started to grant nationality without seeking for genuine link under this Article. At this point, naturally, there has been occurred a conflict, and the genuine link system failed because of contrasting with general principle of international law.

On the other hand, the flag of convenience which conflict with genuine link system has some serious disadvantages for international society, states' economies, environment and safety. Hence, taking into account these disadvantages, it was thought that genuine link system can retrieve the problems on the seas and can maintain the public order at sea. However, the rise of the flag of convenience practice could not be prevented. Herein, some arrangements were made for the flag of convenience to be successful. In this

[84] Ibid p.92.

sense, the port state control agency was established and accordingly, the port state authority was added to the flag state authority.

In fact, although it could be concluded that the problems mentioned above and the disadvantages of the flag of convenience application can be overcome by increasing the responsibilities and sanctions of states on ships, it is clear that genuine link system would be safer and more controllable provided that the legal infrastructure of the system was established very well. For the infrastructure, 1986 Convention entered into force but it is undoubtedly not enough to establish a certain basis. So, international regulations must be developed to perform genuine link system successfully. Further, these regulations must be uniform and can be applied equally to all states to establish a triumphant evolution. Indeed, this evolution must also guarantee that it is not interfered with the internal sovereignty of states under any circumstances because it is possible that some states are nervous to face with this kind of results due to the exclusive appearance of ship registration. In this context, even though registration and nationalization are directly related to domestic law, it should not be overlooked that the registration of ships also has an international meaning. Eventually, the practice of genuine link is the best way for the registration of ships to ensure good order at sea to define which state has juridical power on which ships, to provide effective control on the ships, and to manage the international maritime trade sector properly.

BIBLIOGRAPHY

List of Cases

Barcelona Traction, Light and Power Co Ltd (Belgium v Spain) [1970] ICJ Rep 1

Lauritzen v Larsen (1953) 345 U.S. 571

IMCO Case (Advisory Opinion) Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization [1960] ICJ Reports

Saint Vincent and the Grenadines v Guinea (M/V "Saiga" case No. 2) (1999) ITLOS Case No 2

Naim Molvan v Attorney General for Palestine (The "Asya") (1947) 81 Ll.L. Rep 277

Liechtenstein v Guatemala (Nottebohm Case) [1955] ICJ Rep 4

The Muscat Dhows Case (France v Great Britain) (1906) Hague Court Reports 94

List of Statutes, Regulations, International Conventions

Convention on Certain Questions Relating to Conflict of Nationality Laws (1930)

Geneva Conventions - Convention on the High Seas (1958)

The Merchant Shipping (Registration of Ships) Regulations (1993)

Turkish Commercial Code (2011)

Turkish International Ship Registry Act (1999)

Turkish Ship Registry Regulation (1957)

United Nations Convention on Conditions for Registration of Ships (1986)

United Nations Convention on the Law of the Sea (1982)

Secondary Resources

ANDERSON III HE, 'The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives' (1996-1997) 21 *Tulane Maritime Law Journal* 139.

BARNES R, 'Flag State' (2015) *The Oxford Handbook of the Law of the Sea*.

BALYK L, 'Crewing of Ships in Contemporary Ship Registry Systems: Safety and Socio-economic Considerations' (MSc Dissertation World Maritime University 2006).

BEMFELD JS, 'States, Ships, and Secondary Registers: Examining Sovereignty and Standards in a Globalized World' (Master Thesis Cardiff University 2007).

BOCZED BA, *Flags of Convenience – An International Legal Study* (Harvard University Press 1962).

CHURCILL RR, 'The Meaning of the "Genuine Link" Requirement in Relation to the Nationality of Ships' (University of Wales 2000).

DUBNER BH and ARIAS MC, 'Under International Law, Must a Ship on the High Seas Fly the Flag of a State in Order to Avoid Being a Stateless Vessel? Is a Flag Painted on Either Side of the Ship Sufficient to Identify it?' (2017) 29 *U.S.F. Maritime Law Journal* 99.

GAUCI GM and AQUILINA K, 'The Legal Fiction of a Genuine Link as a Requirement for the Grant of Nationality to Ships and Humans – the Triumph of Formality over Substance?' (2017) 17 *International Comparative Law Review* 167.

GOLDREIN QC I (et.al), "Ship Sale and Purchase" (4th Edition 2003).

GREGORY WR, 'Flags of Convenience: The Development of Open Registries in The Global Maritime Business and Implications for Modern Seafarers' (Master Thesis Georgetown University 2012).

HAMAD HB, 'Flag of Convenience Practice: A Threat to Maritime Safety and

Security' (2016) 1 *Journal of Social Science and Humanities Research* 2017.

HOSANEE NM, 'A Critical Analysis of Flag State Duties as Laid Down Under Article 94 of The 1982 United Nations Convention on The Law Of The Sea' (Oceans and Law of the Sea 2009).

KURT H, 'Türk Uluslararası Gemi Sicili Kanunu'nun Değerlendirilmesi' (2014) 2 *Ankara Barosu Dergisi* 269.

MATLIN DF, 'Re-evaluating The Status of Flags of Convenience under International Law' (1990) 23 *Vanderbilt Journal of Transnational Law* 1017.

MCDOUGAL MS (et. al), 'The Maintenance of Public Order at Sea and the Nationality of Ships' (1960) *Faculty Scholarship Series* 25.

MEYERS H, *The Nationality of Ships* (Martinus Nijhoff / the Hague 1967).

MİSİLİ S, 'Açık Denizlerin Serbestliği, Gemilerin Uyrukluğu ve Bayrak Devleti Münhasır Yargı Yetkisi Arasındaki İlişkinin Teamül Hukuku, Konvansiyonlar ve Mahkeme Kararları Işığında İncelenmesi' (2014) 18 *Gazi Üniversitesi Hukuk Fakültesi Dergisi* 179.

MUKHERJEE PK, 'The Changing Face of the Flag State: Experience with Alternative Registries' (World Maritime University 1993).

OKUR DA, 'Uluslararası Hukukta Gemilerin Uyrukluğu ve Gerçek Bağ Tartışması' (2006) 5 *Maltepe Üniversitesi Hukuk Fakültesi Dergisi* 67.

OSIEKE E, 'Flag of Convenience: Recent Developments' (1979) 73 *The American Journal of International Law* 604.

POURMOTAMED B, 'Parallel Registration of Ships' (Goteborg University 2008).

READY N, *Ship Registration* (Lloyd's of London Press 1991).

ROGERS R, 'Ship Registration: a critical analysis' (Master Thesis World Maritime University 2010).

ŞEKER Z, 'Elverişli Bayrak ve İkinci Sicil' (Master Thesis İstanbul Üniversitesi 1992).

SHAUGHNESSY T and TOBIN E, 'Flags of Inconvenience: Freedom and Insecurity on the High Seas' (2005-2006) 5 *Journal of International Law & Policy*.

TACHE SW, 'The Nationality of Ships: The Definitional Controversy and Enforcement of Genuine Link' (1982) 16 *The International Lawyer* 301.

UWEDE-MESHACK O, 'Does Registration of Ships Signify Genuine-Link' (School of Law and Security Studies, Babcock University 2013)

WATT EB and COLES RMF, "Ship Registration: Law and Practice" (3rd Edition 2018).

EXTRATERRITORIAL APPLICATION OF US ANTITRUST RULES: AMBIGUITIES OLD AND NEW

ABD Rekabet Hukukunun Ülke-Dışı Uygulanması: Eski ve Yeni Belirsizlikler

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Research Article

Abstract

The US was the first state that reacted the cross-border implications of foreign anticompetitive practices. In order to extend their jurisdiction over these practices, US courts introduced 'effects doctrine' which was envisaged to establish judicial jurisdiction on the basis of effects created in US trade and commerce. The extraterritorial application of US antitrust rules has been gradually developed and as of to date, it has been 75 years since the effect doctrine was first adopted by the US courts. Nevertheless, the case law on extraterritoriality of US antitrust rules is far from being complete. This is particularly evident in recent conflicting rulings on component cartels that were concluded and implemented outside the US. Given the advent of new supply chains in global economy, US courts encounter new challenges to ensure competitiveness of domestic markets. In so doing, the Supreme Court must both shed light upon the ambiguities that have been ongoing since the adoption of the effects doctrine and recalibrate its approaches to extraterritoriality to address legal and regulatory challenges ahead.

Keywords: Antitrust, Component Cartels, Sherman Act, Extraterritoriality, Comity, Effects Doctrine

Özet

Amerika Birleşik Devletleri yabancı rekabete aykırı eylemlerin sınır-ötesi etkileri ile ilgili olarak harekete geçen ilk devlet olarak karşımıza çıkmaktadır. Amerikan Mahkemeleri bu tür eylemlere yönelik hukuki yetkilerini kurabilmek için ABD ticaretine olan etkiler üzerinden etki doktrinini geliştirmişlerdir. Doktrinin ortaya atılmasından itibaren 75 yıl geçmiştir ve bu süreç dahilinde ABD rekabet hukukunun ülke-dışı uygulanması sürekli bir gelişmeye tabi tutulmuştur. Buna rağmen, içtihat hukuku hala önemli boşluklar ve sorunlarla doludur. Bu boşluk ve sorunlar, özellikle yakın zamanda verilen ve birbiriyle çelişen mahkeme kararlarında açıkça görünmektedir. Global ekonomide gelişen yeni tedarik zincirleri, ABD mahkemelerine yerel piyasaların rekabetçiliğinin sağlanması adına karşılaşacakları yeni zorluklar sunmaktadır. Bu zorlukların üstesinden gelebilmek için ABD Yüksek Mahkemesinin, hem süregelen hukuki belirsizlikleri ortadan kaldırması hem de daha önce benimsediği bazı hukuki yaklaşımları yeniden gözden geçirmesi gerekmektedir.

Anahtar Kelimeler: Rekabet Hukuku, Birleşen Kartelleri, Sherman Kanunu, Ülke-dışılık, Etki Doktrini

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INTRODUCTION

In an increasingly globalized world, in which the effects of a particular conduct produce cross-border victims, states have become more reluctant in limiting their legal authority to the peripheries of their territory. Illustrations can be reflected in many areas of law such as humanitarian law[1], environmental law[2], human rights violations[3], etc.. Antitrust laws are of no difference. Transactions and business practices among corporations have been involving more of a characteristic of international nature. The integration of multiple markets by multinational companies results in a situation, in which any conduct taken by a legal entity in one market has cross-border effects in other markets. The concurrent exercise of multiple legal authorities in such circumstances results in overlapping jurisdictions, creating further tensions between sovereign States. The situation gets even more complicated due to the conflict of interests, that is, while home countries are lacking of necessary incentive to apply their antitrust rules to conducts of their nationals that distort markets in other jurisdictions, the targeted states, frustrated by these effects, seek to expand their legal jurisdiction in a way reaching the jurisdiction of other sovereign states[4].

US case law provides a great insight into challenges that national authorities encounter in ensuring the competitiveness of domestic markets against the adverse effects posed by extraterritorial conduct. Nevertheless, the approach adopted by the US courts to the extraterritorial application of US antitrust rules is far from complete. This is particularly evident in recent rulings by the Seventh and Ninth Circuits, which turned out to be conflicting each other, despite similar facts. These cases also reflect new challenges in the regulation of foreign conducts, arising due to the advent of new supply chains. This paper seeks to uncover these challenges with an in-depth legal analysis on these two conflicting rulings and thus provide a taxonomy of cases where the extraterritoriality of domestic competition rules is relevant.

In this regard, this paper, first, explores the evolution of US case law on extraterritorial application of the Sherman Act. In the first section, the paper

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1 "In modern times, the class of crimes over which States can exercise universal jurisdiction has been extended to include war crimes and acts identified after the Second World War as 'crimes against humanity'" *United States v. Yousef,* 327 F.3d 56 (2d Cir. 2003). See also: *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005); *Regina v. Bartle, Bow Street Stipendiary Magistrate & Commissioner of Police, Ex Parte Pinochet* 2 W.L.R. 827, 38 I.L.M 581 (1999).

2 See; Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Nov. 6, 1998).

3 See: *Filártiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980).

4 Eleanor M. Fox, 'National Law Global Markets and Hartford: Eyes Wide Shut' (2000) 68/1 Antitrust Law Journal 73, p. 82.

presents the gradual development of the existing legal framework, along with the regulatory instruments adopted to alleviate concerns raised by other national jurisdictions. In the second section, the paper examines legal ambiguities remaining in US jurisprudence on the extraterritorial application of the Sherman Act. This sections reveals that despite 100 years old experience of US case law on the regulation of foreign conduct with anticompetitive effects on US trade and commerce, uncertainties as to the extraterritoriality of US antitrust rules remain. Finally the paper concludes.

I. Evolution of US Case Law on the Extraterritorial Application of US Antitrust Rules

A. The Introduction of Extraterritoriality

The United States, the first state that has adopted rules to ensure the competitiveness of its domestic markets through specific set of rules, also happened to be the first State frustrated by the effects of foreign conducts. 1897 Sherman Act included two sections which specifically dealt with anti-competitive market behavior. While Section 1 of the Sherman Act specifically declared that *"*(e)very contract, combination …, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"[5] was illegal, Section 2 made it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations …"[6]. Even though the formulation of the Act, especially the phrase "with foreign nations", indicated an extraterritorial dimension, for almost 50 years since its adoption, the Act was applied to conducts committed within the US, on the basis of territoriality principle[7]

This practice was abandoned in *Alcoa,* in which Judge Learned Hand, a prominent judicial philosopher of US law, provided that US antitrust rules were applicable to foreign conduct, once it was established that inevitable effects on the US commerce was intended by culprits[8]. Later identified as "intended effects doctrine", Judge Hand's reasoning set out that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that [had] consequences within its borders which the State reprehends…"[9].

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5 15 U.S.C. § 1.

6 15 U.S.C. § 2.

7 The first case, the US courts evaluated the extraterritorial application of the Sherman Act was *American Banana* in which the court rejected this notion and ruled on the basis of territoriality principle. *American Banana Co. v. United Fruit Co.* 213 U.S. 347 (1909).

8 *United States v. Aluminum Co of America*, 148 F.2d 416 (2d Cir. 1945), 424.

9 *Ibid*., 443.

Aware of concerns that his decision would give rise to, Judge Hand stressed that extraterritorial application of national jurisdictions on the basis of domestic effects was not without its limits. Regard should be vested on "limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the Conflicts of Laws"[10]. Furthermore, his reasoning should not lead to a proposition that all foreign conduct could be subject to US jurisdiction, as long as such conduct had effects on domestic commerce. This reading would result in an overarching application of US law as an encroachment of sovereignty rights, bestowed upon other States under public international law. Foreign conduct would be considered within US jurisdiction, only if its perpetrators intended its effects on US commerce.

Judge Hand's reasoning was, in fact, a reflection of Permanent Court of International Justice's (PCIJ) decision in *Lotus,* in which the court noted that "(f)ar from laying down a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it [left] them in this respect a wide measure of discretion which [was] only limited in certain cases by prohibitive rules…"[11]. States could exercise their jurisdiction to persons or conducts abroad, unless there was an international rule that forbade them specifically from doing so. The question in *Lotus* was whether there was such an international rule, and the Court's answer was negative. In this sense, Judge Hand found no obstacle[12] to adopt an effects-based approach to the regulation of extraterritorial conduct. His concern was political repercussions the US would encounter in its relations with other sovereigns which would happen to be real.

Reasoning of Alcoa was endorsed by other federal courts, even to an extent that the majority of concerns Judge Hand had raised as to the application of his doctrine were ignored[13]. This brought about an international clamor in other jurisdictions[14]. Concerns on the extraterritorial application of national

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10 *Ibid*.

11 S.S. "Lotus" (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, para. 46.

12 Except for Supreme Court's ruling in *American Banana Co. v. United Fruit Co.* 213 U.S. 347 (1909), which would be overcome by citing another ruling of the Court, *Strassheim v. Daily,* 221 U.S. 280 (1911), as Judge Hand did in *Alcoa. United States v. Aluminum Co of America*, 148 F.2d 416 (2d Cir. 1945), 443.

13 See: *United States v. Imperial Chemicals Industries Ltd.* 100 F. Supp. 504 (S.D.N.Y. 1951); *United States v. Watchmakers of Switzerland Info. Center, Inc.* 168 F. Supp. 904 (S.D.N.Y. 1958); *Sabre Shipping Corp. v. American President Lines Ltd.* 285 F. Supp. 949 (S.D.N.Y. 1968).

14 Canada, the United Kingdom, Australia, France, South Africa, Italy, the Netherlands, introduced blocking legislations to enjoin their national authorities from complying with

antitrust rules were also addressed in International Court of Justice's decision in Barcelona Traction. Judge Sir Gerald Maurice, in his separate opinion, confirmed that international law on jurisdictions was not mature, pointing out that "under present conditions international law [did] not impose hard and fast rules on States delimiting spheres of national jurisdiction in (…) anti-trust legislation (…) but leaves to State a wide discretion in the matter"[15]. Nevertheless this would not lead to a conclusion of States having an absolute authority to designate the limits of national jurisdictions. Judge Fitzmaurice continued its argument by stressing that international law imposed on "every state an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State"[16].

B. Attempts to Alleviate Concerns on Extraterritoriality and The FTAIA

Strong political and legal criticism across the world prompted US courts to recalibrate the intended effects doctrine with the introduction of international comity and a jurisdictional rule of reason analysis. In Timberlane[17] the 9th Circuit set forth a tripartite test for determining its jurisdiction. Accordingly, the court asked whether;

- the conduct has an intended or actual effects on US commerce,
- the effects are sufficiently large to constitute a cognizable injury to the plaintiffs
- the interests that the US has in exercising its jurisdiction are stronger in comparison with the interests of other nations[18].

Final element of this tripartite test necessitated balancing of interests between the US and other conflicting jurisdictions. Factors to be evaluated in

US proceedings under the extraterritorial application of antitrust rules Roger P. Alford, 'Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches' (1992) 33/1 Virginia Journal of International Law 1, p. 10. The United Kingdom adopted a claw-back legislation enabling the UK nationals to reimburse two thirds of treble damages they were fined by US courts. Donald E. Knebel, 'Extraterritorial Application of US Antitrust Laws: Principles and Responses' (2017) 8/2 Jindal Global Law Review 181, p. 192.

15 Case Concerning Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain) ICJ. 1970, p. 105, See also; Roger P. Alford, Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches (1992) 33/1 Virginia Journal of International Law 1, p. 6

16 *Ibid*.

17 *Timberlane Lumber Co. v Bank of America,* 549 F2d 597 (9th Cir 1976).

18 *Ibid.,* p. 613.

this analysis were later elaborated in Mannington Mills[19] in which the Third Circuit identified ten factors to be considered in its balancing process:

"1) Degree of conflict with foreign law or policy;

2) Nationality of the parties;

3) Relative importance of the alleged violation of conduct here compared to that abroad;

4) Availability of a remedy abroad and the pendency of litigation there;

5) Existence of intent to harm or affect American commerce and its foreseeability;

6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief;

7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;

8) Whether the court can make its order effective;

9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;

10) Whether a treaty with the affected nations has addressed the issue"[20].

Even though the Third Circuit's balancing criteria were welcomed by the majority of academics and other federal courts, strong criticism was directed to the court's alleged lack of competences in determining such a test[21]. This division was deepened with D.C. Circuit's conspicuous denial of applying the balancing test on the ground of its lack of prerogative[22]. Citing some scholarly critics of balancing test, the Court asserted that no mandatory rule was found in international and domestic law that required a comity obligation[23].

Foreign jurisdictions were not the only ones frustrated by the intended effects doctrine. US exporters which would engage in anti-competitive practices

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19 *Mannington Mills, Inc. v. Congloeum Corp*., 595 F.2d 1287 (3rd Cir. 1979).

20 *Ibid*., p. 1297.

21 Roger P. Alford, Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches (1992) 33/1 Virginia Journal of International Law 1, p. 12.

22 "This court is ill-equipped to "balance the vital national interests of the United States and the [United Kingdom] to determine which interests predominate. When one state exercises its jurisdiction and another, in protection of its own interests, attempts to quash the first exercise of jurisdiction it is simply impossible to judicially `balance' these totally contradictory and mutually negating actions". *Laker Airways v. Sabena, Belgian Wd. Airlines*, 731 F.2d 909, 950 (D.C. Cir. 1984).

23 *Ibid*., 950-951.

abroad were also subjected to US antitrust rules. In Pfizer Inc. v. Government of India[24], in which foreign plaintiffs brought claims in US courts for damages they incurred, as a result of price fixing and market division practices carried out by US exporters abroad, the Supreme Court rejected the argument that the Sherman Act intended to protect only US consumers[25]. The Court provided that "(w)hen a foreign nation [entered] our commercial markets as a purchaser of goods or services, it [could] be victimized by anticompetitive practices just as surely as a private person or a domestic State, which (…) was held to be a person within the meaning of the antitrust laws; and there [was] no reason why Congress would have wanted to deprive a foreign nation of the treble-damages remedy available to others who suffered through violations of the antitrust laws"[26].

It was this type of decisions that caused the Congress to react and demarcate the extraterritorial application of the Sherman Act. In 1982, the Congress passed Foreign Trade Antitrust Improvements Act[27] (FTAIA), which introduced further limitations to the scope of the Sherman Act. The wording of the Act provided:

"(The Sherman Act) shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless —

(1) such conduct has a direct, substantial, and reasonably foreseeable effect —

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations, or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of (the Sherman Act), other than this section.

If (the Sherman Act) apply to such conduct only because of the operation of paragraph (1)(B), then (the Sherman Act) shall apply to such conduct only for injury to export business in the United States".

The reading of the FTAIA, though murky, has had substantial implications for the application of the Sherman Act to foreign conduct. First, it promulgated that the Sherman Act would not be applied to any conduct that had repercussions upon US markets or consumers. The Sherman Act could be applicable to foreign conduct, only if its effects were direct, substantial

24 *Pfizer Inc., et al., Petitioners, v. Government of India et al.* 424 U.S. 308 (1978).
25 *Ibid*., p. 313-314.
26 *Ibid*., p. 308.
27 15 U.S. Code § 6a.

and reasonably foreseeable. The FTAIA did not provide further guidance on what constituted direct, substantial and reasonably foreseeable effects, leaving this task to US courts who would evaluate them on a case-by-case basis[28]. Nevertheless, this test indicated that a strong nexus between conduct and its effects on competition in the US was required in order for an extraterritorial application of the Sherman Act.

The FTAIA has introduced a taxonomy of foreign conducts that would be considered within the scope of the Sherman Act. Practices that constituted imports to the US would not be considered as extraterritorial conduct within the meaning of the FTAIA and thus would be governed directly by the Sherman Act. The FTAIA was adopted to address anti-competitive effects inflicted upon US markets by US exports and wholly-foreign conducts. Aware of concerns raised by US exporters as to the application of the Sherman Act to their practices abroad, as illustrated in *Pfizer Inc. v. Government of India,* the Congress has made the FTAIA applicable to export practices, if they had direct, substantial, and reasonably foreseeable effects on US trade or commerce and loses incurred in US markets would be the subject of treble-damages claims. Plaintiffs, US citizen or not, would not bring claims of their losses, they incurred in foreign markets, before the US courts. As to the wholly-foreign conduct, the FTAIA has again required direct, substantial and reasonably foreseeable effects on the US trade and commerce and made losses incurred in the US recoverable under treble-damages claims.

The wording of the FTAIA has not provided any indication on the availability of international comity as a part of extraterritoriality analysis. This resulted in a confusion among scholars and the courts as to whether the direct, substantial and reasonable foreseeable effects test superseded the precedent on international comity or the FTAIA left the implementation of the principle on Courts's discretion[29]. The latter was proved to be true, as US courts continued to refer international comity in subsequent case law[30].

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28 For a detailed analysis on the FTAIA's direct, substantial and reasonably foreseeable effects test, see: Richard W. Beckler & Matthew H. Kirtland, Extraterritorial Application of US Antitrust Law: What is Direct, Substantial and Reasonably Foreseeable Effect under the Foreign Trade Antitrust İmprovements Act, (2003) 38/1 Texas International Law Journal 11.

29 Roger P. Alford, 'Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches' (1992) 33/1 Virginia Journal of International Law 1, 18.

30 See *O.N.E. Shipping, Ltd. v. Flota Mercante Grancolombiana, S.A.*, 830 F.2d 449, 451- 54 (2d Cir. 1987), cert. denied, 488 U.S. 923 (1988); *Transnor (Bermuda) Ltd. v. BP North American Petroleum*, 738 F. Supp. 1472, 1477-78 (S.D.N.Y. 1990). See: Roger P. Alford, Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches (1992) *Virginia Journal of International Law,* 33/1, 1, 18, footnote 94.

C. *Hartford Fire* and 'True Conflict'

In Hartford Fire[31], in which claims of a global cartel involving domestic and foreign insurers and reinsurers with the cartel agreement concluded in London, the United Kingdom, were brought before US courts, the Supreme Court ruled that unless there was a 'true conflict' with the foreign law, the Sherman Act was applicable to the conduct, which had direct, substantial, and reasonably foreseeable effect on US commerce or US exports. The court regarded that a true conflict would arise, when the targeted company could not conform to the laws of both jurisdictions without violating one of them[32]. In other words, once it was established that the laws in the home country obliged the targeted companies to act in a certain manner, which accounted for a violation of the Sherman Act, the US courts would consider refraining from holding the relevant companies liable for antitrust law violation.

The reasoning in Hartford Fire accounted for a recalibration in the implementation of international comity by US courts. The Supreme Court noted that "the fact that conduct was lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws, even where the foreign state had a strong policy to permit or encourage such conduct"[33]. The Court would not find the existence of a true conflict, unless defendants would prove that they would not be able to comply with US antitrust rules without violating laws of other jurisdictions. The demonstration of such a true conflict would be very difficult, yet even if defendants demonstrated the existence of a true conflict, this would not result in a direct and immediate abstention of US courts from exerting their jurisdictions. In other words, the existence of a true conflict between US law and other jurisdiction was one, but not, the only requirement, according to which the Supreme Court would forbear from asserting its judicial authority over extraterritorial conduct. Whether the Court would exercise its jurisdiction was to be determined on the basis of international comity, once a true conflict between domestic and foreign laws had been established.

The Supreme Court's "true conflict" formulation for extraterritorial conducts has not been widely accepted by other courts. Some courts concluded that the existence of a true conflict between US law and laws of other jurisdictions might not always be regarded as a prerequisite for a determination of comity analysis. In Mujica v. Airscan Inc.[34] citing several post-Hartford Fire cases the ninth circuit provided that proof of true conflict was not a prerequisite to

31 *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1998)
32 *Ibid*. p. 799.
33 *Ibid*.
34 *Mujica v. Airscan Inc.*, 771 F.3d 580 (9th Cir. 2014).

comity[35]. Interestingly, the Supreme Court itself, in its later decisions, have seemed to abandon the rigid requirement of true conflict as introduced in Hartford Fire. In Empagran[36] the Supreme Court addressed comity concerns with respect to the application of US antitrust rules by referring Justice Scalia's dissenting opinion in Hartford Fire[37]. The Court concluded that the principle of international comity would counsel against applying its jurisdictions to foreign conducts when foreign effects of such conducts were independent from the effects felt in the US[38]. Any action, in contrast to this conclusion, the Court continued, would be regarded as "an act of legal imperialism through legislative fiat"[39].

A thorough reading of the reasoning of the Supreme Court in Empagran revealed a distinction as to the analysis of extraterritoriality of US antitrust rules. Confirming that the principle of international comity was still an important element in this analysis, the court referred to this principle in relation with remedies originating from foreign injury. Accordingly, international comity barred the Court from granting requests of remedy on private claimants, if such requests were based on injuries incurred by claimants outside the US[40]. An argumentum in contrario of this finding would indicate that the Court would not consider comity concerns in granting remedies for foreign conduct, if private plaintiffs, seeking these remedies before the US courts could establish that their injuries were incurred in US markets.

II. Ambiguities Remain

A. Legal Implications of the Indirect Purchaser Doctrine

The reasoning in Empagran have not addressed the implications of international comity in proceedings brought by competent US agencies, such as Department of Justice or Federal Trade Commission rather than private plaintiffs. Questions such as whether the Court, in such cases, would include the principle of international comity in its extraterritoriality analysis, and if so, would it be evaluated only after a finding of 'true conflict' between US and foreign law was established have remained to be answered. Further ambiguities

35 *Ibid*., p. 602.
36 *F. Hoffmann-La Roche Ltd. v Empagran,* 542 U.S. 155 (2004).
37 *Ibid*., p. 161.
38 *Ibid*., p. 166.
39 *Ibid*., p. 167.
40 This approach was in conformity with the Supreme Court's previous decisions subsequent to the adoption of the FTAIA. "Respondents cannot recover antitrust damages based solely on an alleged caramelization of the Japanese market, because American antitrust laws do not regulate the competitive conditions of other nations's economies." *Matsushita v. Zenith Radio Corp.,* 475 U.S. 574 582 (1986).

as to the extraterritoriality of US antitrust rules have arisen especially after the emergence and increasing prevalence of new links in global supply chains of especially technology-intensive industries[41]. US Federal Courts have concluded conflicting findings with respect to the application of the Sherman Act to foreign component cartels which were cartels fixing prices of components of final products which were incorporated abroad and then imported into the US.

In an early case, Illinois Brick Co. v. Illinois[42], the Supreme Court rejecting the pass-on theories asserted by the complainants, promulgated that the only direct purchasers could sue for the damages accruing from cartel practices[43]. The case involved petitioners alleging that Illinois Brick Company sold its brick blocks at high prices to masonry contractors. There was no direct contractual relationship between the petitioners and Illinois Brick Company. Petitioners supplied their bricks from general contractors which themselves supplied these bricks from the masonry contractors. Accordingly the petitioners sought remedies for the losses they incurred as a result of Illinois Brick Company's overcharging of bricks in its agreements with masonry contractors. The Court noted that allowing direct and indirect purchasers to sue for the same conduct would result in a multiplier effect on the remedies recovered from defendants[44]. Identified as "the Indirect Purchaser Doctrine", the Court's reasoning indicated that the final buyer of a product could not bring claims against the first seller, if there were multiple sale agreements regarding to the same product and they were not parties directly to the same agreement.

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41 See: Dick K. Nanto, 'Globalized Supply Chains and U.S. Policy', (2010), *America in the 21st Century: Political and Economic Issues Series: Globalized Supply Chains and Policy* (ed. Solomon Mensah) 19-70. For the implications of new business models to the application of antitrust rules see also: Leon B. Greefield, et al., 'Foreign Component Cartels and the U.S. Antitrust Laws: A First Principle Approach (2015) 29 Antitrust 18; Ellen Meriwether, Motorola Mobility and the FTAIA: If Not Here, Then Where? (2015) 28 Antitrust, 8; Kenneth W. Dam, 'Extraterritoriality in an Age of Globalization: The Hartford Fire Case' (1993) The Supreme Court Review 289; Jae Hyung Ryu, 'Deterring Foreign Component Cartels in the Age of Globalized Supply Chains' (2016) 17/1 Wake Forest Journal of Business and Intellectual Property Law 81; Megan Masingill, 'Extraterritoriality of Antitrust Law: Applying the Supreme Court's Analysis in RJR Nabisco to Foreign Component Cartels' (2019) 68 American University Law Review 621.

42 *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977).

43 "If a pass-on theory may not be used defensively by an antitrust violator (defendant) against a direct purchaser (plaintiff), that theory may not be used offensively by an indirect purchaser (plaintiff) against an alleged violator (defendant)" *Ibid.,* p. 726.

44 "(A)llowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants, since even though an indirect purchaser had already recovered for all or part of an overcharge passed on to him, the direct purchaser would still automatically recover the full amount of the overcharge that the indirect purchaser had shown to be passed on, and, similarly, following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount." *Ibid.,* p. 730.

There are two important aspects in the Supreme Court's decision in *Illinois Brick Co. v. Illinois* that need to be clarified. First, the Supreme Court's indirect purchaser doctrine did not connote the contested conduct having indirect effects on the losses allegedly incurred by the claimants. The indirect purchaser doctrine merely regulated the relationship between the claimants and the perpetrators, rather than that between the contested conduct and the alleged losses. The doctrine required that in order for a claimant to seek any remedy from a violation of the Sherman Act, this claimant had to directly contract with the perpetrator of that violation. The fact that the claimant did not directly contract with the perpetrator would not mean that the anti-competitive effects inflicted by the alleged conduct upon the alleged losses were indirect.

Second, despite strong criticism from both its members and other scholars[45], the court focused on the limits to claims, brought before by private parties, with respect to a violation of the Sherman Act. The indirect purchaser doctrine would not constitute a defense against proceedings launched by public agencies. The DoJ and the FTC could bring claims before the courts under the FTAIA against foreign component cartels, provided that they had direct, substantial and reasonably foreseeable effects on US trade and commerce.

B. Clash of Seventh and Ninth Circuits.

In 2015, two conflicting rulings arose in the Seventh[46] and Ninth[47] Circuits which dealt with the same conspiracy of a foreign component cartel, fixing the price of liquid-crystal-display (LCD) panels which were incorporated into final products abroad, and then sold to retailers in the US. While the Seventh Circuit dealt with a private claim by a US retailer, the Ninth Circuit focused on criminal proceedings by the DoJ against the foreign perpetrators of LCD cartel. The Seventh Circuit relying on the Supreme Court's reasoning in Illinois Brick Co. v. Illinois concluded that indirect purchaser doctrine prevented the US retailer from bringing claims against cartel members, since the direct victim of price fixing practices was the foreign company which directly bought price-fixed LCD panels from cartel members and incorporated them into its final products[48].

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45 Justice Brennan, dissenting to the reasoning in Illinois Brick Co. v. Illinois, pointed out that the Court's decision "outs Congress's purpose and severely undermines the effectiveness of the private treble damages action as an instrument of antitrust enforcement". Illinois Brick Co. v. Illinois, 431 U.S. 720 749 (1977). See also: Ellen Meriwether, 'Motorola Mobility and the FTAIA: If Not Here, Then Where' (2015)29/2 Antitrust 8; Randy M. Stutz, 'The FTAIA in Flux: Foreign Component -Goods Cases Have Tripped, but Have They Fallen?' (2015) CPI Antitrust Chronicle 2.

46 *Motorola Mobility LLC v. AU Optronics Corp.* 775 D.3d 816 (7th Cir. 2015).

47 *United States v. Hui Hsiung* 778 F.3d 738 (9th Cir. 2015).

48 "A related flaw in Motorola's case is its collusion with the indirect-purchaser doctrine of

The court's reasoning was not affected by the fact that foreign direct purchaser of LCD panels was a subsidiary of the US retailer[49]. The Court did not lift the corporate veil between the parent company and its subsidiary, treating them as separate legal entities. Referring to the Supreme Court's reasoning in Empagran, the Seventh circuit found that the US retailer and the parent company could not bring claims against the cartel under the indirect purchaser doctrine, and its subsidiary would not sue the perpetrators before US courts under the FTAIA, as its injury due to price fixing practices were incurred in foreign markets[50]. Any decision otherwise, the Court continued, would "enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and resentment at the apparent effort of the United States to act as the world's competition police officer, a primary concern motivating the Foreign Antitrust Improvements Act"[51].

The Seventh Circuit's decision was in conformity with both the indirect purchaser doctrine and the taxonomy adopted within the FTAIA. The Court correctly identified that the contested practice was an extraterritorial conduct within the meaning of the FTAIA and that the complainant as an indirect buyer of LCD panels cannot file suits for damages under the indirect purchaser doctrine. Nevertheless, this reasoning revealed a substantial flaw within the reach of the Sherman Act over foreign conducts. As mentioned above, cross-border effects of anticompetitive practices have become more likely due to the advent of new supply chains in the global economy. *Motorola Mobility LLC v. AU Optronics Corp.* clearly illustrated that a strict adherence to the indirect purchaser doctrine would leave certain practices outside the scope of the Sherman Act, even though such practices had foreseeable, substantial and direct effects on US trade and commerce under the FTAIA.

It would be reasonable to expect that the Ninth Circuit would not be concerned indirect purchaser doctrine, as the claims of the Sherman Act violation were brought before its hearing by the DoJ, under criminal proceedings against the cartel members. Nevertheless, the Court took an unexpected approach to the implementation of the FTAIA. It considered the relevant practices of the LCD cartel as imports to the US and applied the Sherman Act directly to the

Illinois Brick Co. v. Illinois, (…), which forbids a customer of the purchaser who paid a cartel price to sue the cartels even if his seller — the direct purchaser from the cartels — passed on to him some or even all of the cartel's elevated price." *Motorola Mobility LLC v. AU Optronics Corp.* 775 D.3d 816 821 (7th Cir. 2015).

49 "Motorola wants us to treat it and all of it and all of its foreign subsidiaries as a single integrated enterprise, as if its subsidies were divisions rather than foreign corporations. But American Law does not collapse parents and subsidiaries (or sister corporations) in that way." *Ibid*., p. 820.

50 *Ibid*.

51 *Ibid*., p. 825.

perpetrators. As noted above, the FTAIA provided an exception for imports to the US, and rendered them directly in-scope of the Sherman Act. However, the FTAIA did not further delve into clarifying what practices would constitute 'imports' within the meaning of its reading. The Court found that the arrival of price-fixed LCD panels should be considered as imports, as they were directed at the US import market[52].

This decision was in contrast with the reasoning of the Supreme Court in *Illinois Brick Co. v. Illinois,* in which the Court refused to consider multiple agreements together, even though the subjects of these agreements were the same products. In *Hui Hsiung*, the Ninth Circuit reached the opposite conclusion, treating agreements regarding the sales of LCDs to producers of final products, and that of final products to the buyers in the US, as one single conduct, and considering it as an import, within the meaning of the FTAIA. Striking point was that the Supreme Court, in *Illinois Brick Co. v. Illinois,* treated multiple transactions as different conducts, even though the products that were traded in these agreements were the same. The Ninth Circuit, in *Hui Hsiung,* on the other hand, treated multiple transactions as one conduct, even though the products that were traded in these agreements were different.

The reasoning in Hui Hsiung would indicate that the Ninth Circuit sought to prevent the escape of cartel members from the jurisdiction of the Sherman Act, while their effects on US trade and commerce were substantial[53]. However, in so doing, the Court did not need to stretch the concept of importation in a way that would blur the distinction drawn by the taxonomy endorsed under the FTAIA. The FTAIA and the Supreme Court judgement in Empagran, had already provided ammunition to US public agencies, necessary for the reach of the Sherman Act to these types of foreign practices, under criminal proceedings. In fact, the Ninth Circuit itself, in later part of its decision, confirmed that the FTAIA would still reach the price fixing practices of the defendants, were they considered to be non-import foreign conducts[54].

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52 *United States v. Hui Hsiung* 778 F.3d 738 755 (9th Cir. 2015). See also: Megan Masingill, 'Extraterritoriality of Antitrust Law: Applying the Supreme Court's Analysis in RJR Nabisco to Foreign Component Cartels' (2018) 68 American University Law Review 621, 643.

53 "The defendants's efforts to place their conduct beyond the reach of United States law and to escape culpability under the rubric of extraterritoriality are unavailing" *United States v. Hui Hsiung* 778 F.3d 738 743 (9th Cir. 2015).

54 In *Hui Hsiung,* the DoJ sought to establish its jurisdiction under the FTAIA's direct, substantial and reasonably foreseeable test. The Ninth Circuit rejected the Agency's formulation yet still confirmed that price fixing practices of the defendants had direct, substantial and reasonably foreseeable effects on US trade and commerce. Ibid., pp. 757-759.

In that regard, the Ninth Circuit's reasoning in *Hui Hsiung* acknowledged that given the advent of new supply chains, the Supreme Court's indirect purchaser doctrine should be recalibrated in a way that foreign anticompetitive practices which seriously affected the competitiveness of domestic trade and commerce should not be allowed to escape the confines of the Sherman Act. What was problematic in the Ninth Circuit's decision was the approach adopted by the Court to prevent that from happening. The Court's designation of the contested practice as an import blurred the distinction between the territorial and extraterritorial application of the Sherman Act and thus was not in compliance with the taxonomy established under the FTAIA.

CONCLUSION

US case law clearly illustrated that the effects doctrine has been an instrument crafted specifically for dealing with foreign conduct which had repercussions in national markets. Despite several reforms that recalibrated its scope and extent, the doctrine has been effective in reaching out extraterritorial anti-competitive practices, since its first introduction in *Alcoa.* The aggressive implementation of the doctrine by US courts has caused clamor in international community which criticized US courts' assertion of judicial jurisdiction as violations of sovereign rights enjoyed by other states in international law. Nevertheless, these criticisms were more of a political nature than a legal one, as the PICJ ruled in *Lotus,* public international law lacked any rule forbidding states from exercising their jurisdiction over persons, property and acts outside their territory.

Even though, public international law provided a wide measure of discretion to States, this discretion would not be construed as a right to exercise national jurisdiction in an arbitrary manner. As Judge Fitzmaurice argued in *Barcelona Traction*, this wide discretion was a result of sovereign rights which were accompanied with reciprocal obligations, that is, states exercising jurisdiction over persons, property and acts outside their territory must avoid doing so, if the jurisdiction of another sovereign is found to be more appropriate. The determination of appropriateness must be carried out with criteria balancing the interests of overlapping jurisdictions, such as nationality of perpetrators, availability of remedies, objective of practices, relative importance of alleged violations. As noted above, US case law has introduced several criteria in dealing with balance of interests between overlapping jurisdictions.

Despite 100 years old jurisprudence on extraterritoriality of antitrust rules, the regulation of foreign conducts under the Sherman Act has been far from being well-established. The case law shows that the implementation of the effects doctrine follows the integration of domestic sectors with international markets. Greater the globalization has become, more aggressively the extraterritoriality

has been applied by US courts. Nevertheless, even in *Hartford Fire*, in which the Supreme Court adopted a very aggressive approach to the extraterritorial application of US antitrust rules, the principle of international comity and balancing tests have always been an important part of the extraterritoriality analysis. Discontent for being described as the protagonist of 'legal imperialism' or 'the world's competition police officer' can be seen throughout the rulings of the Supreme Court and other federal courts. Courts have insisted on being cautious in applying the Sherman Act to foreign conducts which had no or very limited nexus with the territory of the US.

This caution resulted in the Seventh Circuit's decision in *Motorola Mobility LLC v. AU Optronics Corp.,* in which the Court refrained from exercising its jurisdiction over the conduct despite the foreseeable, direct and substantial effects the contested practices inflicted upon domestic trade and commerce. Nevertheless, the necessity of new approaches to deal with domestic anticompetitive effects of extraterritorial practices has proved to be evident due to new business models as a result of the introduction of new supply chains in the global economy. The Ninth Circuit, in *Hui Hsiung* sought to exert its authority over such practices even though the Supreme Court's indirect purchaser doctrine in *Illinois Brick Co. v. Illinois* stipulated otherwise.

This paper endorsed the taxonomy established by the FTAIA as to the extent of extraterritorial practices within the scope of the Sherman Act. However, the effectiveness of the FTAIA has been hindered by the Supreme Court's indirect purchaser doctrine. In this respect, the paper proposes the Supreme Court's reconsideration of this doctrine a way that it would not constitute barrier to the prosecution of foreign anticompetitive practices which have foreseeable, direct and substantial effects on US commerce and trade. While the paper does not suggest that the indirect purchaser doctrine should be discarded completely from US case law on the extraterritorial application of the Sherman Act, it provides that the Supreme Court must, at least, clarify that the perpetrators cannot rely on the doctrine as a defense against proceedings by public agencies. Otherwise, case law developed on the Seventh Circuit's reasoning in *Motorola Mobility LLC v. AU Optronics Corp.* would result in an unwarranted limitation in the scope of the Sherman Act.

BIBLIOGRAPHY

Primary Sources

The Sherman Act of 1890 15 U.S. Code §§ 1-7.

Foreign Trade Antitrust Improvements Act of 1982, 15 U.S. Code § 6a.

Case Law

American Banana Co. v. United Fruit Co. 213 U.S. 347 (1909)

Strassheim v. Daily, 221 U.S. 280 (1911)

S.S. "*Lotus"* (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10

United States v. Aluminum Co of America, 148 F.2d 416 (2d Cir. 1945)

United States v. Imperial Chemicals Industries Ltd. 100 F. Supp. 504 (S.D.N.Y. 1951)

United States v. Watchmakers of Switzerland Info. Center, Inc. 168 F. Supp. 904 (S.D.N.Y. 1958)

Sabre Shipping Corp. v. American President Lines Ltd. 285 F. Supp. 949 (S.D.N.Y. 1968)

Case Concerning Barcelona Traction, Light and Power Company Ltd. (Belgium v. Spain) ICJ. 1970

Timberlane Lumber Co. v Bank of America, 549 F2d 597 (9th Cir 1976)

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)

Pfizer Inc., et al., Petitioners, v. Government of India et al. 424 U.S. 308 (1978)

Mannington Mills, Inc. v. Congloeum Corp., 595 F.2d 1287 (3rd Cir. 1979)

Filártiga v. Peña-Irala 630 F.2d 876 (2d Cir. 1980)

Laker Airways v. Sabena, Belgian Wd. Airlines, 731 F.2d 909, 950 (D.C. Cir. 1984)

Matsushita v. Zenith Radio Corp., 475 U.S. 574 582 (1986)

O.N.E. Shipping, Ltd. v. Flota Mercante Grancolombiana, S.A., 830 F.2d 449, 451- 54 (2d Cir. 1987), cert. denied, 488 U.S. 923 (1988)

Transnor (Bermuda) Ltd. v. BP North American Petroleum, 738 F. Supp. 1472, 1477-78 (S.D.N.Y. 1990)

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993)

Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Nov. 6, 1998)

Regina v. Bartle, Bow Street Stipendiary Magistrate & Commissioner of Police, Ex Parte Pinochet 2 W.L.R. 827, 38 I.L.M 581 (1999)

United States v. Yousef, 327 F.3d 56 (2d Cir. 2003)

F. Hoffmann-La Roche Ltd. v Empagran, 542 U.S. 155 (2004)

Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005)

Mujica v. Airscan Inc., 771 F.3d 580 (9th Cir. 2014)

Motorola Mobility LLC v. AU Optronics Corp. 775 D.3d 816 (7th Cir. 2015)

United States v. Hui Hsiung 778 F.3d 738 (9th Cir. 2015)

Secondary Sources

Alford, Roger P. 'Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches' (1992) 33/1 Virginia Journal of International Law 1.

Beckler, Richard W. & Kirtland, Matthew H. 'Extraterritorial Application of US Antitrust Law: What is Direct, Substantial and Reasonably Foreseeable Effect under the Foreign Trade Antitrust Improvements Act', (2003) 38/1 Texas International Law Journal 11.

Dam, Kenneth W., 'Extraterritoriality in an Age of Globalization: The Hartford Fire Case' (1993) The Supreme Court Review 289.

Donald E. Knebel, 'Extraterritorial Application of US Antitrust Laws: Principles and Responses' (2017) 8/2 Jindal Global Law Review 181.

Greefield, Leon B., et al., 'Foreign Component Cartels and the U.S. Antitrust Laws: A First Principle Approach' (2015) 29 Antitrust 18.

Fox, Eleanor M. 'National Law Global Markets and Hartford: Eyes Wide Shut' (2000) 68/1 Antitrust Law Journal 73.

Masingill, M. 'Extraterritoriality of Antitrust Law: Applying the Supreme Court's Analysis in RJR Nabisco to Foreign Component Cartels' (2018) 68 American University Law Review 621.

Meriwether Ellen, 'Motorola Mobility and the FTAIA: If Not Here, Then Where' (2015) 29/2 Antitrust 8

Nanto, Dick K. 'Globalized Supply Chains and U.S. Policy', (2010), *America in the 21st Century: Political and Economic Issues Series: Globalized Supply Chains and Policy* (ed. Solomon Mensah) 19-70

Stutz, Randy M. 'The FTAIA in Flux: Foreign Component -Goods Cases Have Tripped, but Have They Fallen?' (2015) CPI Antitrust Chronicle 2

INTERNATIONAL BIODIVERSITY LAW AND SOCIAL JUSTICE IN DEVELOPING COUNTRIES

Uluslararası Biyoçeşitlilik Hukuku ve Gelişmekte Olan Ülkelerde Sosyal Adalet

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Graduate Thesis Article

Abstract

This paper discusses the fairness of applying the "Common but Differentiated Responsibilities" principle that is adapted in International Biodiversity Law to the "Conservation and Sustainable Use of Biodiversity" through the lens of social justice expounded by Rawls and other respective scholars. After defining the concepts that are used through the paper and subsequently analyzing the international law and related literature on the differentiated approach to conservation and sustainable use, it is argued that the global approach that distinguishes the responsibilities of the states with regard to their economic level is less likely to meet the demands of social justice both for current and future generations of developing countries. The holistic approach, which is adopted for the evaluation of this argument in favor of an egalitarian approach to conservation and sustainable use, indicates the close linkages between the conservation of biodiversity and environmental justice issues, economic concerns in the long term, socio-economic inequalities, and traditional communities- especially in biological resource-rich developing countries. Certain cases are introduced in order to solidify that the prioritization of socio-economic development over biodiversity conservation in developing economies is not effective in addressing the demands of the least advantaged communities of current and future generations- and therefore less likely to comply with the demands of social justice.

Keywords: Biodiversity, International Law, Social Justice, Equality, Rawls

Özet

Bu makale, başta Rawls olmak üzere muhtelif akademisyenlerin yorumladığı biçimde, sosyal adalet perspektifinden Uluslararası Biyoçeşitlilik Hukukunda kabul edilen "Ortak fakat Farklılaştırılmış Sorumluluklar" ilkesinin "Biyoçeşitlilik Koruması ve Sürdürülebilir Kullanımı" sorumluluğuna uygulanmasının adilliğini tartışmaktadır. İlgili kavramları tanımladıktan ve biyoçeşitlilik koruması ve sürdürülebilir kullanımında farklılaştırılmış sorumluluklar çerçevesinde geliştirilen uluslararası hukuku ve literatürü açıkladıktan sonra, ülkelerin çevresel sorumluluklarını ekonomik durumlarına göre farklılaştıran küresel yaklaşımın gelişmekte olan ülkelerdeki şimdiki ve gelecek nesiller için sosyal adaleti sağlamakta yetersiz olabileceği savunulmaktadır. Bu argümanın, biyoçeşitliliğin korunması ve sürdürülebilir kullanımında eşitlikçi bir yaklaşım lehine değerlendirilmesi amacıyla benimsenen bütünsel yaklaşım, biyoçeşitliliğin korunması ile çevresel adaletin, uzun vadede ekonomik kaygıların, yolsuzluğun, sosyo-ekonomik eşitsizliklerin ve -bilhassa biyolojik kaynak zengini- gelişmekle olan ülkelerdeki yerli grupların arasındaki sıkı bağları vurgulamaktadır. Gelişmekte olan ülkelerde sosyo-ekonomik gelişimin biyoçeşitlilik korumasına tercih edilmesinin şimdiki ve gelecek nesillerin en az avantajlı topluluklarının taleplerini karşılamada yetersiz kaldığını ve dolayısıyla sosyal adaleti sağlamada yetersiz olduğunu savunan doğrulamalarımızın somutlaştırılması amacıyla bazı vakalar takdim edilmiştir.

Anahtar Kelimeler: Biyoçeşitlilik, Uluslararası Hukuk, Sosyal Adalet, Eşitlik, Rawls

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INTRODUCTION

Our actions have destroyed, degraded and polluted the earth's habitats, and as a result, the vast majority of the species of plants and animals are unnaturally declining and becoming extinct. This is an unfavorable situation for our nature but in particular for humans, as we are contingent upon biodiversity at least in two ways: first, it is the source of biological resources that provide global communities' agricultural, pharmaceutical and other utilitarian needs and, second, it maintains the biosphere -zone of life on earth- as a functioning system. Therefore, even though biodiversity exists within national boundaries and for the benefit of those who currently exist, its existence is primarily a global and an intergenerational concern.

Through the 1993 Convention on Biological Diversity (CBD), 192 states accepted their legal obligation to ensure the long-term existence of the global biodiversity for humanity's own good and for the sake of all communities in ecosystems.[1] They agreed on several principles, including the common but differentiated responsibilities of developed and developing countries. In this regard, socio-economic development and poverty eradication were recognized as the priority of developing countries, and developed countries were obliged to support their conservation efforts. The present paper scrutinizes whether this principle is compatible with the requirements of social justice and, in particular, intergenerational justice. Therefore, the paper asks: Should developing countries prioritize their current generation's economic development over the conservation of their biodiversity for future generations?

Section 1 explains the differentiated responsibilities approach of the CBD. Section 2 argues that instead of the differentiated responsibilities approach, an egalitarian approach based on the theory of Rawls would be more suitable to achieve social justice. The subsequent sections 3, 4, and 5 explain how the egalitarian approach can help to flourish the least advantaged members of society.

1. Differentiated Responsibilities Approach to Conservation and Sustainable Use

The international community aims to achieve three objectives through the CBD: the conservation of biological diversity, the sustainable use of its

[1] Secretariat of the Convention on Biological Diversity (CBD), *Handbook of the Convention on Biological Diversity Including its Cartagena Protocol on Biosafety* (3rd edn, Montreal 2005).
The common but differentiated responsibilities principle is also relevant for other documents that are part of international biodiversity law such as Cartagena Protocol and Nagoya Protocol. In this paper I will be focusing only on the CBD because it is the core of international biodiversity law.

components and the fair and equitable sharing of benefits from the use of genetic resources.[2] The CBD adopts various principles, e.g. the common heritage of humankind and common but differentiated responsibilities, to ensure that the convention serves these purposes. This section discusses the rationalizations behind applying the "common but differentiated responsibilities" principle to the objective of "conservation and sustainable use of biodiversity". I begin by explaining the related concepts:

The ***sustainable use*** of biological resources means respecting the ability of the ecosystem to feed certain populations of humans or animals -carrying capacity- while using its components. This concept is adapted from the term "sustainable development" that is introduced by the World Commission on Environment and Development (Brundtland Commission) in 1987. The CBD reconstructed the concept of sustainable use as follows:

"[T]he use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations."[3]

The CBD does not further specify how much decline is allowed or how much biodiversity would suffice the needs and aspirations of present and future generations.

Conservation, unlike preservation, expresses a concern for maintaining biodiversity in its dynamic nature, allowing the ecosystems and species to change and evolve. There are, mainly, two types of conservation: in situ conservation, the conservation of biodiversity components inside their habitat, and ex situ conservation, the conservation of biodiversity components outside their natural habitat.[4] The CBD recognizes in situ conservation as its primary method for biodiversity conservation.[5]

The conservation of biological diversity is the chief objective of the CBD.[6] Yet, it does not provide a literal definition for the word "conservation". The reason is, developing countries wanted to use the components of biodiversity, albeit in a sustainable way and, therefore, they wanted to avoid a possible emphasis on the term's preservation aspects that may become prominent from defining and using the conservation as a term on its own.[7] So, the CBD seeks a

2 ibid 87-89.
3 ibid 89.
4 ibid 8-9.
5 ibid.
6 ibid 88, see Article 1.
7 Lyle Glowka et al, *A Guide to the Convention on Biological Diversity* (IUCN Gland and Cambridge 1994), 25.

balance between conservation and sustainable use by not defining conservation alone but rather by using it with the term sustainable use.

The common but differentiated responsibilities principle dates back to the 1972 Stockholm Declaration of the first UN Conference on the Human Environment, where it was codified as an international environmental legal principle. It is one of the cornerstones of the CBD, and it designates different responsibilities to the developing and developed countries with regard to the conservation of biodiversity and its sustainable use.[8] This principle obliges all the states to take responsibility for environmental protection, but it allows each state to contribute according to their capacity.

The 1992 Rio Declaration of the UN Conference on Environment and Development tied the common but differentiated responsibilities principle with sustainable development. This approach was also adopted by the CBD. There are, at least, three motivations behind this attempt, which I will refer to as the "*differentiated responsibilities approach*".

First, historical and recent facts show that developed countries have been putting more pressure on nature. Partly due to this fact, they have the financial resources and capacity which developing countries lack of. This situation is acknowledged in Principle 7 of the Rio Declaration:

"In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. Developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command."[9]

Therefore, the international community asks the developed countries-which are assumed to be financially capable- to compensate for their previous and, also, current actions by funding global biodiversity protection.

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8 Christopher D Stone, 'Common but Differentiated Responsibilities in International Law' (2004) 98(2) Am J Int Law 276, 276-278.
The preamble paragraphs and the content of the Article 20 and Article 21 of the CBD indicates that the Convention adopts the common but differentiated responsibilities principle. Article 20 states that: "The extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties." Article 21 is on the financial mechanism of that would enable the effective implementation of the common but differentiated responsibilities principle. Apart from these, the CBD does not directly refer to the common but differentiates responsibilities principle.

9 United Nations General Assembly, Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. I), 1992.

The second motivation behind the different responsibilities could be to ensure the compliance of developing countries. This issue is of particular importance since the CBD recognizes sovereign rights over resources, including the right to exploit them.[10] From a realist perspective, such allowance would eventually lead to the destruction of biodiversity as it seems rational for each state, for example, to exploit forests in the Amazon to maximize their own economic welfare. Differentiated approach contributes to the cosmopolitan dimension of the CBD mainly by encouraging developing countries to comply with the convention.

Third, the international community considers the economic and social underdevelopment of developing countries as a threat to the global poor and the environment. According to COP 11[11], by recognizing the common but differentiated responsibilities of parties, developed countries are obliged to pay particular attention to developing countries' special needs.[12] By means of this, developing countries would have the chance to prioritize their development concerns and poverty eradication. In this regard, the Preamble of the CBD states that:

"The Contracting Parties (are)... recognizing that economic and social development and poverty eradication are the first and overriding priorities of developing countries..."[13]

One interpretation of the CBD suggests that this paragraph do recognize that the economic and social development of developing countries are more important than their investment in biodiversity conservation.[14] For global biodiversity, this situation requires a differentiated responsibilities approach that would ensure the financing of conservation efforts of developing countries. This position of the CBD is also stated in Article 20/4:

"... the extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments related to financial resources and transfer of technology and will take fully into account

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10 CBD (n 1) 87. Preamble: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

11 COP is the abbreviation for the Conference of the Parties (of the CBD) which takes place every year to discuss global biodiversity problems and solutions.

12 UNEP, 'Status of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization and Related Developments' (Conference of the Parties to the Convention on Biological Diversity, XI/1, 2012), 13.

13 CBD (n 1) 88.

14 Glowka et al (n 7) 13.

the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country parties."[15]

This paper argues against this third motivation of the CBD that is ambiguous with regard to the following points: (1) Does the CBD suggest that developing countries are allowed to prioritize economic development of their current generation over conservation of their biodiversity for future generations? (2) If developed countries stop assisting developing countries during economic downturns or the funding mechanism of the CBD does not work, would the CBD still allow developing countries to prioritize their economic development?

It is curious that the CBD, overall, recognizes that the conservation of biodiversity and the sustainable use of its components would contribute to economic and social development; however, developing countries might be exempted from one of the two dimensions of sustainable use. This is a dilemma with regard to the ethical dimension of sustainable use. To further explain this point, the CBD brings two requirements:

First, the basic needs of all human beings should be met adequately; therefore, developing countries are allowed to use components of biological diversity for poverty eradication.[16] (The primary target of this proposal is current generations).

Second, the development process should be organized in a way that the balance of the ecosystems is not disturbed and the continuity of biological diversity is guaranteed.[17] (The primary target of this proposal is future generations.

According to the CBD, developing countries -are encouraged to but- do not have an obligation to fulfil the second one. Instead, industrialized, rich countries should assist them with finance and adequate technology, so economically poor countries would have a chance to comply with the second requirement of sustainable use.[18]

However, the differentiated responsibilities approach that distinguishes the responsibilities of states regarding their economic level is not likely to meet the demands of social justice for current and future generations of

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15 CBD (n 1) 243.

16 ibid 4.

17 ibid.

18 ibid 15. See the Article 21 on financial mechanism of the CBD. These articles can be interpreted differently. However, the restrictive interpretation that is adopted in this paper is also possible. The CBD is not clear on the responsibilities of developing countries towards their future generations in the absence of financial help from developed countries. The egalitarian approach defends that the obligations of countries towards future generations should be clarified regardless of whether the country is a developing country or a developed one.

developing countries. This paper argues in favor of an egalitarian approach instead. According to that approach, the right to development and fulfilling responsibilities to future generations should be equally valued, regardless of the economic situation of the country. I adopt a holistic approach to defend my argument, and I introduce three issues to support and illustrate it.

2. Achieving Social Justice through an Egalitarian Approach

Up until now, I explained the three motivations behind the differentiated responsibilities approach. As it appears, the CBD suggests that the states have the common responsibility of conservation and sustainable use of biodiversity. Still, due to different socio-economic situations and historical facts, they might have different responsibilities and priorities. In this respect, the differentiated responsibilities approach to conservation and sustainable use could be considered an effective tool for ensuring international justice. However, it might disadvantage the current least well-off in developing countries and future generations. Therefore, it does not seem fair from the perspective of social justice and intergenerational justice.

I begin with, briefly, explaining Rawls's theory that constitutes the idea of social justice that I adopt to defend an egalitarian approach to the conservation and sustainable use of biodiversity: Rawls discusses two principles of justice:

"First, each person engaged in an institution or affected by it has an equal right to the most extensive liberty compatible with a like liberty for all. Second, inequalities as defined by the institutional structure or fostered by it are arbitrary unless it is reasonable to expect that they will work out to everyone's advantage and provided that the positions and offices to which they attach or from which they may be gained are open to all."[19]

The first principle of justice asserts that justice requires equal treatment to everyone regardless of what social class they are born in to. Inequalities in society are inevitable, but everybody's individual rights should be equally respected. The second principle of justice gives rise to Rawls's *difference principle,* which asserts that these "inequalities are just if and only if they are part of a larger system in which they work out to the advantage of the most unfortunate representative man."[20] Through considering a chief problem of distributive justice, Rawls offers a possible compensation for the inequalities in society. This is not only a theory of distributive justice but also a strict theory of social justice that concerns the allocation of benefits and burdens among various individuals and groups. In such a theory, giving everyone his/her due is possible by ensuring their access to primary social goods.

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19 John Rawls, *Collected Papers* (Oxford University Press 1999), 133.
20 ibid 138.

Moreover, I adopt the idea of intergenerational justice, which states that "all generations have an equal place in relation to the natural system, and that there is no basis for preferring past, present or future generations in relation to the system."[21]

The following sections develop that prioritizing socio-economic development over social justice-oriented conservation policies primarily affects the least advantaged communities (poor, local farmers, forest communities, indigenous peoples). Besides the direct effects of biodiversity degradation, this situation, particularly, undermines the just institutions necessary for the development of future generations -especially in biological resource-rich developing countries. Therefore, an egalitarian approach requires developing countries to pay equal attention to poverty eradication and biodiversity conservation by considering environmental justice, socio-economic inequalities and the values of biodiversity. These dynamics are respectively addressed.

3. Environmental Justice

3.1. Scrutinizing the Concept

Environmental justice discourse advocates that social groups are unequal in their exposure to environmental hazards and their access to environmental amenities.[22] The notion emerged in the United States (US) as a public concern related to racial and ethnic inequalities, which became evident in exposure to environmental risks and accessing environmental policies.[23] Later, the

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21 Edith Brown Weiss, *Environmental Change and International Law: New Challenges and Dimensions* (United Nations University Press Tokyo 1992), 19-26. For studies that discuss intergenerational justice in the context of environmental law see: Richard P. Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (CUP, 2009); Chaitanya Motupalli, 'International Justice, Environmental Law, and Restorative Justice' (2018) 8(2) Washington Journal of Environmental Law and Policy 333.
According to the intergenerational justice principle, each generation should have certain obligations towards the next to maintain the integrity of the relation between the planet and humanity. These obligations are recognized in international arenas and national texts in the last decades regarding the increasing concern that has been provoked by the depletion of natural resources and environmental degradation. The 1972 Stockholm Conference on the Human Environment is the foremost international arena to introduce a concern for the justice to future generations. It was accepted that we have a responsibility to "protect and improve" the environment for both present and future generations." See: The Declaration of the United Nations Conference on the Human Environment (1972) <https://legal.un.org/avl/pdf/ha/dunche/dunche_e.pdf> accessed 5 July 2021.

22 Eloi Laurent, 'Environmental Justice and Environmental Inequalities: a European Perspective' (2010-05) Sciences Po Publications.

23 ibid. In this respect, two prominent aspects of environmental justice are: distributive justice, which is concerned with how environmental goods and bads are distributed among different societal groups, and procedural justice, which is concerned with the equity of access to environmental decision-making process. This paper is elaborating the former one.

environmental justice debate moved beyond the sole racial dimension and embraced all kinds of social conditions that produce environmental injustices, including poverty.

The term "poverty" means "not just lack of income but also inadequate access to basic goods such as food and water; insufficient knowledge, health or skills to fulfil normal livelihood functions; poor housing, unhealthy or dangerous environment, and bad social relations; and lack of civil and political rights, assets and services."[24] With this broad definition, it becomes more apparent that the disadvantaged people in a society are threatened by various forms of interrelated societal risks, including environmental degradation. In this respect, the following inquiries will be scrutinized: First, what risks degradation of biological resources pose to the poor and minorities? Second, can these risks be eliminated by developing countries' biodiversity conservation efforts? Third, what are the global and intergenerational aspects of environmental justice? Fourth, when we consider our findings altogether, can environmental injustices motivate conservation-friendly policies in developing countries?

One aspect of environmental distributive justice is concerned with the distribution of environmental burdens. In the literature, this issue is usually discussed in terms of toxics, chemicals and pollution that directly damage the environment in which the poor or minorities live.[25] These harmful substances also disturb biodiversity. However, because of the direct effect that they have on human health, in such a case, one may not find it necessary to discuss the effect of biodiversity loss on the least advantaged people through the environmental justice discourse.

I will exemplify this situation with a typical but tragic case: Gammalin 20. After the US banned a toxic relative of DDT, Gammalin 20, was imported into Ghana for use as a pesticide by cocoa farmers.[26] Africans fishing in Ghana's Lake Volta discovered that if they dumped the pesticide into the lake, many fish died and floated to the top of the water, and fishermen could easily collect them. These fishes were sold and were eaten by Ghanaian villagers who were

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24 Jessica Smith et al, 'Linking the Thematic Programmes of Work of the Convention on Biological Diversity (CBD) to Poverty Reduction. Biodiversity for Development: New Approaches for National Biodiversity Strategies' (Secretariat of the Convention on Biological Diversity 2010), 16.

25 Kristin Shrader-Frechette, *Environmental Justice: Creating Equity, Reclaiming Democracy* (Oxford University Press 2002); Gordon Walker, *Environmental Justice: Concepts, Evidence and Politics* (Routledge London 2012).

26 DDT (dichloro-diphenyl-trichloroethane) is the first modern synthetic insecticide that poses health risks to humans. See: 'DDT- A Brief History and Status' (*EPA*) <https://www.epa.gov/ingredients-used-pesticide-products/ddt-brief-history-and-status> accessed 5 July 2021.

poisoned and had brain disturbances and liver damage.[27] The fishermen were not aware of their action until a Ghanaian NGO stepped in and explained what happened.

This is a typical environmental injustice. People in developing nations usually face similar, if not worse, environmental threats because of the importation of banned chemicals from developed states to poor countries. From this paper's point of view, in Ghana's case, the fish population of Lake Volta dropped about 10-20%, and this "backstage", the biodiversity loss, threatens the food security of locals -and in the long term their future generations- as the rural poor rely mostly on local ecosystems for primary goods and services. Similarly, suppose a forest is damaged because of pollution or logging activities. In that case, the primary victims turn out to be the poor people or minorities, e.g. indigenous people, who are contingent upon that forest.[28] In such situations, environmental justice issues appear because of forest degradation and because in most cases, disadvantaged communities are not compensated when the biological resources they rely upon are degraded for economic development.[29]

One other aspect of environmental justice deals with how environmental goods are distributed. In this respect, we cannot always claim that conservation favors the least advantaged ones in one society. Therefore, it does not always protect the poor and minorities from becoming victims of unjust environmental action (or inaction) or a policy. Indeed, due to establishing a protected area, many poor or indigenous people lose their land-use opportunities and houses and are not compensated adequately. There appear to be few examples of actual compensation, and above these, it is being discussed whether displaced people should ever be compensated.[30] Moreover, when these people's ex-home becomes a protected area, a local park with many facilities, they will not be the ones to enjoy from the green land utmost. For example, in South Africa, under colonial and apartheid governments, thousands of black South Africans were forced to move out to some urban areas where they had no food, shelter and clean water while billions were spent on preserving wildlife and protecting

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27 Shrader-Frechette (n 25) 10; Marvin J. Levine, *Pesticides: A Toxic Time Bomb in Our Midst* (Praeger Publishing USA, 2007), 229.

28 J. Peter Brosius, 'Endangered forest, endangered people: Environmentalist Representations of Indigenous Knowledge, Human Ecology' (1997) 25(1) Human Ecology 47; Megumi Matuyama, Noboru Morioka, 'The Impact of Deforestation in Brazilian Amazonia: The Indigenous People of Rondonia State', (1998) 4(2) Journal of Forest Planning 71.

29 Andrew Harding, *Access to Environmental Justice: A Comparative Study* (Martinus Nijhoff Publishers Leiden Boston 2007).

30 Daniel Brockington, David Wilkie, 'Protected Areas and Poverty' (2015) 370(1681) Philosophical Transactions of the Royal Society B 1.

wildflowers.[31] Should we blame biodiversity conservation for the inequalities that arise during conservation actions? Or is it precise enough that it is not the conservation but inappropriate conservation policies that lack a social justice perception that brings social injustices?

Biodiversity degradation will be affecting people sooner or later. Still, a conservation policy that goes hand in hand with human development can benefit the least advantaged people in one community and at the same time contribute to the well-being of future people, as Wangari Maathai taught to the world with the Green Belt Movement. Maathai, at the time she was a member of the Environment and Habitat Committee of the National Council of Women in Kenya, suggested that heartening rural women to plant trees would be – in her words- "'a project that would . . . help our member [sic] in the rural areas to inexpensively meet many of their needs including wood fuel, building and fencing material and soil conservation."[32] So, the Green Belt Movement, which engages woman (the least advantaged community in Kenyan society) in both community development and environmental conservation activities, was established and 30 million trees were planted. According to their annual report, their mission is "to mobilize community consciousness for self-determination, justice, equity, reduction of poverty, and environmental conservation, using trees as the entry point."[33] Maathai has been awarded the Nobel Peace Prize, and she inspired community-based conservation efforts in the developing world.[34] Additionally, properly managed protected areas can benefit the least advantaged people in a community. For example, for the management of Kruger National Park in South Africa, an inclusive policy that fosters limited resource use, education of local people and community participation was introduced. Local communities considered this situation as "an opportunity to conserve and learn about nature, as well as a mechanism for generating income and employment."[35]

Apart from these, environmental justice discourse has moved to the global level as it became more apparent that the environmental risks do not stop at

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31 David A. McDonald, *Environmental Justice in South Africa* (Ohio University Press 2002), 1.

32 Wangari Maathai, *The Green Belt Movement: Sharing the Approach and the Experience* (Lantern Books New York 2004), 17.

33 Green Belt Movement, *Special Annual Report* (2003), 6.

34 For Nepal's Community Forestry Program that was inspired from Green Belt Movement see: Bethany Boyer-Rechlin, 'Women in Forestry: A study of Kenya's Green Belt Movement and Nepal's Community Forestry Program' (2010) 25(9) Scandinavian Journal of Forest Research 69.

35 Randy Tanner et al, 'Legitimacy and the Use of Natural Resources in Kruger National Park, South Africa' (2010) 40(3) International Journal of Sociology 76.

national borders. Environmental risks affect the most disadvantaged people globally (as seen in the cases of floods and biodiversity losses because of climate change that industrialized nations contributed).[36] Moreover, our actions also affect the environment in which future generations will live. So currently, the environmental justice discourse goes beyond nations and generations. In this respect, biodiversity conservation can be seen as a global justice issue because we all benefit from biodiversity, and we all cause a loss in biodiversity, e.g. by greenhouse gas emissions. In this case, the question is; which principle of justice should guide us on the distribution of environmental goods and bads?

The egalitarian structures in Rawls' principles of justice- the fair equality of opportunity and the difference principle- stop at national borders, i.e. Rawls intended to apply the question of justice within states only.[37] Yet cosmopolitan liberalists, namely Beitz and Pogge, argue that "the appropriate global principle is Rawls' difference principle"[38] because Rawls' conception of justice will "make the social position of the globally least advantaged the touchstone for assessing our basic institutions."[39] This approach could be seen as more suitable for justifying and specifying the distribution of environmental burdens globally. Therefore, from the perspective of cosmopolitan liberalism, equal distribution of environmental goods and bads globally can be defended. However, in practice, focusing on fair distribution at the global level does not necessarily mean all nations who deal with environmental issues will benefit. For instance, Global Environment Facility (GEF) pays for those investments that have global benefits.[40] Yet, some environmental problems may not get paid by GEF when solving those problems does not assist all nations. Indeed, GEF is criticized for overlooking the problems that are faced by the poorest countries.[41]

Consequently, what I argue is, poor people and minorities are usually the bearers of environmental hazards. Still, a fair conservation policy can

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36 Patrick Hossay, *Unsustainable: A Primer for Global Environmental and Social Justice* (London: Zed Books 2006).

37 Rawls had three concerns: first, related to subject matter, second, different views on ideal-non-ideal theory, third, interpretations of the empirical world. For an explanation of these concerns and related discussions see: Oluf Langhelle, 'Sustainable Development and Social Justice: Expanding the Rawlsian Framework of Global Justice' (2010) 9(3) Environmental Values 295.

38 Charles Beitz, *Political Theory and International Relations* (Princeton University Press 1979), 170.

39 Thomas W. Pogge, *Realizing Rawls* (Cornell University Press Ithaca 1989), 242.

40 The financial mechanism of the CBD.

41 Steinar Andresen, Kristin G. Rosendal, *The Global Environment Facility (GEF): Right Mechanism for Improved Implementation?* (Fridtjof Nansen Institute 2012).

eliminate these risks by making sure that the demands of the least advantaged people in a community are met. On the other hand, it is shown that all the states on earth are obliged to take responsibility for biodiversity conservation. However, if they tend to evade responsibility, there are still good reasons- like achieving environmental justice for the least advantaged people and giving future generations their due- for governments to take responsibility for their territory. The following section introduces a case to further clarify why biodiversity conservation and poverty eradication should be equally valued for environmental justice in developing countries.

3.2. "Seeds of Justice" & Community Gene Banks: Ethiopia's Case

Biodiversity involves various values for different communities who, therefore, face varied threats related to biodiversity loss. Ethiopia is one of the world's poorest countries, yet one of the richest ones in terms of crop diversity. In Ethiopia's case, agricultural biodiversity -crop genetic resources- play a crucial role in terms of economic growth, food security and improvement of local livelihoods.[42] Ethiopia's agrobiodiversity is highly threatened by environmental degradation and agricultural modernization by the replacement of land laces and farmer varieties with hybrid high yielding varieties that increase agricultural production but decrease the diversity.[43]

Agrobiodiversity provides security for the farmer against diseases, pests, drought, and other stresses; supports biological systems essential for the livelihood of local communities; sustains current production systems; improves human diets; and offers forceful seeds to persist in a changing climate.[44] Therefore, there are two challenges that could arise concerning environmental justice when crop diversity is under threat: first, the improvement of food security and livelihood of the rural poor today; second, the sustenance and enhancement of the long-term productivity and resilience of agricultural systems to future generations.[45]

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42 Melaku Worede, 'Agro-Biodiversity and Food Security in Ethiopia, Environment and Development in Ethiopia' (Proceeding of the Symposium of the Forum for Social Studies, Addis Ababa, 2001).

43 ibid 11.

44 Food and Agriculture Organization of the United Nations, 'Save and Grow: a New Paradigm of Agriculture. A Policymaker's Guide to the Sustainable Intensification of Smallholder Crop Production' (FAO 2011) <http://www.fao.org/ag/agp/save-and-grow/pdfs/flyers/Save-and-grow-flyer.pdf> accessed 5 July 2021.

45 Stefanie Sievers-Glotzbach, 'Environmental Justice in Agricultural Systems: An Evaluation of Success Factors and Barriers by the Example of the Philippine Farmer Network MASIPAG' (2012) University of Lüneburg Working Paper Series in Economics No. 225; Food and Agriculture Organization of the United Nations, 'The State of the Food Insecurity in the World. Addressing Food Insecurity in Protracted Crises' (FAO Rome 2010) <http://www.fao.org/3/i1683e/i1683e.pdf> accessed 5 July 2021.

Realizing these circumstances, in 1976, Dr Melaku Worede established the Ethiopia National Gene Bank, which is considered the world's premier genetic conservation institution.[46] Worede's work aimed to embrace participatory plant breeding, re-dignify farmer's expert ecological knowledge and conserve Ethiopia's precious seed diversity through in situ conservation.[47] Through "community gene banks" and with "participatory plant breeding", the best performing seeds that farmers introduced were multiplied and distributed to all local farmers.[48] In this way, both the welfare of local farmers and the well-being of future generations were improved.[49] In spite of all these achievements, Ethiopia is still struggling to provide basic human needs to a substantial part of its -increasing- population.[50] Yet, the astounding progress of the country in the crop in situ conservation and strong community participation can secure the food sovereignty of the locals from the -growing- monopoly power in the seed industry.[51] Therefore, agrobiodiversity conservation by developing countries' own efforts seems like an important tool for promoting environmental justice and securing the increasing value of the natural seeds for future generations' prosperity.

The following section addresses socio-economic inequalities to develop the argument of this paper on why an egalitarian approach to conservation and sustainable use is needed.

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46 The institution is currently named Ethiopian Biodiversity Institute, see: 'About Us' (*Ethiopian Biodiversity Institute*) <https://www.ebi.gov.et/about-us/> accessed 5 July 2021.

47 Worede (n 42); TESFAYE, Tesemma, and REGASSA, Feyissa, Keeping Diversity Alive: an Ethiopian Perspective, in Genes in the Field: On-Farm Conservation of Crop Diversity. London: Lewis Publishers, 2000, pp. 143-161.

48 ibid 149.

49 ibid 158.

50 Betemariam Gebre, Yesigat Ayenew Habtamu, Biadgilign Sibhatu, 'Drought, Hunger and Coping Mechanisms among Rural Household in Southeast Ethiopia' (2021) 7(3) Heliyon e06355.

51 Biotechnological methods, which companies in developed countries provide, increase new varieties of seeds which are protected by patents. Farmers have to pay –sometimes high amounts- for new varieties and when they continue on using them their traditional varieties get lost. In this respect local farmers are getting worried, they state that: "We've been buying high yielding seeds every year, often with borrowed money. We've stopped conserving and saving our own traditional seeds so we have no stocks. We're worried about what will happen if, for some reason, big seed companies are unable to supply seeds…" That is the reason why in situ (on farm) conservation and community seed banks are increasing in the developing world. See: 'Community Seed Banks' (*Green Conserve*) <http://www.greenconserve.com/content/community-seed-banks> accessed 5 July 2021.

4. Socio-economic Inequalities

4.1. Scrutinizing the Concept

Researchers suggest that social inequality has a substantial effect on environmental degradation.[52] The idea is when the wealth is widely held by few resource users, it is in their interest to conserve or degrade it regardless of what the poorer members of the society demand. For example, a study of community forestry in Mexico indicates that forests were poorly managed in a village with an unequal economic structure compared to more equitable villages. Because in the former, small groups of powerful people manipulate the logging industry for their own good, resulting in overexploitation and biodiversity loss.[53] It is also proposed that inequality may thwart conservation because it can hinder the collective action necessary for environmental protection.[54] In this respect, the relationship between inequality and biodiversity was revealed, and it was identified that greater inequality is associated with the number of threatened species.[55] The differentiated responsibilities approach to conservation and sustainable use of biodiversity intensively emphasizes the importance of eradication of poverty for biodiversity. However, these studies suggest that poverty may be a great threat to biodiversity while wealth is an even greater one. Among the various socio-economic drivers that are related to biodiversity loss, such as population density, environmental governance, GDP per capita and inequality, inequality appears to be the most prominent trigger of biodiversity loss. (see Figure 1)[56]

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52 Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press New York 1990); James Boyce, 'Inequality as a Cause of Environmental Degradation' {1994) 11(3) Ecological Economics 169; Jean-Marie Baland et al, *Inequality, Cooperation, and Environmental Sustainability* (Princeton University Press 2007).

53 Daniel Klooster, 'Institutional Choice, Community, and Struggle: A Case Study of Forest Co-Management in Mexico' (2000) 28(1) World Development 1.

54 Jeff Dayton-Johnson, Pranab Bardhan, 'Inequality and Conservation on the Local Commons: a Theoretical Exercise' (2002) 112(481) Economic Journal 577.

55 Gregory M. Mikkelson et al, 'Economic Inequality Predicts Biodiversity Loss' (2007) 2(5) PLOS ONE 1; Tim G. Holland et al, 'A Cross-national Analysis of How Economic Inequality Predicts Biodiversity Loss' (2009) 23(5) Conservation Biology 1304.

56 Holland (n 55) 1311.

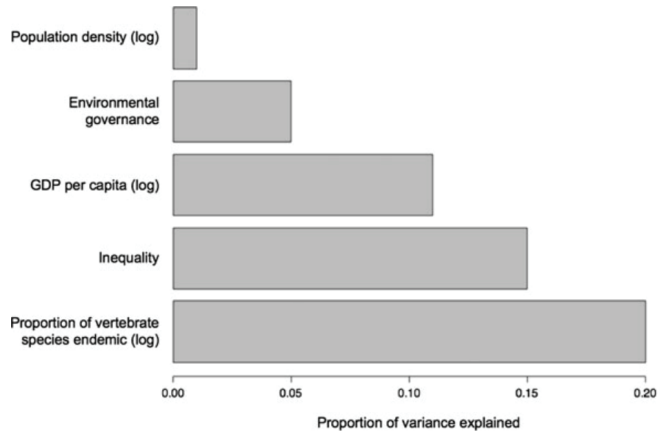

Figure 1. Socio-economic effectors of biodiversity loss.

A far-reaching reduction in the gap between the rich and poor may be a first and foremost requirement both for the development of the poor and conserving biodiversity.[57] After testing his hypothesis on 45 countries and concluding that societies with more unequal distributions of income experience greater losses of biodiversity[58], Mikkelson argued that, "while there is often a trade-off between economic growth and environmental quality, this study suggests that there is a synergy between a different kind of economic development namely, toward a more equitable distribution of wealth and the conservation of biological diversity."[59] Overall, unless current trends toward greater inequality are reversed, it may become increasingly hard to conserve the wide variety of the living world.[60]

Consequently, in terms of biodiversity conservation, a differentiated approach to conservation and sustainable use that prioritizes economic development in developing countries may lead to undesired results if these countries are developing while the gap between rich and poor is widening. This is usually the case in natural resource-rich countries where growing inequalities are manifesting themselves in natural resource use. In South Africa, during the 2000s, close to 40 % of the national income went to 10 % of the population despite the development of democracy, good macroeconomic performance,

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57 Raphael Bille et al, 'Biodiversity Conservation and Poverty Alleviation: A Way out of the Deadlock' (2012) 5(1) S.A.P.I.EN.S 1.

58 Mikkelson (n 55) 2. This study also tested environmental Kuznets' curve and concluded that it was not supported by the data.

59 'Biodiversity Loss Linked To Economic Inequality Worldwide' (*ScienceDaily,* 2007) <www.sciencedaily.com/releases/2007/05/070516071757.htm> accessed 5 July 2021.

60 Mikkelson (n 55) 4.

and less dependence on natural resources.[61] I consider this situation as the non-ideal breaking point of an ideal global distribution of biodiversity conservation cost. This is because, if the just distribution of resources could be applied at the national level, developing countries would not be considering sustainable use as a burden that cannot be afforded without the differentiated responsibilities at the global level. A resource distribution that cannot be achieved at the national level- which cannot even meet the basic demand of an egalitarian justice- puts the global distribution in a hopelessly idealistic position. Moreover, this social justice problem raises intergenerational concerns because without redistribution, "one generation's successful individuals would become the next generation's embedded caste, hoarding the wealth they had accumulated."[62] From this point of view, since the inequality raises unequal access to the political system and position of power, in the long term, it would undermine the well-being of the least advantaged communities who depend on biological resources for their livelihoods. The following section clarifies how the conservation efforts of the communities would help to overcome inequalities.

4.2. Decentralization & Community Participation to Conservation: Nepal's Case

The biogeographic location and the great span of elevation bestow Nepal with rich biodiversity, including many endemic species. On the flip side, Nepal's late history is full of political struggles, civil strikes, and economic crisis. These challenges put a lot of pressure on the forests, and forests became noticeably degraded.[63]

By the 1970s, government foresters realized that the Department of Forests was not able to manage the forests alone.[64] Hence, the government had sponsored Community Forestry with the goal of involving local communities in the management and conservation of the forests upon which they depend. This system developed into the Community Forest User Group (CFUG) system, and today, one in three Nepali citizens is a CFUG member.[65] This program successfully increases the greenery of degraded sites, and it also benefits the

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61 Mthuli Ncube et al, *South Africa's Quest for Inclusive Development, in International Development: Ideas, Experience and Prospects* (Oxford Univeristy Press 2014), 708.

62 Anthony Giddens, Patrick Diamond, *The New Egalitarianism* (Polity Publishing 2005).

63 Kamal P. Acharya, 'Conserving Biodiversity and Improving Livelihoods: The Case of Community Forestry in Nepal' (The International Conference on Rural Livelihoods, Forests and Biodiversity 2003); Ambika P. Gautam et al, 'A Review of Forest Policies, Institutions, and Changes in the Resource Condition in Nepal' (2004) 6(2) International Forestry Review 136.

64 Bethany Boyer-Rechlin, 'Women in Forestry: A Study of Kenya's Green Belt Movement and Nepal's Community Forestry Program' (2010) 25(9) Scandinavian Journal of Forest Research 69.

65 ibid.

least advantaged communities.[66] If this conservation action becomes more responsive to the poor, it will help to eradicate socio-economic inequalities. Moreover, despite all the challenges Nepal is facing -the political instability, poverty and extreme corruption- carrying a conservation activity in which one of every three citizens is involved is hope-inspiring for future generations.

Community forestry is not the only activity in Nepal that the citizens participate in. There are significant non-profit organizations, like the National Trust for Conservation, that are mandated to work for nature conservation. The Government of Nepal hands over the management of certain conservation areas to this trust. The economic resources for conservation come from self-financing mechanisms of conservation areas (namely, three conservation areas are self-financing: Annapurna, Manaslu and Gaurishnakar) or national and international donations.[67] These conservation parks are not museums but (tourist) areas where locals who are trained about resource management take a leading role in managing their own natural resources in a sustainable way. The socio-economic condition near these protected areas shows an upward trend.[68] Hence, the decentralization of conservation can well-off the least advantaged people if conservation areas are properly managed.

The following section develops the value of biodiversity as a concept that supports the egalitarian approach adopted in this paper.

5. The Value of Biodiversity

5.1. Scrutinizing the Concept

In its Preamble, the CBD recognizes, mainly, two values of biodiversity: (1) the intrinsic value and (2) the values for human well-being (economic, social, ecological, genetic scientific, educational). These values are not defined explicitly since the valorization of the values of the biodiversity often viewed as difficult, and in some cases, inappropriate.[69] In this regard, there are mainly two challenges: irreversibility and uncertainty. Uncertainty limits the knowledge about the future society's development patterns and ecological processes. Irreversibility narrows the potential socio-economic development and restricts

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66 Acharya (n 63), 4.

67 I would like to thank to information office of NTNC for providing me this information through e-mail.

68 See: 'Achievements of NTNC' (*National Trust for Nature Conservation*) <https://ntnc.org.np/index.php/achievements-ntnc> accessed 5 July 2021.

69 Robert D Weaver, *Economic Valuation of Biodiversity, in Biodiversity and Landscapes: Paradox of Humanity* (Cambridge University Press 1994); Mike Christie et al, 'Valuing the Diversity of Biodiversity' (2006) 58(2) Ecological Economics 304; Thomas Potthast, 'The Values of Biodiversity: Philosophical Considerations Connecting Theory and Practice' in *Concepts and Values in Biodiversity* (Routledge Studies in Biodiversity Politics and Management 2014).

opportunities for the adaptation of society.[70] These two challenges lead to a justification for conservation by giving rise to the optional value of biodiversity, representing the potential value of biodiversity in the future. The utilitarian value of biodiversity to humans seems infinitive, as new species, new networks, new technologies are discovered continuously. Hence, an economic valuation may estimate the benefits derived from biological resources and the cost of implementing conservation initiatives but not of biodiversity.[71] Moreover, an economic valuation may fail to address the local value of biodiversity.

Biodiversity is often central to the culture, religion or identity of many local and indigenous populations who mostly oppose assigning a monetary value to specific natural resources.[72] Moreover, locals and indigenous people are the foremost appreciators of the diversity of species and habitats, because their existence directly depends on the goods that biodiversity provides them.[73] Therefore, recognizing and representing the local values is vital for ensuring food security, health care and development of local communities. The consideration of (sustainable) development in developing countries should leave enough room for interpretations and ideas of traditional communities about potential resource use patterns. Intergenerational equity should be respected together with the fundamental rights of the traditional populations, who are conscious of not the price but the value of biodiversity.

Consequently, traditional values are significant means for the sustainable development of developing countries. Therefore, conservation of the environment of indigenous peoples should not be less valued in a fair socio-economic development policy. In Rawls' theory, primary goods that every rational individual desire include more than income and wealth. They include rights, opportunities and the social basis for self-respect.[74] Each generation should preserve not only natural assets but also just institutions for future generations' presence in a just society- a society that offers them these primary goods.[75] Indigenous peoples' future and, accordingly, the future of conservation activities depend on respecting these communities and providing them with the opportunity to preserve, develop and transmit their ethnic identity and ancestral lands to future generations. Conservation of biodiversity

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70 Michael Flint, 'Biological Diversity and Developing Countries' in *The Earthscan Reader in Environmental Economics* (Earthscan Publications London 1992), 440.

71 Luca Tacconi, *Biodiversity and Ecological Economics: Participation, Values and Resource Management* (Earthscan Publications 2000), 64.

72 Timo Kaphengst, Christiane Gerstetter, *Addressing Multiple Values of Biodiversity in Development Cooperation* (Policy Brief of Ecologic Institute 2015).

73 Anna Lawrance et al, 'Exploring Local Values for Forest Biodiversity on Mount Cameroon' 20(2) Mountain Research and Development 113.

74 John Rawls, *A Theory of Justice* (Oxford University Press 1999), xix, 28.

75 ibid 8.

together with indigenous communities is essential for achieving social justice in developing countries for current and future generations; as the next case will be emphasizing.

5.2. Learning from Locals & Community Management: Belize's Case

The Maya Indians owned and occupied the territory in Central America, which is now Belize, for thousands of years before European settlement. For hundreds of years, the Maya forest was logged by the natives. They were conserved very well and are still recognized as one of the most important ecological areas in the world on account of their great biological diversity and the remarkably high number of animals and plants.[76] In 1994, the southern part of Belize, where Mayans were settled, was specified as a protected area-Sarstoon-Temash National Park (STNP). The government had never thought to consult the indigenous communities before creating the park. When local people realized that they were living on a national park border, they strongly opposed it.[77] After lengthy discussions, a co-management resolution was offered. With the input provided by external representatives, the communities began to understand that if they contribute to the conservation management, the park could allow them to increase their income-generating opportunities.[78] In 1999, Sarstoon-Temash Institute of Indigenous Management (SATIIM) was established as a non-governmental organization by community leaders. The organization strengthens the communities' capacity to manage the park, records traditional ecological knowledge and defends the indigenous population's rights.[79] SATIIM is Belize's most successful indigenous park management organization. So far, it both safeguards the traditional values of indigenous communities and provides effective conservation for the forest's biological heritage.[80]

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76 Samuel Bridgewater, *A Natural History of Belize: Inside the Maya Forest* (University of Texas Press 2012), 3.

77 Javier Beltrán, Adrian Philips, *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies, IUCN* (The World Conservation Union 2000), 55.

78 ibid 56.

79 The prominent 'legal victory' of the organization is; the right to free, prior and informed consent of the indigenous communities was successfully claimed in the Belize Supreme Court, against the oil drilling agreement between the Government of Belize and US Capital Energy. See: SATIIM, *Annual Report of 2006* <https://www.satiim.org.bz/download/newsletters-and-updates/annualreport06.pdf> accessed 5 July 2021; Maya Indigenous Community of the Toledo District vs. Belize, Case 12.053, Report No. 40/04, Inter-Am. C.H.R., OEA/Ser. L/V/II.122 Doc. 5 rev. 1 at 727.

80 Gregory Ch'oc, 'Indigenous Peoples and the Struggle for Governance of Natural Resources in Belize, in Indigenous Peoples and Conservation: From Rights to Resource Management' (2010) Conservation International 27.

Conclusion

This paper explained that the primary international agreement to conserve biodiversity, the CBD, adopts a differentiated approach to conservation and sustainable use of biodiversity through endorsing the common but differentiated responsibilities principle. This approach allows prioritizing the socio-economic development to biodiversity conservation for developing countries that the global community cannot effectively fund. The paper argued that such an approach does not meet the demands of social justice that require the flourishment of the least advantaged communities. This is because, biodiversity conservation may not be able to alleviate poverty but has an important role in preventing the further impoverishment of the least advantaged communities. Achieving justice for both current and future generations requires improving allocation and the use of biological resources in a way that the health and integrity of the ecosystem are not disturbed, and the least advantaged people in the society do not worse off.

In this regard, the paper emphasized the importance of considering conservation through an egalitarian approach, especially in developing countries. It addressed three dynamics to support this claim: environmental justice, socio-economic inequalities and the value of biodiversity. Under these concepts, certain successful conservation cases that justify an egalitarian approach were analyzed. The common ground of these cases is the grassroots efforts for biodiversity conservation. Hence, supporting the bottom-up movements of the least advantaged communities in developing countries is needed to respect social justice while conserving biodiversity.

Bibliography

Acharya K.P, 'Conserving Biodiversity and Improving Livelihoods: The Case of Community Forestry in Nepal' (The International Conference on Rural Livelihoods, Forests and Biodiversity 2003)

Andresen S, Rosendal K.G, *The Global Environment Facility (GEF): Right Mechanism for Improved Implementation?* (Fridtjof Nansen Institute 2012)

Baland JM, *Inequality, Cooperation, and Environmental Sustainability* (Princeton University Press 2007)

Beitz C, *Political Theory and International Relations* (Princeton University Press 1979)

Beltrán J, Philips A, *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies, IUCN* (The World Conservation Union 2000)

Bille R et al, 'Biodiversity Conservation and Poverty Alleviation: A Way out of the Deadlock' (2012) 5(1) S.A.P.I.EN.S 1

Boyce J , 'Inequality as a Cause of Environmental Degradation' {1994)

11(3) Ecological Economics 169

Boyer-Rechlin B, 'Women in Forestry: A study of Kenya's Green Belt Movement and Nepal's Community Forestry Program' (2010) 25(9) Scandinavian Journal of Forest Research 69

Bridgewater S, *A Natural History of Belize: Inside the Maya Forest* (University of Texas Press 2012)

Bockington D, Wilkie D, 'Protected Areas and Poverty' (2015) 370(1681) Philosophical Transactions of the Royal Society B 1

Brosius J.P, 'Endangered forest, endangered people: Environmentalist Representations of Indigenous Knowledge, Human Ecology' (1997) 25(1) Human Ecology 47

Ch'oc G, 'Indigenous Peoples and the Struggle for Governance of Natural Resources in Belize, in Indigenous Peoples and Conservation: From Rights to Resource Management' (2010) Conservation International 27

Christie M et al, 'Valuing the Diversity of Biodiversity' (2006) 58(2) Ecological Economics 304

Dayton-Johnson J, Bardhan P, 'Inequality and Conservation on the Local Commons: a Theoretical Exercise' (2002) 112(481) Economic Journal 577

Flint M, 'Biological Diversity and Developing Countries' in *The Earthscan Reader in Environmental Economics* (Earthscan Publications London 1992)

Food and Agriculture Organization of the United Nations, 'Save and Grow: a New Paradigm of Agriculture. A Policymaker's Guide to the Sustainable Intensification of Smallholder Crop Production' (FAO 2011) <http://www.fao.org/ag/agp/save-and-grow/pdfs/flyers/Save-and-grow-flyer.pdf> accessed 5 July 2021.

Food and Agriculture Organization of the United Nations, 'The State of the Food Insecurity in the World. Addressing Food Insecurity in Protracted Crises' (FAO Rome 2010) <http://www.fao.org/3/i1683e/i1683e.pdf> accessed 5 July 2021

Gautam A.P et al, 'A Review of Forest Policies, Institutions, and Changes in the Resource Condition in Nepal' (2004) 6(2) International Forestry Review 136

Gebre B, Habtamu Y.A, Sibhatu B, 'Drought, Hunger and Coping Mechanisms among Rural Household in Southeast Ethiopia' (2021) 7(3) Heliyon e06355

Giddens A, Diamons P, *The New Egalitarianism* (Polity Publishing 2005)

Glowka L et al, *A Guide to the Convention on Biological Diversity* (IUCN Gland and Cambridge 1994)

Harding A, *Access to Environmental Justice: A Comparative Study* (Martinus Nijhoff Publishers, Leiden Boston 2007)

Hiskes R.P, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (Cambridge University Press 2009)

Holland T.G et al, 'A Cross-national Analysis of How Economic Inequality Predicts Biodiversity Loss' (2009) 23(5) Conservation Biology 1304

Hossay P, *Unsustainable: A Primer for Global Environmental and Social Justice* (London: Zed Books 2006)

Kaphengst T, Gerstetter C, *Addressing Multiple Values of Biodiversity in Development Cooperation* (Policy Brief of Ecologic Institute 2015)

Klooster D, 'Institutional Choice, Community, and Struggle: A Case Study of Forest Co-Management in Mexico' (2000) 28(1) World Development 1

Langhelle O, 'Sustainable Development and Social Justice: Expanding the Rawlsian Framework of Global Justice' (2010) 9(3) Environmental Values 295

Laurent E, 'Environmental Justice and Environmental Inequalities: a European Perspective' (2010-05) Sciences Po Publications

Lawrence A et al, 'Exploring Local Values for Forest Biodiversity on Mount Cameroon' 20(2) Mountain Research and Development 113

Levine M.J, *Pesticides: A Toxic Time Bomb in Our Midst* (Praeger Publishing USA, 2007)

Maathai W, *The Green Belt Movement: Sharing the Approach and the Experience* (Lantern Books New York 2004)

Maruyama M, Morioka N, 'The Impact of Deforestation in Brazilian Amazonia: The Indigenous People of Rondonia State', (1998) 4(2) Journal of Forest Planning 71

McDonald D.A, *Environmental Justice in South Africa* (Ohio University Press 2002)

Mikkelson G.M. 'Economic Inequality Predicts Biodiversity Loss' (2007) 2(5) PLOS ONE 1

Motupalli C, 'International Justice, Environmental Law, and Restorative Justice' (2018) 8(2) Washington Journal of Environmental Law and Policy 333

Ncube M et al, *South Africa's Quest for Inclusive Development, in International Development: Ideas, Experience and Prospects* (Oxford University Press 2014)

Ostrom E, Governing the Commons: *The Evolution of Institutions for Collective Action* (Cambridge University Press New York 1990)

Pogge T.W, *Realizing Rawls* (Cornell University Press Ithaca 1989)

Potthast T, 'The Values of Biodiversity: Philosophical Considerations Connecting Theory and Practice' in *Concepts and Values in Biodiversity* (Routledge Studies in Biodiversity Politics and Management 2014)

Rawls J, *A Theory of Justice* (revised edn, Oxford University Press 1999)

Collected Papers (revised edn, Oxford University Press 1999)

Secretariat of the Convention on Biological Diversity (CBD), *Handbook of the Convention on Biological Diversity Including its Cartagena Protocol on Biosafety* (3rd edn, Montreal 2005).

Shrader-Frechette K, *Environmental Justice: Creating Equity, Reclaiming Democracy* (Oxford University Press 2002)

Sievers-Glotzbach S, 'Environmental Justice in Agricultural Systems: An Evaluation of Success Factors and Barriers by the Example of the Philippine Farmer Network MASIPAG' (2012) University of Lüneburg Working Paper Series in Economics No. 225

Smith J et al, 'Linking the Thematic Programmes of Work of the Convention on Biological Diversity (CBD) to Poverty Reduction. Biodiversity for Development: New Approaches for National Biodiversity Strategies' (Secretariat of the Convention on Biological Diversity 2010)

Stone C.D, 'Common but Differentiated Responsibilities in International Law' (2004) 98(2) Am J Int Law 276

Tacconi L, *Biodiversity and Ecological Economics: Participation, Values and Resource Management* (Earthscan Publications 2000)

Tanner R et al, 'Legitimacy and the Use of Natural Resources in Kruger National Park, South Africa' (2010) 40(3) International Journal of Sociology 76

UNEP, 'Status of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization and Related Developments' (Conference of the Parties to the Convention on Biological Diversity, XI/1, 2012)

United Nations General Assembly, Rio Declaration on Environment and Development, A/CONF.151/26 (Vol. I), 1992

Walker G, *Environmental Justice: Concepts, Evidence and Politics* (Routledge London 2012)

Weaver R.D, *Economic Valuation of Biodiversity, in Biodiversity and Landscapes: Paradox of Humanity* (Cambridge University Press 1994)

Weiss E.B, *Environmental Change and International Law: New Challenges and Dimensions* (United Nations University Press Tokyo 1992)

Worede M, 'Agro-Biodiversity and Food Security in Ethiopia, Environment and Development in Ethiopia' (Proceeding of the Symposium of the Forum for Social Studies, Addis Ababa, 2001)

Worede M, Tesfaye T, and Regassa F, *Keeping Diversity Alive: an Ethiopian Perspective, in Genes in the Field: On-Farm Conservation of Crop Diversity* (London: Lewis Publishers 2000)

THE ALABAMA ARBITRAL AWARD AND INDIRECT DAMAGES IN INTERNATIONAL LAW

Alabama Tahkimi Kararı ve Uluslararası Hukukta Dolaylı Zararlar

Judge Elit Meviza DEMİRKOL*

Research Article

Abstract

The Alabama Arbitral Award is of crucial importance in the field of international law. One of its many significant rulings is that which regards indirect damages. Although the arbitral tribunal rejected all American indirect claims; this decision is nonetheless considered political and it is deemed necessary to analyze the question of whether these claims constitute indirect damages for which Great Britain was responsible.

This article, composed of three chapters, begins by examining the Tribunal Award. Firstly, it examines the American Civil War, which was the source of the two countries' disagreement and the Treaty of Washington which established the Alabama arbitral tribunal. In addition, the United States' direct and indirect claims against Great Britain and the award granted to the States will be analyzed. In the second chapter, the notion of indirect damages in international law will be examined. It is preferred to focus on the notion's interpretation according to ARSIWA Commentary. In the last chapter, an analysis of American indirect claims as indirect damages will be discussed in light of various legal opinions and link of causality.

Keywords: Indirect damages, ARSIWA, Treaty of Washington, link of causality

Özet

Uluslararası hukuk alanında Alabama Tahkimi kararı büyük önemi haizdir. Kararın pek çok kayda değer hükmünden bir tanesi, tali zararlara ilişkin olandır. Kuşkusuz, tahkim mahkemesi tüm Amerikan tali taleplerini reddetmiştir; ancak bu karar siyasi kabul edilmekte ve bu nedenle Birleşik Krallık'ın söz konusu tali zararlardan sorumlu olup olmadığı sorusunun irdelenmesi gerekli olmaktadır.

Üç bölümden oluşan bu makale, kararın incelenmesiyle başlamaktadır; ilk olarak iki ülke arasındaki anlaşmazlığın kaynağı olan Amerikan İç Savaşı ve Alabama tahkim mahkemesini kuran Washington Antlaşması aktarılacaktır. Akabinde, Amerika Birleşik Devletleri'nin Birleşik Krallık'tan olan doğrudan ve tali talepleri ile Birleşik Devletler lehine verilen hükümden bahsedilecektir. İkinci bölümde, uluslararası hukuktaki tali zarar kavramı irdelenecektir; kavramın ARSIWA Yorumları uyarınca anlamı üzerinde durulması tercih edilmiştir. Son bölümde, çeşitli görüşler ve nedensellik bağı ışığında tali zarar teşkil edip edemeyeceği noktasında Amerikan tali talepleri tahlil edilecektir.

Anahtar Kelimeler: Tali zararlar, ARSIWA, Washington Antlaşması, nedensellik bağı.

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INTRODUCTION

The Alabama Claims of the United States of America against Great Britain, known as Alabama Claims or Geneva Arbitration, was an arbitral award rendered on 14 September 1872 on the United States' claims against Great Britain. The conflict was resolved by the Arbitral Tribunal established by Article I of the Treaty of Washington of 8 May 1871.

The Alabama Arbitration is significant in various points. Firstly, the arbitration is considered as the origin of interstate arbitration and a mediation of respectable and peaceful settlement of international disputes[1].

Secondly, the rule expressed in Articles on State Responsibility of States for Internationally Wrongful Acts (ARSIWA)[2] Article 3, that the characterization of an internationally wrongful act is governed by international law and such characterization is not affected by its characterization as lawful by internal law, was stated pointedly in the Alabama case; a State cannot rely on its internal law as an excuse for not performing its international obligations[3].

The third important aspect of the Alabama Claims Arbitration is its ruling on indirect claims of the United States, which is the subject of this paper, composed of three chapters. The first chapter will examine the facts of the award, the United States' claims and the award granted to the States. In the second chapter, the meaning of indirect damages under international law will be explained. Lastly, in the third chapter, the question of whether the American indirect claims can be considered as indirect damages in international law will be analyzed.

I. THE ALABAMA ARBITRAL AWARD

The Alabama arbitral award's ruling on indirect damages is notable in international law. In order to better comprehend its significance and the discussion revolving around the ruling, several matters need to be scrutinized. In this chapter, the facts leading to the Alabama arbitration will be firstly conveyed. Secondly, the United States' claims against Great Britain will be explained under two subcategories. Thirdly and lastly, the award granted to the States and the arbitral tribunal's decision will be reviewed.

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1 Wolfgang Friedmann, "Half a Century of International Law", **Virginia Law Review**, Vol. 50, No. 8, December 1964, pp. 1333-1358, p. 1334.

2 Text adopted by the International Law Commission of the United Nations at its 53rd session in 2001.

3 James Crawford, "State Responsibility", **Max Planck Encyclopedia of Public International Law**, September 2006, paragraph 17.

A. Facts Leading the Alabama Arbitration

The disaccord between the United States and Great Britain did not arise overnight, and therefore the historical facts leading to the arbitration are warrant examination. The event that gave rise to the divergence of these two great powers was the American Civil War, which will be explained under the first subcategory. To settle their differences, these two powers agreed to have recourse to arbitration under the Treaty of Washington, which will be discussed under the second subcategory.

1. American Civil War

The American Civil War was the origin of the United States and Great Britain's differences. This American war was between the Union States and the Confederacy and lasted for four years, between 1861 and 1865[4]. The Union was comprised of Northern States, which were loyal to federal government. In opposition, there were the breakaway Confederate States, which are mainly referred as the Southern States.

The Confederacy, originally composed of seven southern states, seceded from United States following Abraham Lincoln's election to the presidency in 1860[5]. The Confederate States consisted of states in which slavery was legal (often referred to as "slave states") including South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas. These seven were later joined by Arkansas, North Carolina, Tennessee and Virginia, for a total of 11 Confederate states[6].

Slavery was foundational to the economies of the Southern 'Slave States'. The plantation system used and depended on the forced labor of slaves brought to the United States from Africa. President Lincoln, and the Northern States were opposed to this practice and vowed to end it. Thus, the southern secession and the resulting conflict occurred due to differing convictions about the enslavement of Black Americans[7].

During the Civil War, the Union and the Confederacy used every available resource in order to secure victory. The Confederacy sought to cripple the Union's commerce by hunting and sinking Northern merchant vessels. To this aim, their agents traveled to Great Britain to procure ships[8]. They managed to

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4 Dwight T. Pitcaithley, "The American Civil War and the Preservation of Memory", **Cultural Resource Management**, Vol. 25, No. 4, 2002, pp. 5-9, p. 5.

5 https://www.britannica.com/event/American-Civil-War (Date of access: 04.12.2020).

6 Ibidem (Ibid.).

7 Karen Byrne, "'We Have a Claim on This Estate', Remembering Slavery at Arlington House", **Cultural Resource Management**, Vol. 25, No. 4, 2002, pp. 27-29, p. 27.

8 Tom Bingham, "The Alabama Claims Arbitration", **International and Comparative Law Quarterly**, 54/1, 2005, pp. 1-25, pp. 3-4.

buy thirteen vessels including Confederate States Ship (CSS) Alabama, CSS Florida, CSS Georgia, and CSS Shenandoah. These ships were delivered with no arms or ammunition. However, when they sailed out to sea and reached waters over which Britain had no jurisdiction, they linked up with other vessels and were loaded with guns and ammunition. These armed Southern vessels were then used to capture, burn or sink Union merchant vessels.

The Union, for their part, used a different naval strategy to prevent the Confederate States from trading, a strategy commonly referred to as the 'Union Blockade' or 'Southern Blockade'. In international law, a maritime blockade constitutes a legal acknowledgement of a state of war[9]. Following the introduction of the blockade, several countries declared neutrality, with Great Britain becoming the first to do so.

To explain neutrality briefly, it is a practice that allows states to declare that they will not become involved in outbreaks of war among two or more other states[10]. This is temporary neutrality, not permanent neutrality of which Switzerland is an example[11]. States that declare neutrality in armed conflicts abstain from the hostilities and they are to be impartial towards the belligerents. States generally declare neutrality in order to protect their interests, including trade relations, since the laws of neutrality allowed neutral and belligerent state citizens to have the same opportunities to buy and sell goods in markets[12].

2. Treaty of Washington

The relations between the United States and Great Britain began to fissure during the Civil War. There were numerous British statements, many of them official, expressing support for the Confederacy and antipathy to the Union[13]. The United States alleged that Great Britain was negligent in its neutrality obligations during the Civil War, with particular complaints about British shipbuilding for the Confederacy.

In order for the two countries to resolve their differences, negotiations began in Geneva, Switzerland under the 1871 Treaty of Washington. The treaty's full name was "Treaty Between Great Britain And the United States for The Amicable Setting of All Causes of Difference Between the Two Countries". This document is regarded as a complete diplomatic triumph for the United States[14].

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9 Elizabeth Chadwick, **The British View of Neutrality in 1872**, 2018, p. 3.
10 Chadwick, p. 3.
11 Chadwick, p. 2.
12 Chadwick, pp. 3-4.
13 Bingham, p. 3.
14 Frederick Trevor Hill, **Decisive Battles of the Law-Narrative Studies of Eight Legal Contests Affecting the History of the United States between the Years 1800 and 1886**,

Article 1 of the Treaty is considered as its core: "*Whereas differences have arisen between the Government of the United States and the Government of Her Britannic Majesty, and still exist, growing out of the Acts committed by the several vessels which have given rise to the claims generically known as the Alabama Claims; ... the regret felt by Her Majesty's Government for the escape, under whatever circumstances, of the Alabama and other vessels from British ports, and for the depredations committed by those vessels;*

Now, in order to remove and adjust all complaints and claims on the part of the United States and to provide for the speedy settlement of such claims, which are not admitted by Her Britannic Majesty's Government, the High Contracting Parties agree that all the said claims, growing out of Acts committed by the aforesaid vessels, and generically known as the Alabama Claims, shall be referred to a tribunal of arbitration to be composed of five arbitrators.".

With this treaty, the United States and Great Britain mutually agreed on specific standards of neutrality in advance, and these neutral rules formulated ex-post facto Britain's negligence [15]. In fact, this document formed the law of their arbitration. The Treaty of Washington constituted a clear codification of the law applicable to the obligations of a neutral power towards belligerents and an agreement to submit the Alabama claims to binding international arbitration[16].

Article 6 of the Treaty comprises "Three Rules of Washington", which were the rules of public international law by which British liability was to be judged[17]: Firstly, a neutral government must use due diligence[18] to prevent the arming, equipping or departure, in or from its jurisdiction of vessels the neutral government had reasonable grounds to believe were intended for the war effort. Secondly, a neutral government must not permit belligerents to make use of its ports or waters to serve as operational bases for either belligerent. Thirdly, a

1906, p. 189.

15 Chadwick, p. 2, 8.

16 Bartram S. Brown, "Humanitarian Intervention at a Crossroads", **William&Mary Law Review**, Vol. 41 (1999-2000), Issue 5, 2000, pp. 1683-1741, p. 1716.

17 Bingham, pp. 15-16. "…*The arbitrators are bound under the terms of the said VIth article, in deciding the matters submitted to them, to be governed by the three rules therein specified and by such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case...*" (Alabama claims of the United States of America v. Great Britain, Arbitration Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871 ("Arbitration Award"), **Reports of International Arbitral Awards**, Volume XXIX, pp.125-134, p. 129.).

18 In the Corfu Channel Case, the Court sums up due diligence principle as "*Every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States*" (Corfu Channel Case (United Kingdom v. Albania); Merits, International Court of Justice, 9 April 1949, p. 22).

neutral government must prevent any violation of these rules in its own ports and waters. The Geneva arbitrators had to interpret the content of due diligence as per the Three Rules of Washington.

Additionally, the United States and Great Britain agreed to take this matter to be resolved by arbitration under the Treaty of Washington. Thanks to the Treaty, the disaccord between these two states was to be amicably and peacefully resolved by arbitration. Even though there had been other treaties, such as the Jay Treaty of 1794 between the United States and Great Britain, with provisions having recourse to arbitration, the Alabama arbitration is considered as the origin of interstate arbitration with its binding award[19]. Five arbitrators were appointed by the Treaty; Charles Francis Adams for the United States, Sir Alexander Cockburn for Great Britain, Count Frederic Sclopis for Italy, Jacob Staempfli for Switzerland and Baron d'Itajuba for Brazil were selected by each state.

B. United States' Claims:

After the Civil War concluded, the United States demanded compensation from Great Britain; claiming that the British government did not act with due diligence in maintaining relations equally with both belligerents[20] and their tacit support for construction of the CSS Alabama and other vessels resulted in massive damage to the United States. The United States had two set of claims in their contention of Great Britain's breach of neutrality duties and thus, their responsibilities. These claims, categorized as direct and indirect claims, will be examined in turn.

1. Direct Claims

The United States' first and main allegations were direct claims, which were damages the Union suffered as a direct result of Great Britain's negligence in permitting Confederate warships to be built in and depart from British ports. Great Britain had a Foreign Enlistment Act of 1819 and its provisions did not prohibit the construction in Britain of a ship capable of being adapted for warlike purposes. It only prohibited the equipping and arming of belligerent ships within Britain's jurisdiction[21].

To illustrate, the CSS Alabama was constructed for Confederate use in 1862 in Liverpool, yet it was equipped and armed elsewhere but with the help of two

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19 Mikael Schinazi, "The Three Ages of International Commercial Arbitration and the Development of the ICC Arbitration System", **ICC Dispute Resolution Bulletin**, Issue 2, 2020, pp. 63-75, p. 65.

20 Chadwick, p. 7.

21 Willliam Park/ Bruno de Fumichon, "Retour sur L'Affaire de L'Alabama: De l'Utilité et de l'Histoire pour l'Arbitrage International", **Revue de l'Arbitrage**, 2019, No. 3, pp. 743-834, p. 766.

British vessels[22]. Great Britain claimed the ships were "innocent" when they were in their ports. However, they were in fact destined for the Confederacy in breach of the Southern blockade.

Great Britain contended that a neutral state and its subjects may continue to engage in trade, although an abstaining and impartial, neutral state does not supply either belligerent directly with war articles[23]. Therefore, the issue of whether the sale of a ship of war as a commercial transaction could or could not be a breach of neutrality needed to be resolved[24].

The Americans' first set of claims consisted of "extensive direct losses in the capture of a large number of vessels with their cargos, and in the heavy national expenditures in pursuit of the cruisers"[25]. The first claim - of direct losses - derives from destruction of vessels and their cargos; the second - national expenditures - derive from the expenditures in pursuit of Confederate commercial raiders.

The States alleged that the CSS Alabama, together with other Confederate raiders, deprived the United States government and its suppliers and agents of 250 vessels actually destroyed with an estimated loss of 500.000 tons of shipping[26]. In short, the direct claim is the damages demanded for losses incurred and depredations committed, directly resulting from, the failure of Britain honestly and faithfully to fulfill the obligations of neutrality.

2. Indirect Claims

The second set of American claims were the indirect claims, which caused great controversy. The direct claim was the cost of lost ships and property with a value of 15 million dollars. Charles Sumner, the senator for Massachusetts, delivered a speech in 1869 where he transformed the scale of the American claim[27] by adding the indirect damages.

The indirect claims included firstly a claim for the increased cost of marine insurance; secondly, a claim for diminution in the American carrying trade;

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22 http://www.encyclopediaofalabama.org/article/h-973 (Date of access: 08.12.2020).

23 Sir Alexander Cockburn's Dissenting Opinion in the Alabama Claims Arbitration of September 14th, 1872 in Papers Relating to the Treaty of Washington (1872), at 230 et seq., p. 235 (https://www.trans-lex.org/262138/_/sir-alexander-cockburns-dissenting-opinion-in-the%C2%A0alabama-claims-arbitration-of%C2%A0september-14th-1872-in:-papers-relating-to-the-treaty-of-washington-at-230-et-seq/ (Date of access: 10.12.2020).

24 Chadwick, p. 23.

25 The Executive Documents Printed by Order of The House of Representatives During the Second Session of the Forty-Second Congress, 1871-1872, Washington Government Printing Office, 1872, s. 39.

26 John E. Robinson, "The Alabama Claims and the Development of Modern Admiralty Arbitration", **Malabu: Maritime Law Bulletin**, Vol. 3, No. 1, Winter 2012, pp. 22-25, p. 23.

27 Bingham, p. 12.

and thirdly, a claim for a decrease in overall American merchant tonnage. The second and the third claims are the business losses incurred by the transfer of the American commercial marine vessels to the British flag, that is, the cost of the lost cargo that was allegedly diverted from the States vessels to safer foreign vessels (primarily Britain)[28]. American indirect claims also consisted of a fourth claim for loss of import and export business and a fifth claim for the loss of expected economic growth.

These five claims together were valued at 110 million dollars[29]. Factually, these complaints were not without foundation. The losses inflicted on Northern merchant ships did lead to greatly increased insurance premiums, many Northern ship-owners registered their vessels under foreign flags, and knowledgeable commentators have asserted that the American merchant marine never fully recovered from the Civil War[30].

The United States included one more claim, which is a claim for the cost of suppressing the rebellion for a period of two years[31]: Senator Sumner contended that the war had been prolonged by the damage the cruisers inflicted on the Union. The Americans claimed that prolongation of the war resulted from British failure to intervene against the Confederacy's actions in the British empire[32]. This claim was valued at two billion dollars, which is equal to 30 trillion dollars today[33].

It is crucial to explain what happened during the Arbitration process in Geneva in order to understand the arbitral tribunal's decision on indirect damages. The negotiations were quiet until the British found out that the States advanced indirect claims that Sumner had advanced in his Senate speech three years earlier[34]. The British government contended that these claims could not be the subject of arbitration, and that an award on these claims would bankrupt the country[35]. According to them, the war itself would have been a preferable alternative than to pay this sum[36].

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28 Robinson, p. 24.

29 Marion Mills Miller**, Great Debates in American History, from the Debates in the British Parliament on the Colonial Stamp Act (1764-1765) to the Debates in Congress at the Close of the Taft Administration (1912-1913)**, Current Literature Pub. Co., New York, p. 439.

30 Bingham, p. 12, f.n. 46.

31 Désiré Girouard, "The Alabama Indirect Claims", **Revue Critique de Legislation et de Jurisprudence du Canada**, Vol. 2, No. 2, 1872, pp. 185-205, p. 186.

32 Robinson, p. 25.

33 Park/Fumichon, p. 759. Senator Sumner proposed that the United States seize Canada in return for the Britain's indemity debt (Ibid.).

34 Bingham, p. 19.

35 Bingham, p. 20.

36 Roundell Palmer, **Memorials**, Macmillan&Co., London, 1898, p. 231.

It must be mentioned that the Americans had no confidence in these indirect claims, yet it was politically impossible for them to abandon them[37]. The United States claimed that the treaty itself provided for the settlement "of all differences", and that the arbitrators were authorized "to examine and decide all questions that should be laid before them by either government.". As a result, they insisted that the arbitrators should rule on the claims, but the British insisted they should not; so, there was an impasse[38].

The British didn't present their argument to the arbitral tribunal and asked for an adjournment of eight months[39], which would mean the end of the arbitration, and also violation of an international agreement. For three days, there was intense negotiation on these indirect claims, which was actually a skillful diplomatic move[40]. In the end, both sides concluded an agreement, and the arbitral tribunal delivered an extra-judicial opinion which referred to the parties' disagreement over whether the tribunal was competent to rule on the indirect claims[41]. However, it neither expressed nor implied any opinion on the point regarding the competency of the Tribunal itself.

According to the Geneva Tribunal's decision on indirect claims; "*...The Arbitrators…have arrived, individually and collectively, at the conclusion that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations, and should, upon such principles, be wholly excluded from the consideration of the Tribunal in making its award even if there were no disagreement between the two governments as to the competency of the tribunal to decide thereon…*[42]*."*

In sum, the American party informed the tribunal that they would no longer pursue the indirect claims[43]. One can reasonably conclude that they were abandoned in the hope of an amicable settlement[44]. This means, in effect, that the tribunal didn't offer a conclusion on the indirect claims, but rather it was the litigant- the British- that pronounced judgement[45].

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37 The Alabama Claims, **American Law Review**, Vol. 4, No. 1, October 1869, pp. 31-39.

38 Bingham, p. 20.

39 Caleb Cushing, **Treaty of Washington: Its Negotiation, Execution, and the Discussion Relating Thereto**, Harper&Bros, New York, 1873, p. 68.

40 Bingham, p. 20-21.

41 Park/Fumichon, p. 771.

42 Jackson H. Ralston, **Law and Procedure of International Tribunals: Being a Resume of the Views of Arbitrators upon Questions Arising under the Law of Nations and of the Procedure and Practice of International Courts**, Stanford University Press, 1926, p. 242.

43 Marjorie M. Whiteman, **Damages in International Law**, U.S. Government Printing Office, Washington, 1943, p. 1774.

44 Girouard, p. 189.

45 Hill, p. 192. To understand the political reasons behind the Tribunal's decision, Great

C. The Award Granted to the United States

The Geneva tribunal, after a negotiation process of 9 months, found unanimously against Britain on the direct claim regarding the CSS Alabama and on the CSS Florida. According to the arbitral tribunal, neutral states must exercise their due diligence obligation "*in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part*"[46].

With regards to the CSS Alabama, the Award states that the British government failed to use due diligence in the performance of its neutral obligations. During the construction of said vessel in the British port of Liverpool, diplomatic agents of the States issued warnings, yet Britain "… *omitted… to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable*…"[47].

Regarding the CSS Florida, the free admission of the vessel into the ports of British colonies and its armament with the co-operation of the British vessel "Prince Alfred" were additional reasons for the Tribunal to admit Britain's failure, by omission, to fulfil its duties[48]. For the CSS Shenandoah, the enlistment of men to the vessel within the port at Melbourne was found indicative of negligence on behalf of Great Britain. Thus, regarding the CSS Shenandoah, the Tribunal found against Britain by a majority of three to two, from and after the vessel's entry into port at Melbourne[49].

The United States had asked for an award of 24 million dollars. Eventually a majority of the arbitrators accepted the final figure of $15.5 million dollars to be paid in gold, including interest on 14th September 1872[50]. This sum is equivalent approximately to 225 billion dollars today[51].

Britain's Queen's speech constitutes a good example. In her speech to Parliament on the 6th of February 1872, the Queen said "*In the Case so submitted on behalf of the Unites States, large claims have been included which are understood on my part not to be within the province of the arbitrator. On this subject, I have caused a friendly communication to be made to the Government of the United States*." (Thomas Willing Balch, The Alabama Arbitration 1-2, 1900, p. 123-124 https://archive.org/stream/alabamaarbitrati00balcuoft?ref=ol#page/123/mode/1up (Date of access: 26.12.2020).)

46 Arbitration Award, p. 129.

47 Arbitration Award, p. 130.

48 Arbitration Award, p. 131.

49 Arbitration Award, p. 132.

50 Arbitration Award, p. 133-134. For copies of the certificate of deposit and bonds for this payment, see Frank W. Hackett, **Geneva Award Acts: With Notes, and References to Decisions of the Court of Commissioners of Alabama Claims**, Little, Brown and Co., Boston, 1882, pp. 179-180.

51 Fumichon/Park, p. 747; Schinazi, p. 65.

The award, by assigning Britain's responsibility, became the pioneering landmark in applying the principle that a State cannot rely on its internal law as an excuse for not performing its international obligations. Britain's Foreign Enlistment Act of 1819, which did not prohibit the construction of warships in British ports, could not justify Britain's omission of acting in due diligence. Notwithstanding that construction of Confederate vessels in British ports was lawful according to the British law, due diligence obligations were of an international nature, thus incurring Britain's responsibility.

As stated above, indirect claims were excluded from the arbitration process. With regards to direct damages, according to the Geneva Tribunal, the costs of pursuit of the confederate cruisers was not properly distinguishable from general expenses of the war carried by the United States, so the States were not awarded this sum[52]. Furthermore, the tribunal decided that prospective earnings cannot be properly made subject to compensation as they depend upon future and uncertain contingencies[53], and thus the States weren't awarded this sum either.

I humbly disagree with the Tribunal's decision. It is possible to calculate prospective earnings by the average net profits of a ship's seasonal voyages, and there are several cases that conclude these kinds of indirect damages such as the Orinoco Asphalt Company case[54] and the American and British Claims Tribunal[55] [56]. The United States and Germany Mixed Claims Commission's decision has distinctive importance as to its order to pay to the owner of a ship the net annual profit it would probably have yielded the owner during its potential life, taking into account war conditions, and the amount paid by owner to crew as wages and allowances during the dates of internment[57].

Lastly, as for direct damages; the Tribunal set aside double claims for the same losses and all claims for "gross freights" if they exceeded "net freights", in order to arrive at an equitable compensation for the damages which had been sustained. The Tribunal ruled that interest at a reasonable rate is just and reasonable[58].

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52 Arbitration Award, p. 133.

53 Arbitration Award, p. 133.

54 Orinoco Asphalt Case, **Reports of International Arbitral Awards**, Volume X, pp. 424-428.

55 Decisions of Arbitral Tribunal Great Britain-United States, **Reports of International Arbitral Awards**, Volume VI.

56 For more arbitral decisions allowing prospective earnings, see Ralston, pp. 251-253.

57 Mixed Claims Commission (United States and Germany), 1 November 1923-30 October 1939, **Reports of International Arbitral Awards**, Volume VII, pp.1-391, p. 251.

58 Arbitration Award, p. 133.

II. INDIRECT DAMAGES IN INTERNATIONAL LAW

The Alabama Arbitration Award is renowned for its ruling on United States' indirect damages. The notion of 'indirect damages' has two meanings in international law, therefore the duality of the term "indirect damages" will be firstly discussed. Subsequently, it is crucial to mention the controversial nature of this notion, as incertitude prevails within international law doctrine and jurisprudence. Lastly, the solution of the International Law Commission (ILC) will be discussed to guide us through an analysis of American indirect claims.

A. Duality of the Term

The term "indirect damage" corresponds to different scenarios under international law. There exist two types of indirect damages, used in separate contexts. The first type is used in describing the responsibility of the state, and this is the indirect injury the state suffers through its nationals. This principle's origin lies in the Vattelian idea that an injury to a person amounts to an indirect injury to that person's state of nationality[59], which establishes the basis for diplomatic protection.

The second implication of the term is indirect damage that is in relation with the link of causality. A state, having committed an internationally wrongful act, is under the obligation to repair damages, whether material or moral, direct or indirect, to the opposing state. The context in which indirect damages are discussed in the Alabama Arbitration is this second meaning of the term.

B. Problematic Nature of Indirect Damages

The term "indirect damages" is vague in its meaning[60], since it is not easy to determine which damages constitute indirect damages. To give examples of typical indirect claims, loss of profits, loss of possible business gains, loss of workers, loss of credit, premiums of war risk insurance and liability for life insurance policies paid by insurers fall under this category[61].

The real problem is not the question of whether indirect damages should be allowed at all, but of the degree, or kind, of damages which it is permissible to award[62]. Indirect damages are common to being awarded, yet a criterion needs to be established in order to take the burden of consequences too far removed

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59 James Crawford, **State Responsibility: The General Part** (Cambridge Studies in International and Comparative Law), Cambridge University Press, Cambridge, 2013, p. 569.

60 Clyde Eagleton, "Measure of Damages in International Law", **Yale Law Journal**, Vol. 39, 1929, pp. 52-75, p. 66.

61 Ralston, pp. 243-250.

62 Eagleton, p. 73.

from the wrongful act off the responsible state. It is important to determine to what extent a consequential damage is linked by a claim of causation to an earlier act or omission[63].

Another problem with indirect damages is the inability to determine precisely the damage. This issue is relevant to evidence. A tribunal must be satisfied with the evidence before them; and if it is established that the loss is due to the illegal act, the loss occurred must be calculated as reasonably certain as possible. Hypothetical and entirely conjectural losses should be thrown out by the tribunal; only where the loss can be calculated with a reasonable degree of certainty should it be permitted[64]. For instance, in the Mora&Arango case, the umpire Lewenhaupt concluded that because of the speculative character of the notion "loss of possible business gains", only interest on the capital was to be awarded as part of prospective earnings[65].

C. Two-Stage Test According to the ARSIWA Commentary

ARSIWA, draft articles prepared by the ILC within the United Nations, is a document considered to be an accurate codification of customary international law on state responsibility[66]. Subsequent to ruling that every internationally wrongful act of a State entails the international responsibility of that State, in article 31, it is stated that the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act, and injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

ILC's commentary on this article, under paragraph 10, underlines the obligation for the existence of a link which must exist between the wrongful act and the injury, in order for the obligation of reparation to arise[67]. According to the commentary, it is deduced that there are two conditions for reparation of damages: Causality and exclusion of remote or consequential injury[68].

The first stage is causality: Causality may exist when losses are attributable to an act as a proximate cause, and there must be a direct causal link between

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63 F.V. Garcia Amador, Sixth Report on International Responsibility, **Yearbook of the International Law Commission**, Vol. II, 1966, p. 40.

64 Eagleton, p. 75.

65 John Bassett Moore, **History and Digest of the International Arbitrations to Which the United States Has Been a Party**, Washington, 1898, p. 3783.

66 Crawford, p. 43.

67 International Law Commission, **Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts ("**Commentary**")**, Supplement No. 10 (A/56/10), Chapter IV. E. 1, November 2001, pp. 92-93.

68 For the debate over the usage of both terms of "damage" and "injury" in the Commentary, see Crawford, p. 54 et seq.

the unlawful international conduct and the damages incurred[69]. The damage must be the normal or natural consequence of the act or omission by which it was occasioned[70]. Should the first test be considered passed, then it becomes possible to continue with the second test.

With regards to the rule of proximate cause; in the United States and Germany Mixed Claims Commission, the umpire Parker pointed out that it doesn't matter whether the loss is sustained directly or indirectly as long as there is a clear unbroken connection between the illegal act and the loss. There may be several links in the chain of causation connecting an act with the loss sustained; provided that there is no break in the chain. It must be considered that there is a break in the chain when the loss cannot be clearly, unmistakably, and definitely traced, link by link to the illegal act[71].

The second test is the exclusion of injury that is too "remote" or "consequential" to be the subject of reparation. These are criteria of directness, foreseeability, or proximity according to the relevant jurisprudence; damages must be a reasonably foreseeable consequence of the act that constituted the breach[72]. This test requires the determination of whether a reasonable man in the position of the wrong-doer at the time would have foreseen the damage as likely to ensue from his action[73]. In conclusion, injury which is too indirect, remote and uncertain is excluded. The ILC cites Hauriou's opinion that the Alabama arbitration is considered as the most striking application of the rule excluding "indirect" damage[74].

Nonetheless, it must not be forgotten that in some situations, such as if State organs deliberately cause the harm, or the harm caused is within the ambit of the breached rule; then it should be concluded that these remote or indirect damages are admitted injury[75]. This means that the requirement of a causal link may vary according to the breach of an international obligation.

To sum up, the commentary states that the notion of a sufficient causal link which is not too remote is embodied in the general requirement in article 31 that the injury should be in consequence of the wrongful act, but without the addition of any particular qualifying phrase.

By this commentary, ILC informs us that compensation is limited to damage actually suffered as a result of the internationally wrongful act and excludes damage which is indirect or remote. As for indirectness or remoteness

69 Commentary, p. 92.
70 Amador, p. 40.
71 Mixed Claims Commission (United States and Germany), pp. 29-30.
72 Commentary, p. 93.
73 Whiteman, p. 1780.
74 Commentary, p. 92, f.n. 460.
75 Commentary, p. 93.

of damage, the commentary avoids providing a formula, leaving complexities of causation to courts and practitioners[76]. Thus, the circumstances of each case must be considered.

This view is also asserted by authors of international law doctrine. It is emphasized that it would be impossible to devise a rule which would cover every case. Shelton states "*A general statement of obligation to make reparation for harm caused masks many difficult legal issues that probably could not be adequately answered by a single set of articles, because the principles are intended to apply to every breach of an international obligation regardless of the source of the obligation or nature of the breach*"[77]. Yet, Crawford contends that it is regrettable that the ILC did not clarify the difficult issues relating to the causal link[78].

III. ANALYSIS OF AMERICAN INDIRECT CLAIMS AS INDIRECT DAMAGES

In Alabama Arbitration, were American indirect claims indemnifiable? This is a question that one must seek to answer regardless of the Geneva Tribunal's decision. Primarily, for guidance, it must be mentioned how Alabama Arbitration is regarded by authors. According to Hauriou, the expense of pursuing the Confederate cruisers, the prolongation of the war and the increased insurance rates are classic examples of damnum emergens, direct damage. And yet, they were classified as indirect damages[79]. I respectfully disagree with the author. From my standpoint, especially for the claimed expenses for the prolongation of the war, it is not possible to classify them as direct damages.

Additionally, in Eagleton's opinion, Alabama Claims arbitration is not considered as a binding precedent for rejecting indirect damage, because the order excluding indirect damages was dictated by political considerations, and is, therefore, of little judicial value[80]. Also, the Tribunal didn't decide that indirect claims were generally to be disallowed.

Conversely, according to Professor Yntema, all the Alabama claims were indirect because the liability of the British Government resulted only from the non-enforcement of the neutrality laws by British officials and the evasions

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76 Dinah Shelton, "Righting Wrongs: Reparations in the Articles on State Responsibility" **The American Journal of International Law**, Vol. 96, No. 4, 2002, pp. 833–856, p. 846.

77 Shelton, p. 833, f.n. 2.

78 Crawford, pp. 492-494.

79 André Hauriou, Les Dommages Indirects dans les Arbitrages Internationaux, **Revue Generale de Droit International Public**, Vol. 31, 1924, p. 213 (as cited in Eagleton, p. 67, f.n. 47).

80 Eagleton, p. 67.

by persons for whom the British Government was not directly responsible[81]. Hence, the Alabama Award may be cited as authority for the allowance of claims for indirect damage in international law. According to Professor Yntema, the reasons why the state is responsible must be considered[82].

In my estimation, ILC's commentary should be of assistance while analyzing American indirect claims in the Alabama arbitration. Firstly, the rule of proximate cause must be examined. I contend that the wrongful omission of Great Britain was the legal cause of the damage sustained. Great Britain, having acted without due diligence with regards to shipbuilding in its own ports for the Confederacy, caused injury to the Union[83]. Without the vessels the Confederate States obtained from Great Britain, the Civil War could have been over long before 1865. Thus, American indirect claims passed the first test.

Secondly, the issue of whether these damages are either too remote or consequential to the omission should be examined. From my standpoint, it is safe to say that the indirect claims are derivative of shipping losses themselves. In the context of modern damages, these constitute loss of profits and expected future losses, and other damage that could not be attributed to direct loss of tonnage or cargo at the hands of the Confederacy[84].

While I believe that these damages are consequential; the United States' indirect claims are too far removed from the illegal breach of neutrality of Great Britain. Indirect damages that the United States suffered are too remote from Great Britain's omission. Hence, American indirect claims didn't pass the second test. Moreover, the transfer of American commercial maritime vessels to the British flag and loss of import and export business are extremely difficult to estimate reasonably[85]. On these grounds, I consider that it is rightful not to indemnify the States for their indirect claims.

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81 Hessel E. Yntema, "The Treaties with Germany and Compensation for War Damage, IV. The Measure of Damages in International Law." **Columbia Law Review**, Vol. 24, No. 2, 1924, pp. 134–153, p. 151.

82 Ibid.

83 "*The decline of national commerce, the expense and inconvenience of convoys, the frequent and expensive search and pursuit after the rovers, enter into the sum total of the national loss."* (The Alabama Claims, **American Law Review**, pp. 34-35).

84 Robinson, p. 24.

85 "*The loss of profits, the difficulty of procuring insurance, the abandonment of contemplated voyages, and the very general transfer of our tonnage into foreign hands, threw us a long way behind, in the competition with other countries, for the carrying trade of the world, and inflicted upon us an immense national loss. But if we were to bring forward this great national loss as, a matter of pecuniary claim, we should certainly find ourselves embarrassed with certain well established, and not wholly pedantic, rules, familiar to the courts of law, as to remote and proximate causes of damage."* (The Alabama Claims, **American Law Review**, p. 34).

CONCLUSION

The Alabama Claims Arbitration is a decision of great importance. It is considered a key arbitral award in the context of direct and indirect damages. Following the American Civil War, the United States claimed that Great Britain had breached rules of neutrality, since the Confederacy had made use of vessels that had been built in British ports. These warships sank or burnt the Union's vessels, and the States incurred great losses.

To resolve this dispute, the United States and Great Britain formulated a mutually agreeable codification of the applicable rules of international law[86], which was the Treaty of Washington. This international document included neutrality rules as well as agreement by the two nations on this matter being resolved by arbitration. The Geneva Arbitration, composed of five arbitrators, had to conclude the States' direct and indirect damages, the former being the cost of loss of ships and their cargos and the latter being the cost of business losses, increased marine insurance premiums, loss of expected economic growth and the cost of prolongation of the war for two years.

The Geneva Tribunal, after intense negotiation on indirect claims, decided to exclude these claims from the consideration of the tribunal. The arbitral tribunal's decision is considered as political; and therefore, it is necessary to discuss whether the American indirect claims amounted to indirect damage and were indemnifiable. The ILC sets forth a two-stage test in the ARSIWA Commentary: the causality and the exclusion of remote or consequential injuries. In my opinion, the American indirect claims passed the test of causality, indirect losses were attributable to Great Britain's breach of neutrality as a proximate cause. Yet, for the test of remoteness, the indirect claims didn't meet this criterion because they didn't constitute a reasonably foreseeable consequence of Britain's breach of its international duties. In conclusion, for different reasoning, I agree with the Arbitral Tribunal's decision to not compensate the United States for their indirect claims.

BIBLIOGRAPHY

AMADOR F.V. Garcia, Sixth Report on International Responsibility, **Yearbook of the International Law Commission**, Vol. II, 1966.

Alabama claims of the United States of America v. Great Britain, Arbitration Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871, **Reports of International Arbitral Awards**, Volume XXIX, pp.125-134.

The Alabama Claims, **American Law Review**, Vol. 4, No. 1, October 1869, pp. 31-39.

[86] Brown, p. 1711.

BALCH Thomas Willing, The Alabama Arbitration 1-2, 1900. https://archive.org/stream/alabamaarbitrati00balcuoft?ref=ol#page/123/mode/1up

BINGHAM Tom, "The Alabama Claims Arbitration", **International and Comparative Law Quarterly**, 54/1, 2005, pp. 1-25.

BROWN Bartram S., "Humanitarian Intervention at a Crossroads", **William&Mary Law Review**, Vol. 41 (1999-2000), Issue 5, 2000, pp. 1683-1741.

BYRNE Karen, "'We Have a Claim on This Estate', Remembering Slavery at Arlington House", Cultural Resource Management, Vol. 25, No. 4, 2002, pp. 27-29, p. 27.

CHADWICK Elizabeth, **The British View of Neutrality in 1872**, 2018.

Corfu Channel Case (United Kingdom v. Albania); Merits, International Court of Justice (ICJ), 9 April 1949.

CRAWFORD James, **State Responsibility: The General Part** (Cambridge Studies in International and Comparative Law), Cambridge University Press, Cambridge, 2013.

CRAWFORD James, "State Responsibility", **Max Planck Encyclopedia of Public International Law**, September 2006.

CUSHING Caleb, **Treaty of Washington: Its Negotiation, Execution, and the Discussion Relating Thereto**, Harper&Bros, New York, 1873.

Decisions of Arbitral Tribunal Great Britain-United States, **Reports of International Arbitral Awards**, Volume VI.

EAGLETON Clyde, "Measure of Damages in International Law", **Yale Law Journal**, Vol. 39, 1929, pp. 52-75.

FRIEDMANN Wolfgang, "Half a Century of International Law", **Virginia Law Review**, Vol. 50, No. 8, December 1964, pp. 1333-1358.

GIROUARD Désiré, "The Alabama Indirect Claims", **Revue Critique de Legislation et de Jurisprudence du Canada**, Vol. 2, No. 2, 1872, pp. 185-205.

HACKETT Frank W., **Geneva Award Acts: With Notes, and References to Decisions of the Court of Commissioners of Alabama Claims**, Little, Brown and Co., Boston, 1882.

HILL Frederick Trevor, **Decisive Battles of the Law-Narrative Studies of Eight Legal Contests Affecting the History of the United States between the Years 1800 and 1886**, 1906.

HAURIOU André, Les Dommages Indirects Dans les Arbitrages Internationaux, **Revue Générale de Droit International Public**, Vol. 31, 1924.

International Law Commission, **Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts**, Supplement No. 10 (A/56/10), Chapter IV. E. 1, November 2001.

MILLER Marion Mills**, Great Debates in American History, from the Debates in the British Parliament on the Colonial Stamp Act (1764-1765) to the Debates in Congress at the Close of the Taft Administration (1912-1913)**, Current Literature Pub. Co., New York.

Mixed Claims Commission (United States and Germany), 1 November 1923-30 October 1939, Reports of International Arbitral Awards, Volume VII, pp.1-391.

MOORE John Bassett, **History and Digest of the International Arbitrations to Which the United States Has Been a Party**, Washington, 1898.

Orinoco Asphalt Case, **Reports of International Arbitral Awards**, Volume X, pp. 424-428.

PALMER Roundell, **Memorials**, Macmillan&Co., London, 1898.

PARK Willliam/de FUMICHON Bruno, "Retour sur L'Affaire de L'Alabama: De l'Utilité et de l'Histoire pour l'Arbitrage International", **Revue de l'Arbitrage**, 2019, No. 3, pp. 743-834.

PITCAITHLEY, Dwight T., "The American Civil War and the Preservation of Memory", **Cultural Resource Management**, Vol. 25, No. 4, 2002, pp. 5-9.

RALSTON Jackson H., **Law and Procedure of International Tribunals: Being a Resume of the Views of Arbitrators upon Questions Arising under the Law of Nations and of the Procedure and Practice of International Courts**, Stanford University Press, 1926.

ROBINSON John E., "The Alabama Claims and the Development of Modern Admirality Arbitration", **Malabu: Maritime Law Bulletin**, Vol. 3, No. 1, Winter 2012, pp. 22-25.

SCHINAZI Mikael, "The Three Ages of International Commercial Arbitration and the Development of the ICC Arbitration System", **ICC Dispute Resolution Bulletin**, Issue 2, 2020, pp. 63-75.

SHELTON Dinah, "Righting Wrongs: Reparations in the Articles on State Responsibility", **The American Journal of International Law**, Vol. 96, No. 4, 2002, pp. 833–856.

WHITEMAN Marjorie M., **Damages in International Law**, U.S. Government Printing Office, Washington, 1943.

YNTEMA Hessel E., "The Treaties with Germany and Compensation for War Damage, IV. The Measure of Damages in International Law." **Columbia Law Review**, Vol. 24, no. 2, 1924, pp. 134–153.

The Executive Documents Printed by Order of The House of Representatives During the Second Session of the Forty-Second Congress, 1871-1872, Washington Government Printing Office, 1872

Sir Alexander Cockburn's Dissenting Opinion in the Alabama Claims Arbitration of September 14th, 1872 in Papers Relating to the Treaty of Washington (1872), at 230 et seq. (https://www.trans-lex.org/262138/_/sir-alexander-cockburns-dissenting-opinion-in-the%C2%A0alabama-claims-arbitration-of%C2%A0september-14th-1872-in:-papers-relating-to-the-treaty-of-washington-at-230-et-seq/

https://www.britannica.com/event/American-Civil-War

http://www.encyclopediaofalabama.org/article/h-973

List of Abbreviations

ARSIWA	**:** Articles on State Responsibility of States for Internationally Wrongful Acts
CSS	**:** Confederate States Ship
et seq.	**:** And what follows
f.n.	**:** Footnote
Ibid.	**:** Ibidem
ILC	**:** International Law Commission
No.	**:** Number
p.	**:** Page
pp.	**:** Pages
Vol.	**:** Volume

RELIGIOUS SYMBOLS AND CLOTHING IN PUBLIC SCHOOL AND UNIVERSITIES: A DWORKINIAN CRITIQUE

Devlet Okulları ve Üniversitelerde Dini Sembol ve Kıyafetler: Dworkin Gözünden Bir Eleştiri

Lecturer Dr. Eray Sinan DEMİRHAN*

Research Article

Abstract

Freedom of religion is a fundamental right guaranteed not only in the European Convention on Human Rights but also in many other national, regional and international mechanisms. The importance of freedom of religion has been emphasised on a number of occasions by the European Court of Human Rights. However, some of the Court's decisions can be criticised for their controversial reasoning, and there are several areas, such as the regulation of the wearing of religious clothing in public sphere, which remain controversial. The aim of this article is not to add directly to the substance of that controversy. Rather, the present article uses Dworkin's theory of law as a theoretical lens to read the Court's case-law on freedom of religion. This article is aimed at critically engaging with the issue of religious symbols and clothing in the public place within the case-law of the ECtHR and Dworkin's theory of law is the theoretical lens chosen to perform this task.

Keywords: European Court of Human Rights, Freedom of Religion, Ronald Dworkin.

Özet

Temel bir insan hakkı olarak din özgürlüğü, sadece Avrupa İnsan Hakları Sözleşmesi ile garanti altına alınmamış olup, aynı zamanda birçok ulusal, bölgesel ve uluslararası mekanizmalar aracılığıyla korunmaktadır. Din özgürlüğünün önemi, Avrupa İnsan Hakları Mahkemesi tarafından defalarca vurgulanmıştır. Ancak, mahkemenin gerek dini kıyafetlerin kamusal alanda giyilmesiyle ilgili aldığı bazı kararları, gerekse de devlet okullarında kullanılan dini sembollerle ilgili aldığı kararlar tartışmaya açık gerekçelendirilmeleri sebebiyle eleştirilebilir. Bu makalenin amacı doğrudan bu tartışmaya katılmak değildir. Onun yerine, bu makalede Ronald Dworkin'in hukuk teorisi kullanılarak mahkemenin belirtilen alandaki kararları tartışılmıştır. Sonuç olarak, bu çalışmada Avrupa İnsan Hakları Mahkemesi'nin, kamusal alanda dini kıyafetlerin kullanılmasıyla ilgili aldığı kararlar, Dworkin'in hukuk teorisi ışığında incelenmiştir.

Anahtar Kelimeler: Avrupa İnsan Hakları Mahkemesi, Din Özgürlüğü, Ronald Dworkin, İnsan Hakları Hukuk

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INTRODUCTION

The importance of freedom of religion has been underlined on a number of occasions by the European Court of Human Rights (hereinafter, referred to as 'the Court' or 'the ECtHR'). According to the Court's case-law, freedom of thought, conscience and religion is "one of the most vital elements that go to make up the identity of believers and their conception of life".[1] The Court accepted that freedom of thought, conscience and religions as enshrined in Article 9 of the European Convention on Human Rights (hereinafter, referred to as 'the ECHR' or 'the Convention') is one of the foundations of a "democratic society" and such freedom is also considered as a "precious asset for atheist, agnostics, sceptics and the unconcerned".[2]

Over the years, however, some European countries like Switzerland, Turkey, Italy and France have legislated restrictions on wearing Islamic clothing, putting forward different arguments such as: i) ensuring state's religious neutrality in the state-school; ii) promoting gender equality; iii) upholding state secularism at the state-university. Therefore, the issue of religious symbols and clothing in the public place has become a source of legal and political contention within Europe over recent years.[3]

This article is aimed at critically engaging with those arguments and Dworkin's theory is chosen to perform this task. This article is divided into three main sections. Section I provides a legal framework in which religion is protected by Article 9 ECHR. It then briefly presents the ECtHR's case-law on Article 9 ECHR, with a specific emphasis on the displaying religious symbols in public schools and universities. Section II discusses the issue of the separation of religion and state. Freedom of religion, as enshrined in Article 9 of the ECHR, imposes that states must be religiously neutral. This does not mean that states might not have official religions. Rather, in the Court's own words: "the obligation under Article 9 of the Convention incumbent on the State's authorities to remain neutral in the exercise of their powers in this domain".[4] This suggests that the Court attached particular importance to the need for state neutrality in the exercise of power in this context.[5] According to the Court then,

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1 *Kokkinakis v Greece*, Series A no 260-A, 25 May 1993, para 31.

2 *Leyla Şahin v Turkey* (GC), Application no 44774/98, ECHR 2005-XI, para 104.

3 See Isabella Rorive, 'Religious Symbols in the Public Space: In Search of a European Answer' (2009) 30 *Cardozo Law Review* 2669.

4 *Religionsgemeinschaft Der Zeugen Jehovas and others v Austria*, Application no 40825/95, 31 July 2008, para 92.

5 For a critical discussion regarding state neutrality on religious matters in public see Dimitrios Kyritsis and Stavros Tsakyrakis, 'Neutrality in the classroom' (2013) 11 *International Journal of Constitutional Law* 200.

states have a duty to remain neutral and impartial in exercising its discretion in the context of Article 9 of the Convention. This means that there is a strong correlation between the notions of state neutrality and religious freedom in the context of the ECHR. The purpose of this section is to compare and contrast these two concepts -secularism and neutrality- by engaging in analyses of the Court's decision in the cases of *Dahlab*, *Şahin* and *Lautsi* in light of Dworkin's theory of neutrality.

Section III discusses the way in which the ECtHR has dismissed the choices of women who were denied the right to wear headscarves in educational institutions. This discussion is important for two reasons. First, in banning religious clothing, such as the Islamic headscarf, the Contracting States often argue that while this restriction limits women's freedom and their choices, this is actually good for their liberation.[6] States 'somehow' have established a link between the protection of the dignity of women and the prohibition of the wearing of the headscarf. Consequently, bans were seen as a solution to the threats against to the dignity of women. This approach will critically be examined through the lens provided by Dworkin's theory of dignity.

Second, it seems highly interesting to analyse the Court's approach in such cases through the lens of Dworkin since he finds the foundations of the right to freedom of religion in the key value of ethical independence.[7] He points out that there is a fundamental right to ethical independence in moral issues that protects people's responsibility to define and find value in their lives.[8] This means that the right of religious freedom protects the principle of personal responsibility which holds that "each person has a special responsibility for realizing the success of his own life, a responsibility that includes exercising his judgment about what kind of life would be successful for him".[9] Such principle requires a tolerant secular state in which people are allowed to choose their religion and follow its practice. This suggests that people should be allowed to take personal moral responsibility for their religious convictions. On this view, religious freedom is based on human dignity and personal moral

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6 This pointed out by Judge Tulkens, "wearing the headscarf is considered to be synonymous with the alienation of women. The ban on wearing the headscarf is therefore seen as promoting equality between men and women". See *Leyla Şahin v Turkey* (n 2), dissenting opinion of Judge Tulkens, para 11.

7 Ronald Dworkin, *Religion Without God* (Harvard University Press, 2013); See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1978) chapter 12. See also Ronald Dworkin, *A Matter of Principle* (Oxford University Press, 2001) chapter 3 and chapter 6.

8 See also Cecile Laborde, 'Dworkin's Freedom of Religion Without God' (2014) 94 *Boston University Law Review* 1255.

9 Ronald Dworkin, *Is Democracy Possible Here?* (Princeton University Press, 2008) 10.

responsibility.[10] Section III thus provides an examination of the principle of personal responsibility of women in the Islamic clothing cases.

1. Religious Freedom in the European Convention on Human Rights

1.1. The Legal Framework

Freedom of religion is enshrined in the ECHR under Article 9 that provides the basic legal framework for freedom of religion. Article 9 of the ECHR provides that:

> (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
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> (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[11]

One can say that there are two elements to Article 9 ECHR. First, the right to hold and change religious belief has absolute protection. This means that the private freedom of thought, conscience and religion is an absolute right which does not allow any limitation (forum internum). As the structure of Article 9 makes it clear that one's inner religious freedom or belief cannot be limited by the state. Hence, privately held beliefs are 'untouchable' which means it cannot be interfered with by the state.[12]

Second, the manifestation of religion or belief can be subject to limitations under paragraph 2 of the Article (forum externum). This implies that under Article 9(2), Contracting States are allowed to impose restrictions on such manifestations of religion or belief. A reason for this is that Article 9 requires a proper balance to be established between the rights of individual and

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[10] ibid chapter 3; Dworkin, *Religion Without God* (n 8). For a critical discussion on Dworkin's argument on religion see Rafael Domingo, 'Religion for Hedgehogs? An Argument against the Dworkinian Approach to Religious Freedom' (2012) 2 *Oxford Journal of Law and Religion* 371.

[11] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 ('European Convention on Human Rights'), Article 9.

[12] Tom Lewis, 'What not to wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56 *International and Comparative Law Quarterly* 395, at 400.

competing common goals. In order to strike such balance, as Article 9 allows, freedom to manifest one's religion can be subject to limitations.[13] For instance, the ECtHR recognised that in democratic societies, in which different religions coexist, "it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected".[14] Yet, such restrictions must pursue "a legitimate aim", be "prescribed by law, and be "necessary in a democratic society".[15]

1.2. Case-Law on the Wearing of Religious Clothing and Symbols in Public Education: *Dahlab, Şahin, and Lautsi*

In *Dahlab v. Switzerland*, the applicant was a primary school teacher, who abandoned the Catholic faith and converted to Islam and began wearing a headscarf to school.[16] Interestingly, she was permitted to wear the headscarf in class for three years and had never received any complaints about the headscarf from her colleagues, her pupils or their parents. This point has been emphasised by Carolyn Evans: "a woman with an otherwise spotless employment record who had spent years wearing Islamic clothing to which no-one objected had been effectively sacked because of her religion. But the issue was so clear that it did not even deserve a full and proper consideration by the Court".[17] However, after a school inspector informed the Director General of Primary Education that Ms. Dahlab wore an Islamic headscarf consequently the applicant was prevented from wearing an Islamic headscarf in class.

While the Court convinced that there had been an interference with Article 9(1) of the Convention, ruled that there had been no violation of Article 9. In reaching this conclusion, the Court relied on the margin of appreciation doctrine to conclude that the Swiss Federal Court's arguments for upholding the restriction on wearing the headscarf were relevant, sufficient, and proportionate to the stated legitimate aims. The Court, therefore, held that such an interference was necessary in a democratic society.

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13 In the words of Malcom Evans: "the claim that an activity is a bona fide manifestation of religion or belief is not a 'trump' card: it is merely a factor to be taken into account when balancing up conflicting interest". See Malcolm D Evans, 'Believing in Communities, European Style' in Nazila Ghananea-Hercock (ed) *The Challenge of Religious Discrimination at the Dawn of the Millennium* (Springer, 2004) 141

14 *Leyla Şahin v Turkey* (n 2) para 106.

15 David J Harris and others, *Law of the European Convention on Human Rights*, 3rd edn. (Oxford University Press, 2014) 605; Alastair R Mowbray, *Cases and materials on the European Convention on Human Rights* (Oxford University Press, 2012) 617.

16 *Dahlab v Switzerland*, Reports of Judgements and Decisions 2001-V, 15 February 2001.

17 Carolyn Evans, 'The Islamic Scarf in the European Court of Human Rights' (2006) 7 *Melbourne Journal of International Law* 52, at 60.

In the case of *Leyla Şahin v. Turkey* of 29 June 2004*,* the applicant was a Muslim student at the University of Istanbul.[18] On 23 February 1998 the Vice-Chancellor of Istanbul University issued a circular, which stated:

> By virtue of the Constitution, the law and regulations, and in accordance with the case-law of the Supreme Administrative Court and the European Commission of Human Rights and the resolutions adopted by the university administrative boards, students whose 'heads are covered' (who wear the Islamic headscarf) and students (including overseas students) with beards must not be admitted to lectures, courses or tutorials.[19]

Following a circular issued by the Vice-Chancellor banning the wearing the Islamic headscarf, the applicant was refused access to a written examination because she was wearing the headscarf. Subsequently, she was denied admission to a lecture, again for the same reason. Consequently, she argued that the circular prohibiting wearing the Islamic headscarf amounted to a violation of her rights under Article 9 ECHR.

The ECtHR accepted that there had been an interference with the applicant's right to manifest her religion yet ruled that there had been no violation of Article 9. The ECtHR examined two key questions in reaching its conclusion: (1) whether the prohibition on the right to wear the Islamic headscarf in universities constituted an interference with the right of Leyla Şahin to manifest her religion; (2) if so, whether such restriction is necessary in a democratic society within the meaning of Article 9 (2).

With respect to the first question, the ECtHR acknowledged that the headscarf ban had constituted an interference with the applicant's freedom to exercise her religious conviction under Article 9. Indeed, the Court did not examine whether the applicant's choice to wear a headscarf carried out a religious task. This means that the Court did not focus on whether the Islamic headscarf is a requirement of Islam. Rather, it relied on the assumption that the restriction in issue interferes with the applicant's right to freedom to manifest her religion:

> Accordingly, her decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief and, without deciding whether such decisions are in every case taken to fulfil a religious duty, the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion.[20]

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18 *Leyla Şahin v Turkey* (n 2).
19 ibid para 16.
20 ibid para 78.

Once the ECtHR recognised such governmental interference, it then went on to consider whether the interference was prescribed by law, pursued a legitimate aim and was "necessary in a democratic society". Once again, in its judgement, the Court invoked margin of appreciation and held that the banning of the wearing of the Islamic headscarf at the University of Istanbul did not violate Article 9 ECHR.

The case of *Lautsi v. Italy* arose from a complaint lodged by a parent against the presence of a crucifix in the state-school classrooms.[21] Following the rejection by the school's governors to comply with her demand, the applicant brought administrative proceedings. The Administrative Court dismissed the application and advocated that "although the crucifix was undeniably a religious symbol", it should also be considered "a symbol of a value system underpinning the Italian Constitution".[22] The applicant claimed that the display of a crucifix in the state-school classroom attended by her children was contrary to the principle of secularism by which she wished to raise her children. This was because, as the applicant explained, the presence of the crucifix is a sign which implies that the state supports one religion over others.[23] Therefore, relying on Article 2 of Protocol No.1 (right to education)[24] and Article 9, the applicant argued that the presence of a religious symbol constituted an interference incompatible with the ECHR.

However, the Grand Chamber recognised a wide freedom for Italian authorities to decide whether crucifixes should be present in state-school classrooms.[25] In doing so, the Grand Chamber reversed the decision of the Chamber. The Grand Chamber decided, by 15 votes to 2, that there had been no violation of the Convention, on the grounds that the Italian authorities had acted "within the limits of the margin of appreciation" granted to the state.[26] In reaching such conclusion, the Grand Chamber accepted that national authorities are better placed to examine whether crucifixes should be present

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21 *Lautsi v Italy*, Application no 30814/06, 3 November 2009; *Lautsi and others v Italy* (GC), Application no 30814/06, 18 March 2011.

22 *Lautsi and others v Italy* (n 22) para 25.

23 The applicant also added that: "in a State governed by the rule of law, no-one should perceive the State to be closer to one religious denomination than another, especially persons who were more vulnerable on account of their youth". See *Lautsi and v Italy* (n 22) para 31.

24 Article 2 of Protocol No. 1 provides: No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions. See Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221 ('European Convention on Human Rights').

25 *Lautsi and others v Italy* (n 22) para 61.

26 ibid para 76.

in state-school classrooms. This means the Grand Chamber's ruling relied on the margin of appreciation doctrine. On the one hand, the Grand Chamber decision was considered as a victory either for the Italian Government or for the Vatican. On the other hand, such decision has attracted a large amount of criticism focusing on different angles of the decision.[27]

This section briefly presented the Court's case-law on the wearing of religious clothing and symbols in public sphere. Those three cases (*Lautsi*, *Şahin* and *Dahlab*) all bring up the main issue of the State's duty of neutrality and impartiality in public schools. The next section critically deals with cases in which the ECtHR addressed issues of secularism, neutrality and intolerance.

2. Intolerance, Secularism, and Neutrality: *Dahlab, Şahin and Lautsi*

It could be argued that one of the main principles established by the Court is that of state's obligation of neutrality.[28] The Court for the first time, in *Hasan and Chaush v. Bulgaria,* ruled that states have an obligation to be neutral in religious issues.[29] It stated that "facts demonstrating a failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers' freedom to manifest their religion within the meaning of Article 9 of the Convention".[30] This means that the principle of religious neutrality has been recognised by the Court. As Julie Ringelheim has observed the Court, in a 2000 judgment, clearly established that religious freedom entails that states have a duty to be neutral in religious matters.[31] State neutrality remains as a core principle of the Court's case-law in religious matters. Therefore, this section aims to shed light on how the ECtHR has constructed the concept of states' denominational neutrality.

It should be noted that the European Court of Human Rights endorsed the findings of the judgement of the domestic court in the *Dahlab* case, so that it

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27 Kyritsis and Tsakyrakis, 'Neutrality in the classroom' (n 6); Eugenio Velasco Ibarra, 'Why Appearances Matter. State Endorsement of Religious Symbols in State Schools in Europe After *Lautsi*' (2014) 3 *UCL Journal of Law and Jurisprudence* 262; Lorenzo Zucca, 'Lautsi: A Commentary on a decision by the ECtHR Grand Chamber' (2013) 11 *International Journal of Constitutional Law* 218; Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty' (2010) 6 *European Constitutional Law Review* 6; Paolo Ronchi, 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber ruling in *Lautsi v Italy*' (2011) 3 *Ecclesiastical Law Journal* 287.

28 See Julie Ringelheim, 'State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach' (2017) 6 *Oxford Journal of Law and Religion* 24. See also Kyritsis and Tsakyrakis, 'Neutrality in the classroom' (n 6).

29 *Hasan and Chaush v Bulgaria* (GC), Application no 30985/96, ECHR 2000-XI.

30 ibid para 78.

31 Ringelheim, 'State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach' (n 29) 24.

might be necessary to resort to the judgement of the Federal Court. According to the Federal Court in *Dahlab*, freedom of religion is understood as requiring 'the State to observe denominational and religious neutrality' which implied that 'in all official dealings it must refrain from any denominational or religious considerations that might jeopardise the freedom of citizens in a pluralistic society… In that respect, the principle of secularism seeks both to preserve individual freedom of religion and to maintain religious harmony in a spirit of tolerance".[32] Given the applicant's role and status, the Federal Court also noted that this neutrality is particularly important in State schools simply because teachers are representatives of the State, "it is therefore especially important that they should discharge their duties… while remaining denominationally neutral".[33] The Federal Court's reasoning for this approach seems to be that the applicant's freedom of religion and belief must be balanced against the public interest in the principle of denominational neutrality.

According to the ECtHR, pupils and parents may be influenced or offended by the teacher's faith. However, as the Federal Court explicitly noted that "admittedly, there have been no complaints from parents or pupils to date".[34] In a similar vein, there was no evidence that the applicant wanted to promote her religious belief in the classroom. For instance, even the Federal Court acknowledged that the applicant only wanted to wear the Islamic headscarf "in order to obey a religious precept…"[35] Nevertheless, merely the wearing of the Islamic headscarf was considered as a threat to the peace at schools. The Federal Court explained:

> Her pupils are therefore young children who are particularly impressionable. Admittedly, she is not accused of proselytising or even of talking to her pupils about her beliefs. However, the appellant can scarcely avoid the questions which her pupils have not missed the opportunity to ask. It is therefore difficult for her to reply without stating her beliefs. Furthermore, religious harmony ultimately remains fragile in spite of everything, and the appellant's attitude is likely to provoke reactions, or even conflict, which are to be avoided.[36]

As the citation reveals, there is a clear suggestion in the Federal Court's judgement of an association between the Islamic headscarf and provocative actions which can lead to conflict.[37] Carolyn Evans points out that, first of all,

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32 *Dahlab v Switzerland* (n 17).
33 ibid.
34 ibid.
35 ibid.
36 ibid.
37 It has to be stressed that the Federal Court's arguments have been essentially accepted by the ECtHR.

it must be accepted that "the evidence of direct proselytising by Ms. Dahlab was non-existent".[38] While there was no evidence to suggest that the applicant intended to convert her pupils to Islam, the ECtHR held that "it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect".[39] Such language, according to Nehal Bhuta, is the "marker of an absence of evidence, and effectively reverses the burden of demonstrating the necessity of the rights restrictive measures".[40] Therefore, the 'evidence' of proselytising was solely based on the wearing of the Islamic headscarf.

In reaching its conclusion the Court reasoned that the headscarf was a 'powerful religious symbol' and that teachers may have a serious influence on their pupils.[41] In that connection, the Court found that "the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran" therefore it is difficult "to reconcile the wearing an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils".[42] In the light of those considerations, the Court concluded that the measure banning the applicant wearing the Islamic headscarf in class was 'necessary in a democratic society'.

There are two key elements to this reasoning. First, the Islamic headscarf is considered as a 'powerful religious symbol' that may have a negative influence on pupils. Second, the headscarf is characterised as a symbol of gender inequality, which cannot be compatible with respect for others. These arguments presented by the Court might be subject to different criticisms on the basis of Dworkin's defence of state neutrality.

Dworkin begins by saying that "government must be neutral on what might be called questions of the good life".[43] Adding further specification to this claim, Dworkin argues that "political decisions must be independent of any conception of the good life or what gives value to life".[44] This position assumes that political decisions should be 'independent' of ideas of the 'good' and justifications of such decisions should be neutral.[45] A reason for this is that each individual follows a complex conception of the good life or what makes

38 Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 18) 62.
39 *Dahlab v Switzerland* (n 17).
40 ibid.
41 ibid.
42 ibid.
43 Dworkin, *A Matter of Principle* (n 8) 191.
44 ibid 191.
45 See *Ludvig Beckman, The Liberal State and the Politics of Virtue* (Transaction Publishers, 2001) Chapter 3 and Chapter 7.

value to life. Individuals, then, should be free in their personal private life to act as they choose. This implies that government ought to be neutral to the different interpretations of the good life as adopted by its citizens.

Neutrality, then, entails that government should take no position with regard to the various ideas of the good life. Fundamental to this neutrality based on equality is an essential condition for a state to treat its citizens as equals. This means that the Dworkinian notion of neutrality seems to have a principle of equality at its heart.[46] This is because he draws attention to the idea that there is a connection between the concept of neutrality and equality. Indeed, he establishes a link between the ideal of state neutrality and the ideal of equality. Therefore, once the Islamic headscarf is associated with gender inequality and intolerance to the others by the State, this can easily be shown to violate the principle of state neutrality in Dworkin's sense.

The Court's reasoning in *Şahin* can be found less convincing for a couple of reasons. The Turkish government argued that in order to protect human rights and democracy within the state, the principle of secularism must be essentially preserved. The Court accepted this ill-defined argument and added that the principle of secularism, as interpreted by Turkey's Constitutional Court, was undoubtedly one of the key principles of the Turkish State, "which are in harmony with the rule of law and respect for human rights".[47] Hence, according to the Court, upholding this principle is crucial to protect the democratic system in Turkey. However, no argument has been put forward as to how prohibiting students to wear the Islamic headscarf is necessary for the protection of the democratic system in Turkey.

It can be argued that the ECtHR was too deferential to the Turkish Government's interpretation that the headscarf ban is necessary to defend the principle of secularism.[48] The Turkish Government advocated that the prohibition of wearing an Islamic headscarf in the state school was necessary to maintain the constitutional values of secularism. The government, then, referred to the case-law of the Turkish Constitutional Court, which had held that "secularism in Turkey, as the guarantor of democratic values, was the meeting point of liberty and equality".[49] In addition to this, the Constitutional

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46 Indeed, the concept of equality is at the core of Dworkin's theory neutrality. See also Rae Langton, *Sexual Solipsism: Philosophical Essays on Pornography and Objectification* (Oxford University Press, 2009) 165.

47 *Leyla Şahin v Turkey* (n 2) para 114.

48 Benjamin D Bleiberg, 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Leyla Sahin v. Turkey'* (2005) 91 *Cornell Law Review* 129, at 151.

49 *Leyla Şahin v Turkey* (n 2) para 113.

Court added that "freedom to manifest one's religion could be restricted in order to defend those values and principles".[50] According to the ECtHR:

> This notion of secularism to be consistent with the values underpinning the Convention. It finds that upholding that principle, which is undoubtedly one of the fundamental principles of the Turkish State which are in harmony with the rule of law and respect for human rights, may be considered necessary to protect the democratic system in Turkey.[51]

While the ECtHR correctly emphasised the importance of the concept and practice of secularism in the Turkish context, it failed to adequately assess Turkey's interpretation of secularism.[52] In making a judgement about what is secular, the ECtHR relied upon adherence to the state's domestic interpretations of secularism.[53] The consequence of this is that "any action Turkey takes to limit religious freedom in the name of secularism must be in harmony with human rights, since secularism -as an element of democracy- is itself in harmony with human rights."[54] The Court accepted that this understanding of secularism was compatible with the values underpinning the Convention. Therefore, it can be said that the ECtHR's necessity test began with the presumption that the wearing of the Islamic headscarf is incompatible with secularism. The immediate question, then, becomes how is banning of religious dress in state universities might help to preserve secularism?

However, the ECtHR neither analysed secularism in this context nor critically evaluated why the headscarf constituted a threat to the principle of secularism. In other words, secularism has not been defined by the ECtHR. Rather, deferring to the Turkish Constitutional Court's interpretation of secularism, the ECtHR hold that "this notion of secularism to be consistent with the values underpinning the Convention," and convinced that upholding secularism is "necessary to protect the democratic system in Turkey."[55] This implies that the ECtHR reiterated the Turkish Constitutional Court's Interpretation of secularism and acknowledged it at face value. The rulings in both cases -*Dahlab* and *Şahin* - were held to maintain the neutrality of the state. However, the legal basis of the headscarf's incompatibility with secularism has remained largely absent in the ECtHR's rulings.

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50 ibid para 113.

51 ibid para 114.

52 This failure lies in how the ECtHR itself interpreted secularism in the instant case.

53 James Arthur, 'Secular Education and Religion' in Phil Zuckerman and John R Shook (eds), *The Oxford Handbook of Secularism* (Oxford University Press, 2017) 408.

54 William P Simmons, *Human Rights Law and the Marginalised Other* (Cambridge University Press, 2011) 64.

55 *Leyla Şahin v Turkey* (n 2) para 114.

Furthermore, in *Dahlab*, the applicant was not permitted to wear her headscarf in public school as a necessity of the principle of neutrality applicable at the Canton of Geneva. According to the Swiss authorities, such prohibition was necessary in order to uphold the secular nature of state institution:

> The Federal Court took into account the very nature of the profession of State school teachers, who were both participants in the exercise of education authority and representative of the State, and in doing so weighed the protection of the legitimate aim of ensuring the neutrality of the State education system against the freedom to manifest one's religion.[56]

The essence of this argument is that state school teachers are considered as representatives of the State, and therefore, they should tolerate proportionate limitations on their freedom of religion to maintain the right of State school pupils "to be taught in a context of denominational neutrality".[57] Malcom Evans criticises this understanding of neutrality: "the call for 'impartiality' and 'neutrality' has increasingly been taken to mean that the State must present itself, through its servants, in a neutral fashion, where neutrality means non-religious, and the mere presence of the religion is seen as a threat to the perception of neutrality".[58] It has to be stressed that the Court in *Şahin* makes no distinction between teachers and students as it does in *Dahlab*, which concerned a state-school teacher as a representative of the State. However, in *Şahin*, while the applicant was a student, the Court failed to distinguish the facts of the cases. Consequently, the judgements in both cases were held to preserve the neutrality of the state.[59]

In *Lautsi v. Italy* the main issue was the permissibility of the display of crucifixes in state-school classrooms. The applicant argued that the presence of crucifixes in state-school classroom was incompatible with her freedom of religion, as protected by Article 9 ECHR. The Grand Chamber of the ECtHR ruled that the display of the crucifix on the classroom walls of Italian state school is compatible with freedom of thought, conscience and religion (Article 9 ECHR) under ECHR. While secularism is not clearly embodied in the Constitution, the Italian Constitutional Court admitted that secularism is to be

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56 *Dahlab v Switzerland* (n 17).

57 ibid.

58 Malcolm D Evans, 'From Cartoons to Crucifixes: Current controversies concerning the freedom of religion and the freedom of expression before the European Court of Human Rights' in Esther D Reed and Michael Dumper (eds), *Civil liberties, National Security and Prospects for Consensus* (Cambridge University Press, 2014) 83-113, at 112.

59 In brief, in *Şahin* and *Dahlab*, the Islamic headscarf was perceived as a threat to secularism and the neutrality of public space, and therefore it should be kept at a distance from the state.

considered as one of the main principles of the Italian legal system.[60] However, it should be stressed that in Italy secularism does not mean neutrality, rather it means "a positive or welcoming attitude towards all religions communities".[61]

According to the Chamber, "the symbol of the crucifix has a number of meanings among which the religious meaning is predominant".[62] Quoting the *Dahlab v Switzerland* decision,[63] the Chamber argued that the crucifix can be considered as a 'powerful external symbol', so that the display of it can be interpreted by pupils as a religious sign.[64] The Court reasoned that crucifixes, in the context of public education, were perceived as an integral part of the school environment, thus they were considered as 'powerful external symbols'. In doing so, the Court interpreted the crucifix as a 'powerful' religious symbol, namely "a sign that is immediately visible to others and provides a clear indication that the person concerned belongs to a particular religion".[65] This means that it is impossible to ignore the crucifix, whose religious meaning is predominant.[66] This implies that the presence of the crucifix may have an influence on pupils in a way that they have been educated "in a school environment marked by a particular religion".[67] The Court found that such a powerful religious symbol can have an emotional influence on pupils who belong to religious minorities, and hence they may be 'emotionally disturbing'.[68]

Moreover, the Chamber pointed out that, the state has an obligation to uphold 'confessional neutrality' in state-school classrooms.[69] This means that the state is bound to provide religious neutrality in public education, where school attendance is compulsory.[70] In other words, in a neutral state, in Dimitrios Kyritsis' words: "citizens can legitimately expect that state will not use the school environment to champion any parochial position on religious matters".[71] In addition to that, the Court further held that parents had the right

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60 Dominic McGoldrick, 'Religion in the European Public Square and in European Public Life –Crucifixes in the Classroom?' (2011) 11 *Human Rights Law Review* 451, at 465.

61 Mancini, 'The Crucifix Rage: Suprational Constitutionalism Bumps Against the Counter-majoritarian Difficulty' (n 28) 6 at 9.

62 *Lautsi v Italy* (n 22) para 51.

63 *Dahlab v Switzerland* (n 17).

64 *Lautsi v Italy* (n 22) para 54.

65 *Dahlab v Switzerland* (n 17).

66 *Lautsi v Italy* (n 22) para 51.

67 ibid para 55.

68 ibid para 55.

69 ibid para 56.

70 It is worth noting that according to the Court's case-law, the Contracting State are restricted to impose beliefs "in places where persons were dependent on it or in places where they were particularly vulnerable, emphasising that the schooling of children was particularly sensitive area in that respect". *Lautsi v Italy* (n 22) para 31.

71 Kyritsis and Tsakyrakis, 'Neutrality in the classroom' (n 6) 211.

to educate their children according to their convictions and children had the right to decide whether to believe or not believe. The Court concluded that:

> …It is of the opinion that the practice infringes those rights because the restrictions are incompatible with the State's duty to respect neutrality in the exercise of public authority, particularly in the field of education.[72]

Consequently, the Court unanimously concluded that there had been a violation of Article 2 of Protocol no 1 taken together with Article 9 ECHR.

However, the Grand Chamber overturned the Second Chamber's decision and concluded that the presence of the crucifix is compatible with the right of parents to have their children educated compatibly based on their own philosophical and religious convictions. As will be discussed in the following section, the Grand Chamber failed to explain how the display in state-school classrooms of a crucifix could serve the preservation of educational pluralism that is one of the essential conditions for the maintenance of democratic society under the Convention.

2.1. The Grand Chamber Reasoning in *Lautsi*: Active Symbol vs Passive Symbol

The Grand Chamber explicitly refused the characterisation made in the previous decision that the crucifix should be seen as a 'powerful' external symbol, as firstly recognised in *Dahlab*. In *Dahlab*, the Islamic headscarf of a teacher had been recognised as a powerful external symbol, and therefore it had been banned. The prohibition on wearing an Islamic headscarf was justified in order to "protect the religious beliefs of the pupils and their parents and to apply the principle of denominational neutrality in schools enshrined in domestic law".[73] In *Dahlab*, the Court specifically took into account that pupils were between the age of four and eight, "an age at which children wonder about many things and are also more easily influenced than older pupils".[74]

Contrary to the Chamber's decision, the Grand Chamber said that that there was no evidence to support that the presence of a religious symbol on the classroom walls had an influence on pupils. In other words, the Grand Chamber disagreed with the Chamber on the basis that: "there is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonable be asserted that it does or does not have an effect on young persons whose convictions are still in the

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72 *Lautsi v Italy* (n 22) para 32.

73 *Dahlab v Switzerland* (n 17).

74 The ECtHR identified specific principles regarding the relationship between religion and children. In particular, the Court had consideration for 'the tender age of children', aged between four and eight, therefore, in the Court's view they need special protection. *Dahlab v Switzerland* (n 17).

process of being formed".[75] Accordingly, the Grand Chamber demanded that concrete evidence ought to be submitted, to the Court, to prove that a religious symbol had an emotional impact. This point has also been supported by Judge Power: "given the critical role of "evidence" in any Court proceedings, the Grand Chamber has correctly noted that there was no evidence opened to the Court to indicate any influence which the presence of a religious symbol may have on school pupils".[76] Therefore, the applicant is asked to adduce evidence to show any negative influence of the state-sponsored crucifix on her children.

It has to be born in mind that in *Dahlab*, there was not any evidence that the Islamic headscarf had any influence on pupils. In addition to that, the applicant had never been accused of 'proselytising'. Nevertheless, in ruling on *Dahlab*, the Court relied on a speculative argument which suggests:

> The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children… it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect.[77]

This means that the presence of a religious symbol, associated with a teacher, at a State school was sufficient grounds for the ECtHR to ban it in the classroom.[78]

However, the Grand Chamber in *Lautsi*, considered that the crucifix lacks impact and influence on pupils. In reaching this understanding, the Grand Chamber reasoned that "a crucifix on a wall is an essentially passive symbol and this point is of importance in the Court's view, particularly having regard to the principle of neutrality".[79] The upshot is that the crucifix was interpreted as a 'passive' symbol by the Grand Chamber. In other words, while the Islamic headscarf is a powerful external symbol, the crucifix is a passive symbol.[80] One may think that the principle of neutrality can be invoked to restrict minority symbols but cannot be invoked to prohibit majority symbols.[81] In the words of Lorenzo Zucca: "some symbols are more neutral than others".[82]

Furthermore, in *Dahlab*, the ECtHR clarified that "a powerful religious symbol – that is to say, a sign that is immediately visible to others and provides

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75 *Lautsi and others v Italy* (n 22) para 66.
76 ibid, concurring opinion of Judge Power.
77 *Dahlab v Switzerland* (n 17).
78 In *Dahlab*, the nature of the religious symbols and its impact on young pupils were specifically taken into account by the ECtHR.
79 *Lautsi and others v Italy* (n 22) para 72.
80 Zucca, 'Lautsi: A Commentary on a decision by the ECtHR Grand Chamber' (n 28) 220.
81 ibid.
82 ibid 221.

a clear indication that the person concerned belongs to a particular religion".[83] In *Lautsi*, the Chamber considered the crucifix as a powerful symbol because "it is impossible not to notice crucifixes in the classrooms. In the context of public education, they are necessarily perceived as an integral part of the school environment and may therefore be considered "powerful external symbols"'.[84] However, the Grand Chamber rejected this analogy without giving adequate reasoning, and by doing so, failed to provide a clear definition of what a passive symbol is.

The Grand Chamber held that the organisation of the school environment and content of education fell within the competence of the Contracting States unless these teachings do not constitute to indoctrination of pupils.[85] The Grand Chamber emphasised that the ECtHR shows respect to the Contracting States' decision in relation to education and teaching as long as such decisions "do not lead to a form of indoctrination". The immediate question, then, becomes what does the display of a religious symbol on classroom walls mean in this context?[86] First, it is difficult to accept that the presence of the crucifix is 'neutral'.[87] Second, it should be admitted that the crucifix is an explicit symbol of the dominant religion in Italy.[88] Importantly, even the Grand Chamber

83 ibid.

84 *Lautsi and others v Italy* (n 22) para 54 and 73.

85 It is worth noting that the ECtHR has made clear that "the state, in fulfilling the functions assumed by it in regard to education and teaching must take care that information or knowledge included in the curriculum is conveyed in an objective critical and pluralistic manner". *Folgerø and others v Norway* (GC), Application no 15472/02, ECHR 2007-III, para 84

86 Heiner Bielefeldt, the Special Rapporteur on freedom of religion or belief, provides an overview of the issue of religious symbols in the school context: "a teacher wearing religious symbols in the class may have an undue impact on students, depending on the general behaviour of the teacher, the age of students and other factors. In addition, it may be difficult to reconcile the compulsory display of a religious symbol in all classrooms with the State's duty to uphold confessional neutrality in public education in order to include students of different religions or beliefs on the basis of equality and non-discrimination". See Heiner Bielefeldt, 'Report of the Special Rapporteur on freedom of religion or belief' (2010) A/HRC/16/53 *UN General Assembly*, para 44.

87 See Zucca, 'Lautsi: A Commentary on a decision by the ECtHR Grand Chamber' (n 28) 220 and 221.

88 Susanna Mancini makes this point: "the crucifix, despite the judges' effort, does not become a purely cultural symbol but rather a "semi-secular" symbol that very effectively represents the "new" and "healthy" forms of the alliance between religion and state power… But this "cultural" or "diffused" Christianity that supposedly pervades the Constitution produces an unacceptable discriminatory effect in that non-believers are excluded from the religious meaning of the cross". See Susanna Mancini, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' (2009) 30 *Cardozo Law Review* 2629, at 2639.

recognised that "the crucifix is above all a religious symbol".[89] However, the presence of the crucifix in public school has been considered as compatible with the principle of neutrality by the Grand Chamber.

A neutral state, as Dworkin notes, should treat all its citizens "as free, or as independent, or with equal dignity".[90] What does, then, this imply? Dworkin's conception of neutrality entails that the state is required to treat each individual with equal concern and respect. This is because, all individuals have equal moral worth, so that the state must treat each individual as a moral equal. This implies that the liberty to determine and pursue one's own conception of the good life is entailed by the idea of equal respect.[91] A neutral state, then, does not promote a particular way of life or conception of the good life. Therefore, the state can be neutral as long as it treats its citizens as equal.

Dworkin explains: "since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group".[92] If the government were to favour a particular conception of the good life, this would illustrate a failure to show equal respect and concern for all of its citizens. This entails that state neutrality is required by the 'equal concern and respect' principle. It can be concluded that in *Lautsi*, the state failed to show equal concern and respect for all its citizens.

Moreover, the justifications for religious freedom can be divided into two main groups such as instrumental and deontological.[93] According to an instrumental justification, religious freedom has been understood to refer to the tolerance of different opinions concerning religion. From this perspective, such religious toleration is seen as necessary to maintain social order and prevent conflicts between people from different belief systems. For instance, one of the main arguments for religious toleration was advanced by John Locke:

> It is not the diversity of opinions (which cannot be avoided), but the refusal of toleration to those that are of different opinions (which might have been granted) that has produced all the bustles and wars that have been in the Christian world, on account of religion.[94]

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89 *Lautsi and others v Italy* (n22) para

90 Dworkin, *A Matter of Principle* (n 8) 66.

91 Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2013) 63.

92 Dworkin, *A Matter of Principle* (n 8) 191.

93 Lewis, 'What not to wear: Religious Rights, the European Court, and the Margin of Appreciation' (n 13) 401.

94 John Locke, 'Letter Concerning Toleration', in David Wootton (ed), *John Locke Political Writings* (Penguin, 1993) 390.

Ronald Thiemann notes that the truth behind the separation of church and state comes from the principle of state neutrality.[95] Such principle implies that government should not prefer one conception of the good over another. It could be argued that the central concept of this principle is the idea of equality. Indeed, this approach reflects on the idea that while the meaning of life may be different for each individual, each human life is equally important. Therefore, as Dworkin explains, government [state] "must not only treat people with concern and respect, but with equal concern and respect… It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's."[96] This, then, means that a state is neutral as long as it does not interfere with the individual conceptions of the good life.[97] In other words, state neutrality is required by "the principle of equal concern and respect", which suggests that all individuals have the right to equal concern and respect from government. Thus, government can be neutral as long as it remains morally and religiously neutral.

According to this understanding of neutrality, each individual should be allowed to find his or her own good life. This is because, each individual has a different conception of the good life and in order to implement their conceptions of the good life, the state must remain neutral in religious matters. However, unlike the Chamber in the first *Lautsi* decision, the issue of state neutrality and impartiality have been abandoned by the Grand Chamber.[98] This means that the state-school classroom as a public sphere is not bound to be religiously neutral provided that this does not imply to indoctrination.[99] As Julie Ringelheim points out, the way the Court applied the concept of state neutrality in religious matters throughout its case-law has been subject to criticism.[100] In particular, the Court has failed to hold a consistent approach in its interpretation to state religious neutrality in public institutions. Therefore, the Grand Chamber decision in *Lautsi* demonstrates not only the inconsistency with *Dahlab* but also the state's failure to show equal concern and respect for all its citizens.

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95 Ronald F Thiemann, *Religion in Public Life: A Dilemma for Democracy* (Georgetown University Press, 1996) Chapter 7.

96 Dworkin, *Taking Rights Seriously* (n 8) 272 and 273.

97 Rafael Palomino 'Religion and Neutrality: Myth, Principle, and Meaning' (2011) 2011 *BYU Law Review* 657, at 668.

98 Jeroen Temperman, *The Lautsi Papers* (Martinus Nijhoff, 2012).

99 Esther D Reed, *Theology for International Law* (Bloomsbury Publishing, 2013) 293.

100 See Ringelheim, 'State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach' (n 29) 26.

3. Gender Equality and Headscarves: *Dahlab* and *Şahin*

The tension between gender equality and religious freedom is considered as one of the most controversial debates in this context.[101] For instance, according to Christine Chinkin, this tension between freedom of religion and gender equality principles is common in states where 'there are significant minorities of a different religious persuasion from that of the majority population'.[102] With regard to the principle of gender equality, the ECtHR made an assertion that the Islamic headscarf "appears to be imposed on women by a precept which is laid down in the Koran and which is hard to square with the principle of gender equality".[103] Hence, bans on the wearing of Islamic headscarves are often thought to be compulsory for the promotion of gender equality.[104] Therefore, the Court seems to have taken a paternalistic approach towards women.[105]

In *Dahlab*, the Court justified its decision as follows: the wearing of a headscarf "appears to be imposed on women by a precept which is laid down in the Koran and which is hard to square with the principle of gender equality".[106] This explanation clearly means that the wearing of the Islamic the headscarf is incompatible with the principle of gender equality.[107] This understanding of the Islamic headscarf has been used in later decisions of the ECtHR to justify restrictions on wearing the headscarf in state institutions. However, it should be noted that none of those points were properly supported by either concrete evidence or facts.[108] Yet, such decision had a significant importance because its legal reasoning was used in *Şahin*. Indeed, such arguments -gender equality and tolerance- were considered, without much consideration, as the main grounds for the Court's conclusion in *Şahin*. This means that the Grand Chamber in *Şahin* relied on the judgement in *Dahlab* with specific respect to gender equality and tolerance.

In *Şahin,* the prohibition was based on two principles: secularism and gender equality. On this basis, the wearing of the Islamic headscarf was found

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101 Cochav E Levy, 'Women's Rights and Religion – The Missing Element in the Jurisprudence of the European Court of Human Rights' (2014) 35 *University of Pennsylvania Journal of International Law* 1175, at 1222.

102 Christine Chinkin, 'Women's Human Rights and Religion: How do they Co-exist?' in Javaid Rehman and Susan Breau (eds), *Religion, Human Rights and International Law* (Nijhoff, 2007) 56.

103 *Dahlab v Switzerland* (n 17); *Leyla Şahin v Turkey* (n 2).

104 See Howard Erica, 'Banning Islamic veils: is gender equality a valid argument?' (2012) 12 *International Journal of Discrimination and the Law* 147.

105 See Kyritsis and Tsakyrakis, 'Neutrality in the classroom' (n 6) 210 and 217.

106 *Dahlab v Switzerland* (n 17) para 1.

107 See Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 18) 62.

108 Hilal Elver, *The headscarf Controversy: Secularism and Freedom of Religion* (Oxford University Press, 2012) Chapter 4.

incompatible with the principle of gender equality. What emerges strongly from *Şahin* is that the Court reinforced that the wearing of an Islamic headscarf was incompatible "with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils".[109] In doing so, the Court established a link between the symbolic meaning of the Islamic headscarf and anti-democratic values in the Turkish context. This is because the Court accepted that the Islamic headscarf was 'somehow' inconsistent with the value of equality, the principle of secularism and democracy. This approach, however, was strongly criticised by Judge Tulkens in her dissenting opinion:

> It is not the Court's role to make an appraisal of this type – in this instance a unilateral and negative one – of a religion or religious practice, just as it is not its role to determine in a general and abstract way the signification of wearing the headscarf or to impose its viewpoint on the applicant.[110]

Nevertheless, the Court's decision in *Şahin* can be explained on the basis of the need to protect secularism and democracy from extremist movements in Turkey.[111] The Court noted that "it is the threat posed by extremist political movements seeking to impose on society as a whole their religious symbols and conception of a society founded on religious precepts".[112] In the Court's view, manifesting one's religion by peacefully wearing a headscarf can be restricted in order to prevent 'radical Islamism'. Although there was no legal proof of the applicant having a political agenda, what comes out from this decision is an implicit suggestion of a correlation between the Islamic headscarf and militant forms of Islam.[113] This means that the Court considered that all women who wear the headscarf are potentially fundamentalist, and therefore they pose a threat to preserve pluralism in the society.[114]

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109 *Dahlab v Switzerland* (n 17) para 1; *Leyla Şahin v Turkey* (n 2), dissenting opinion of Judge Tulkens, para 111.

110 *Leyla Şahin v Turkey* (n 2), dissenting opinion of Judge Tulkens, para 12.

111 See Elver, *The headscarf Controversy: Secularism and Freedom of Religion* (n 109).

112 *Leyla Şahin v Turkey* (n 2) para 115.

113 Peter Cumper and Tom Levis, 'Taking Religious Seriously Human Rights and Hijab in Europe Some Problems of Adjudication' (2008) 34 *Journal of Law and Religion* 599, at 609.

114 Indeed, such an approach implies that the ECtHR's judgement seems driven by the fear of Islamic Fundamentalism. For instance, in *Refah Partisi* (the Welfare Party) and *Others*, the Court said that: "In a country like Turkey, where the great majority of the population belong to a particular religion, measures taken in universities to prevent certain fundamentalist religious movements from exerting pressure on students who do not practise that religion or on those who belong to another religion may be justified under Article 9(2) of the Convention". *Refah Partisi (The Welfare Party) and others v Turkey* (GC), Application nos 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II) para 95. In *Şahin*, this approach has been criticized by Judge Tulken in her dissenting opinion: "Merely wearing

In favour of the Court's position, one could plead that the ECtHR explicitly recognised the importance of the principle of gender equality. Such principle is described as "one of the key principles underlying the Convention" and "a goal to be achieved by member states of the Council of Europe".[115] To some extent, it is understandable that the Court was concerned about the principle of gender equality in the Turkish context. Such concern derives from the presumption that:

> when examining the question of the Islamic headscarf in the Turkish context, it must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it.[116]

This passage represents the Court's position with regard to gender equality and the Islamic headscarf in the Turkish context. In such a context, wearing the Islamic headscarf was considered in contradiction to the principle of equality between man and woman. According to the Court, then, the headscarf is seen as a serious obstacle to the liberation of women in Turkey. The prohibition on wearing the headscarf is considered as providing equality between women and men. Thus, the ECtHR seems to have accepted Turkey's assertion that the headscarf ban advances gender equality.

However, no argument has been put forward as to how prohibiting students to wear the Islamic headscarf is a necessary condition for gender equality in Turkey. According to Vakulenko, in both cases "the headscarf was attributed a highly abstract and essentialised meaning of a religious item extremely detrimental to gender equality".[117] Ratna Kapur points out that *Şahin* and *Dahlab* cases are "an example of how equality remains its own stumbling block to the realisation of equality".[118] Therefore, it can be said that the principle of gender equality, without adequate analysis, does not provide a legal basis for restricting a woman from following a freely adopted religious practice.[119]

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the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and "extremists" who seek to impose the headscarf as they do other religious symbols". *Leyla Şahin v Turkey* (n 2), dissenting opinion of Judge Tulkens, para 10. See also Baljit Kooner, 'The Veil of Ignorance: A Critical Analysis of the French Ban on Religious Symbol in the Context of the Application of Article 9 of the ECHR' (2008) 12 *Mountbatten Journal of Legal Studies* 23, at 40.

115 *Leyla Şahin v Turkey* (n 2) para 115.

116 ibid para 115.

117 Anastasia Vakulenko, ''Islamic Headscarves' and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16 *Social and Legal Studies* 183, at 192.

118 Ratna Kapur, 'Un-Veiling Equality: Disciplining the 'Other' Woman Through Human Rights Discourse' in Anver M Emon, Mark Ellis and Benjamin Glahn (eds), *Islamic law and International Human Rights Law* (Oxford University Press, 2015) 288.

119 Jill Marshall 'Freedom of Religious Expression and Gender Equality: Sahin v Turkey'

As mentioned above, religious freedom can be justified on two main grounds such as instrumental and deontological justifications. One of the main deontological justifications put forward by Dworkin for freedom of religion centre on the concepts of human dignity and personal responsibility which can only be ensured by the recognition of personal autonomy.[120] In this regard, religious freedom can be understood as protecting individuals' ethical independence. Dworkin explains:

> Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived.[121]

On this view, the basis for the right to religious freedom is respect for the individual's conception of the good life.

It may be true to say that in the context of religious symbols and clothing in the public sphere, the choice to follow a specific religious practice and manifest it through clothing reflects the autonomous decision of the individual.[122] Marshall summarises this point:

> Each person is recognised as unique and ought to be able to live his or her life. Self-respect in this context – viewing oneself as worthy of the same status and entitlements as every other person regardless of what you choose to wear - should surely be foundational in any liberal democracy.[123]

This means that the woman claiming the right to wear the Islamic headscarf is exercising her personal autonomy in religion.[124]

On this account, women's autonomy can be legally recognised when the concepts of human dignity and personal responsibility are considered as "empowering and self-determining rather than constraining and paternalistic".[125] As both *Dahlab* and *Şahin* demonstrate, the prohibitions on religious symbols in state-school were justified in the name of gender equality. However, the personal autonomy of individual women has been considered as the missing

(2006) 69 *Modern Law Review* 452, at 459 and 460.

120 ibid 402.

121 Dworkin, *Taking Rights Seriously* (n 8) 272.

122 Lewis, 'What not to wear: Religious Rights, the European Court, and the Margin of Appreciation' (n 13) 402.

123 Jill Marshall, 'The legal recognition of personality: full-face veils and permissible choices' (2014) 10 *International Journal of Law in Context* 75.

124 Lewis, 'What not to wear: Religious Rights, the European Court, and the Margin of Appreciation' (n 13) 402.

125 See Kai Moller, 'Dworkin's Theory of Rights in the Age of Proportionality' (2018) 12 *Law and Ethics of Human Rights* 281

element in the Court's decisions.[126] It is fair to say that the paternalistic goal of restricting people from living ethically worthless lives does not constitute as legitimate under the principle of personal responsibility.[127] Therefore, banning the Islamic headscarf because of paternalistic disapproval would widely be considered as simply unacceptable and an unjustifiable intrusion in the personal life of the right-holder.[128]

This approach, moreover, can be seen as violating the principle of human dignity by denying women's individual autonomy. As Dworkin notes, a restriction or a policy may violate dignity "by usurping an individual's responsibility for his [or for her] own ethical values".[129] For instance, forcing people to wear seatbelts does not violate people's ethical independence simply because such policy is not motivated by a belief in the superiority of some view.[130] According to Dworkin, as Steven Guest emphasised, there is no violation of ethical independence "where the matter is not foundational, or the government does not assume any 'ethical' justification".[131] The Court's approach in *Dahlab* and *Şahin* ignores the many different reasons why Muslim women choose to wear headscarves or veils, so that it denies an essential feature of responsibility for their own life in the name of gender equality. Such paternalistic justification should not be accepted as a legitimate reason since it violates the principle of human dignity. Thus, denying one's personal responsibility and ability to adopt a freely chosen religion to practice can be considered as violating his or her human dignity.

3.1. Denying Women's Autonomy in the name of Protecting Gender Equality

According to Dworkin, the concept of human dignity consists of two principles: the principle of intrinsic value and the principle of personal responsibility. The upshot is that the state's role should not be that of superimposing a specific conception of the good life, rather that of providing the ethical independence of all individuals and the chance for people to define and pursue their own ideal of well-being. Religious freedom, as Dworkin argues, should be understood as protecting individuals' ethical independence. This argument derives from the principle of personal responsibility which can only

126 See Levy, 'Women's Rights and Religion – The Missing Element in the Jurisprudence of the European Court of Human Rights' (n 102). See also Marshall, 'The legal recognition of personality: full-face veils and permissible choices' (n 124).

127 See Moller, 'Dworkin's Theory of Rights in the Age of Proportionality' (n 126) 281.

128 ibid.

129 Dworkin, *Is Democracy Possible Here?* (n 10) 71.

130 See Kyritsis and Tsakyrakis, 'Neutrality in the classroom' (n 6) 210.

131 Stephen Guest, *Ronald Dworkin* (Stanford University Press, 2013) 176.

be properly achieved through recognising everyone's personal responsibility in defining and pursing the value of his or her life.

It can be argued that Dworkin's account of dignity blocks paternalistic policies which may restrict the autonomy and liberty of individuals without their consent. In this context, gender equality is invoked to restrict individual choices by, for instance, claiming that the wearing of the headscarf is incompatible with the ideals of equality. However, it is difficult to find concrete evidence in either *Şahin* or *Dahlab* that the wearing of the Islamic headscarf was anything other than the choice of those women. In each, the Court found an artificial conflict between the Islamic faith and women's right to equality which had not been adequately examined. Therefore, in *Şahin* and *Dahlab* the Court paternalistically denied the applicant's right to personal autonomy.[132]

As Ivana Radacic argues, the principles of equality and secularism have been interpreted in a paternalistic manner.[133] Such a paternalistic approach, however, can be seen as violating the principle of personal responsibility by denying the individual the ability to define and pursue her own judgement about the value of wearing the Islamic headscarf. In *Dahlab* and *Şahin*, the decisions of the Court relied on two stereotypes of Muslim women as the main grounds for the decisions. The Court, in both cases, made the assumption that the wearing of a headscarf by itself is incompatible with the principle of gender equality. The Court reasoned that it seems to be "imposed on women by a precept which is laid down in the Koran".[134] Evan draws attention to the wording used by the Court in *Dahlab*. She notes that the way in which the word 'imposed' is used here is unnecessary.[135] In the words of Carolyn Evans:

> Most religious obligations are 'imposed' on adherents to some extent and the Court does not normally refer to the obligations in such negative terms. It is not clear why wearing headscarves is any more imposed on women by the *Qur'an,* than abstinence from pork or alcohol is imposed on all Muslims, or than obeying the Ten Commandments is imposed on Jews and Christians.[136]

It has to be born in mind that there is an explicit disagreement among Islamic scholars as to whether the wearing of the Islamic headscarf is a mandatory religious duty.[137] However, the concept of gender equality in Islam, and its

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132 Anastasia Vakulenko, *Islamic Veiling in Legal Discourse* (Routledge, 2013).

133 Ivana Radacic, 'The Ban on Veils in Education Institutions: Jurisprudence of the European Court of Human Rights' (2008) 4 *Croatian Yearbook of European Law and Policy* 267, at 281.

134 *Dahlab v Switzerland* (n 17).

135 Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 18) 65.

136 ibid 65.

137 See Ellen Wiles, 'Headscarves, Human Rights, and Harmonious Multicultural Society:

relationship with the Islamic headscarf did not receive serious consideration by the Court in either case. In both cases, according to Evans, the Court relied on the Western understanding of Islam: "…the *Qur'an* and Islam are oppressive to women and there is no need to be more specific or to go into any detail about this because it is a self-evident, shared understanding of Islam".[138] Sharon Todd notes that: "the point is that this connection between lack of equality and the wearing of religious symbols is only ever made in the light Muslim practices. The argument is never marshalled to defend Jewish or Sikh boy's equality".[139] This means that the Islamic headscarf is perceived by the ECtHR as a 'powerful' symbol of gender inequality.

It is difficult to understand why the Islamic headscarf has to necessarily symbolise gender inequality. In both cases, the Court did not provide a plausible reason as to why the wearing of the headscarf cannot be compatible with gender equality. Rather, the Court simply said that it was "…difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and…equality and non-discrimination."[140]An immediate question arises as to why it is difficult or where such difficulty lies. Or as Ellen Wiles notes: "is the headscarf solely or invariably a symbol of female submission and inferiority in Islam, or is its meaning more complex and divergent, particularly in contemporary European societies?"[141] It seems that the Court, without engaging with the complexity of the issue, took a simplistic assumption about Muslim women.

In fact, the Court in *Şahin* relied only on the decision in *Dahlab* with respect to the Islamic headscarf and gender equality. In *Dahlab*, the headscarf was interpreted as a 'powerful religious symbol' in a way that "appeared to be imposed on women by a precept which is laid down in the Koran and which…was hard to square with the principle of gender equality". This does not mean more than that merely wearing the Islamic headscarf is an obstacle to the realisation of the gender equality. The Court's reasoning for this approach seems to be that the Islamic headscarf is inherently oppressive and inimical to gender equality, and therefore it should be banned. What has been missing until now is the voice of Muslim women who wear the headscarf as an autonomous choice.

Implications of the French Ban for Interpretations of Equality' (2007) 41 *Law and Society Review* 699.

138 Evans, 'The Islamic Scarf in the European Court of Human Rights' (n 18) 65.

139 Sharon Todd, *Toward an Imperfect Education* (Routledge, 2016) 92.

140 *Dahlab v Switzerland* (n 17); *Leyla Şahin v Turkey* (n 2).

141 Wiles, 'Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality' (n 138) 719.

It should be pointed out that the Court's assumption ignores the many different reasons why women wear headscarves. As Judge Tulkens pointed out in her powerful dissenting opinion:

> What is lacking in this debate is the opinion of women, both those who wear the headscarf and those who choose not to…In this connection, I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them. "Paternalism" of this sort runs counter to the case-law of the Court, which has developed a real right to personal autonomy on the basis of Article 8.[142]

The first impression given by the case law of the Court is that the Islamic headscarf has been recognised as being associated with the subordination of women. In other words, in both cases, the restrictions on wearing the Islamic headscarf were justified in the name of gender equality. Such presumption ignores the fact that a woman may wear the Islamic headscarf in accordance with her religious faith, culture or personal convictions. What emerges strongly from *Şahin and Dahlab* is that wearing the headscarf as a personal choice was simply absent from the Court's rulings. Thus, the Court justified its decisions based on preconceived opinions about Muslim women.

From the cases mentioned above, it can be concluded that the Court took a paternalistic approach toward Muslim women.[143] Such approach derives from the idea that "the person interfered with will be better off or protected from harm".[144] In this context, "banning [the headscarf] means imposing one set of standards and denies these women freedom as autonomous persons in their own right: seemingly in the name of gender equality".[145] The Court took the view that these adult women do not know what is good for them, so that they should be forced not to wear the Islamic headscarf. This sort of paternalistic approach, as Judge Tulkens emphasised, is contrary to the case law of the ECtHR which has developed a real right to personal autonomy. Such approach, therefore, can be seen as a denial of the woman's right to personal autonomy in the context of the ECHR. Dworkin writes:

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142 *Leyla Şahin v Turkey* (n 2); *Dahlab v Switzerland* (n 17).

143 See Maleiha Malik, 'The Return of a Persecuting Society? Criminalizing facial veils Europe' in Eva Brems (ed), *The Experiences of Face Veil Wearers in Europe and the Law* (Cambridge University Press, 2014) 232-250; See also Howard, 'Banning Islamic Veils: is gender equality a valid argument?' (n 32).

144 Gerald Dworkin, 'Paternalism' in Edward N Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (Stanford University, Winter 2017 Edition).

145 Marshall, 'Freedom of Religious Expression and Gender Equality: Sahin v Turkey' (n 120) 460.

> Some laws can be justified only on deep paternalistic assumptions the majority knows better than some individuals where value in their lives is to be found and that it is entitled to force those individuals to find it there… These laws are offensive to liberty and must be condemned as affronts to people's personal responsibility for their own lives'.[146]

According to Dworkin's account of human dignity and liberty, the Court's paternalistic approach violates the woman's right to liberty by deciding for her something that she has the right to decide for herself. In this context, the notion of dignity should be understood as a claim for independence from state in matters of ethical choice.[147] It is a fundamental aspect of Dworkin's theory that a good life is understood as defining success according to one's independently defined and chosen values. This approach has been suggested as the basis for human dignity, hence it can be seen as a philosophical underpinning for the right to religious freedom. For Dworkin, therefore, the concept of human dignity provides the legitimate ground for religious freedom.[148] Since the basis for the right to religious freedom is respect for the individual autonomy, paternalism is unacceptable under the principle of personal responsibility. However, the Court in *Şahin* and *Dahlab* failed to recognise women's personal responsibility for realising the value of their life, hence violated the dignity of women.

Conclusion

The issue of religious dresses has been the subject of deep controversy in Europe over the years.[149] This article analysed the case-law of the Court as it relates to the restrictions on the wearing of religious clothing and symbols in public spheres. It first provided a legal framework in which religion is guaranteed under Article 9 ECHR. The article then critically engaged with the ECtHR's case-law on Article 9 ECHR, with a specific emphasis on displaying religious symbols in public spheres.

This article has showed that the ECtHR had consistently held that the restrictions on the Islamic headscarf were compatible with the Convention.[150] In *Dahlab* and *Sahin,* gender equality was invoked in order to restrict individual choices by, for example, arguing that the wearing of the headscarf is an obstacle to the liberation of women. This is highly important in this context, because

146 Dworkin, *Is Democracy Possible Here?* (n 10) 73.

147 Domingo, 'Religion for Hedgehogs? An Argument against the Dworkinian Approach to Religious Freedom' (n 11) 373.

148 Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011) 376.

149 Lewis, 'What not to wear: Religious Rights, the European Court, and the Margin of Appreciation' (n 13).

150 *Karaduman v Turkey*, Application no 16278/90, Commission decision of May 3, 1993, DR 74; *Dahlab v Switzerland* (n 17); *Leyla Şahin v Turkey* (n 2).

the conflict between the right to freedom of religion and women's rights to equality is considered as a controversial issue under the Convention.[151] This article has critically examined the treatment of gender equality by the Court in the Islamic clothing cases through the lens of Dworkin.

This article has made explicit that restrictions on the wearing of Islamic headscarves are often thought to be compulsory for the promotion of gender equality. While a headscarf ban has been justified as a solution to gender inequality, the ECtHR, in two cases, failed to give adequate weight to the personal autonomy of the applicants. As discussed above, *Dahlab* and *Şahin* denied the fact that restricting the wearing of headscarves by the state "is just as paternalistic and patriarchal as putting pressure on women to wear these garments".[152] Dworkin's theory of personal responsibility helped us to reveal that the Court ignored individual's responsibility and ability to adopt a freely chosen religious practice. Thus, the Court's paternalistic approach does not qualify as legitimate under the principle of personal responsibility. The findings of this article suggest that such failure, from a Dworkinian approach, can be seen as violating the principle of personal responsibility.

As discussed throughout the article, religious freedom can be based on human dignity and personal responsibility. This understanding of human dignity is important because, as pointed out by Jill Marshall, the main aim and very essence of the Convention "is respect for human dignity and human freedom".[153] In this article, I argued that, understood as an important component of human dignity, the concept of personal autonomy is a missing element in the Court's decisions in this context.

This article has also elaborated to what extent the principle of state neutrality has been respected by the ECtHR. In particular, it has focussed on whether the principle of religious neutrality can be considered as compatible with the compulsory display of crucifixes in classrooms of state-schools. The ECHR jurisprudence on religious dress and symbols, as Ronan McCrea writes,

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151 Levy, 'Women's Rights and Religion – The Missing Element in the Jurisprudence of the European Court of Human Rights' (n 102); See also Marshall, 'Freedom of Religion Expression and Gender Equality: *Sahin v Turkey*' (n 120).

152 Howard, 'Banning Islamic veils: is gender equality a valid argument?' (n 32) 160.

153 Marshall, 'The legal recognition of personality: full-face veils and permissible choices' (n 124) 64; See *Pretty v UK*, Reports of Judgments and Decisions 2002-III, 29 April 2002, para 65. In fact, in *Goodwin v. the UK*, the Court has already emphasised this point: "the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including their right to establish details of their identity as individual human beings." *Christine Goodwin v the UK* (GC), Application no 28957/95, ECHR 2002-VI, para 90.

has "granted priority to the right of states to define their own relationship to religion, to defend the public sphere and state institutions from religion, or, conversely, to promote certain denominations through state institutions".[154] This means that in relation to the regulation of religious manifestations in the public sphere, the Contracting States have been allowed a wide margin of appreciation.[155] Importantly, exercising such discretion, the Contracting States are subject to limitations. For instance, in *Refah Partisi v. Turkey*, the ECtHR implicitly defined the duty of the state as "the neutral and impartial organiser of the exercise of various religions, faiths and beliefs".[156] In order to perform the state's duty of neutrality and impartiality, the state must abstain from assessing "the legitimacy of religious belief".[157]

In the case of *Lautsi v. Italy*, the main issue was the permissibility of the display of crucifixes in state-school classroom. While the Court held that the display of the crucifix on the classroom walls of the state school is compatible with the Convention, this article has showed that the issue of neutrality and impartiality have been abandoned by the Court. This finding also suggests that such ruling is inconsistent with the Court's previous decisions in *Dahlab* and *Şahin*.

Bibliography

1. Primary Sources

1.1. Cases

Christine Goodwin v United Kingdom (GC), Application no 28957/95, ECHR 2002-VI

Dahlab v Switzerland, Reports of Judgments and Decisions 2001-V, 15 February 2001

Folgerø and others v Norway (GC), Application no 15472/02, ECHR 2007-III

Hasan and Chaush v Bulgaria (GC), Application no 30985/96, ECHR 2000-XI.

154 Ronan McCrea, *Religion and the Public Order of the European Union* (Oxford University Press, 2010) 121.

155 In sum, the doctrine of margin of appreciation entails that sensitive issues should be handled by the states as the local authorities are better placed to assess such issues than Strasbourg institutions. Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press, 2016). See Steven Greer, *The Exceptions to Articles 8 to 11of the European Convention on Human Rights* (Council of Europe Publishing, 1997). See also Dimitrios Tsarapatsanis, 'The Margin of Appreciation Doctrine: A Low-Level Institutional View' (2015) 35 *Legal Studies* 675.

156 *Refah Partisi (The Welfare Party) and others v Turkey* (n 115) para 91.

157 ibid para 91.

Karaduman v Turkey, Application no 16278/90, Commission Decision of May 3 1993, DR 74

Kokkinakis v Greece, Series A no 260-A, 25 May 1993

Lautsi and others v Italy (GC), Application no 30814/06, 18 March 2011

Leyla Şahin v Turkey (GC), Application no 44774/98, ECHR 2005-XI

Refah Partisi and others v Turkey, Reports of Judgments and Decisions 2003-II, 13 February 2013

Religionsgemeinschaft Der Zeugen Jehovas and others v Austria, Application no 40825/95, 31 July 2008

SAS v France (GC), Application no 43835/11, 1 July 2014

Pretty v UK, Reports of Judgments and Decisions 2002-III, 29 April 2002

1.2. Regional Treaties

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

2. Secondary Sources

2.1. Books

Beckman, L, *The Liberal State and the Politics of Virtue* (Transaction Publishers, 2001)

Dworkin R, *Taking Rights Seriously* (Harvard University Press, 1977)

--, *A Matter of Principle* (Harvard University Press, 1985)

--, *Law's Empire* (Harvard University Press, 1986)

--, *Freedom's Law* (Oxford University Press, 1996)

--, *Is Democracy Possible Here?* (Princeton University Press, 2008)

--, *Justice for Hedgehogs* (Harvard University Press, 2011)

--, *Religion Without God* (Harvard University Press, 2013)

Dzehtsiarou K, *European Consensus and the Legitimacy of the European Court of Human Rights* (Cambridge University Press, 2015)

Donnely J, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2013)

Greer S, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Council of Europe Publishing, 1997)

Harris D and others, *Law of the European Convention on Human Rights*, 3rd edn (Oxford University Press 2014)

Letsas G, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007)

Locke, J, 'Letter Concerning Toleration', in David Wootton (ed), *John Locke Political Writings* (Penguin, 1993)

Marshall J, *Personal Freedom Through Human Rights Law?* (Martinus Nijhoff, 2009

Mowbray A, *Cases and Materials on the European Convention on Human Rights* (Oxford University Press, 2012)

McCrea R, *Religion and the Public Order of the European Union* (Oxford University Press, 2010)

Reed E, *Theology for International Law* (Bloomsbury Publishing, 2013)

Scolnicov A, *The Right to Religious Freedom in International Law* (Routledge, 2011)

Simmons, W, *Human Rights Law and the Marginalised Other* (Cambridge University Press, 2011)

Stephen Guest, *Ronald Dworkin* (Stanford University Press, 2013)

Temperman J, *The Lautsi Papers* (Martinus Nijhoff, 2012).

Thiemann R, *Religion in Public Life: A Dilemma for Democracy* (Georgetown University Press, 1996)

Todd S, *Toward an Imperfect Education* (Routledge, 2009)

Vakulenko, A, *Islamic Veiling in Legal Discourse* (Routledge, 2013).

Zucca L, *A Secular Europe: Law and Religion in the European Constitutional Landscape* (Oxford University Press, 2012)

2.2. Book Chapters

Arthur, J, 'Secular Education and Religion' in Phil Zuckerman and John R Shook (eds), *The Oxford Handbook of Secularism* (Oxford University Press, 2017)

Chinkin, C, 'Women's Human Rights and Religion: How do they Co-exist?' in Javaid Rehman and Susan Breau (eds), *Religion, Human Rights and International Law* (Nijhoff, 2007)

Evans, MD, 'Believing in Communities, European Style' in Nazila Ghananea-Hercock (ed) *The Challenge of Religious Discrimination at the Dawn of the Millennium* (Springer, 2004)

--, 'From Cartoons to Crucifixes: Current controversies concerning the freedom of religion and the freedom of expression before the European Court of Human Rights' in Esther D Reed and Michael Dumper (eds), *Civil liberties, National Security and Prospects for Consensus* (Cambridge University Press, 2014)

Kapur, R, 'Un-Veiling Equality: Disciplining the 'Other' Woman Through

Human Rights Discourse' in Anver M Emon, Mark Ellis and Benjamin Glahn (eds), *Islamic law and International Human Rights Law* (Oxford University Press, 2015)

2.3. Journal Articles

Bleiberg, D, 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Leyla Sahin v. Turkey'* (2005) 91 *Cornell Law Review* 129

Castillo-Ortiz P, Ali A, and Samanta N, 'Gender, intersectionality, and religious manifestation before the European Court of Human Rights' (2019) 18 *Journal of Human Rights* 76

Cumper, P and Levis, T, 'Taking Religious Seriously Human Rights and Hijab in Europe Some Problems of Adjudication' (2008) 34 *Journal of Law and Religion* 599

Domingo, R, 'Religion for Hedgehogs? An Argument against the Dworkinian Approach to Religious Freedom' (2012) 2 *Oxford Journal of Law and Religion* 371

Elkayam-Levy, C, 'Women's Rights and Religion – The Missing Element in the Jurisprudence of the European Court of Human Rights' (2014) 35 *University of Pennsylvania Journal of International Law* 1175

Elver, H, *The headscarf Controversy: Secularism and Freedom of Religion* (Oxford University Press, 2012)

Erica, H, 'Banning Islamic veils: is gender equality a valid argument?' (2012) 12 *International Journal of Discrimination and the Law* 147

Evans, C, 'The Islamic Scarf in the European Court of Human Rights' (2006) 7 *Melbourne Journal of International Law* 52

Ibarra, EV, 'Why Appearances Matter. State Endorsement of Religious Symbols in State Schools in Europe After *Lautsi*' (2014) 3 *UCL Journal of Law and Jurisprudence* 262

Kooner, B, 'The Veil of Ignorance: A Critical Analysis of the French Ban on Religious Symbol in the Context of the Application of Article 9 of the ECHR' (2008) 12 *Mountbatten Journal of Legal Studies* 23

Kyritsis, D and Tsakyrakis, S, 'Neutrality in the classroom' (2013) 11 *International Journal of Constitutional Law* 200

Laborde, C, 'Dworkin's Freedom of Religion Without God' (2014) 94 *Boston University Law Review* 1255

Lewis, T, 'What not to wear: Religious Rights, the European Court, and the Margin of Appreciation' (2007) 56 *International and Comparative Law Quarterly* 395

Mancini, S, 'The Power of Symbols and Symbols as Power: Secularism and Religion as Guarantors of Cultural Convergence' (2009) 30 *Cardozo Law Review* 2629

--, 'The Crucifix Rage: Supranational Constitutionalism Bumps Against the Counter-Majoritarian Difficulty' (2010) 6 *European Constitutional Law Review* 6

Marshall, J, 'Freedom of Religion Expression and Gender Equality: *Sahin v Turkey*' (2006) 69 *Modern Law Review* 452

--, 'The legal recognition of personality: full-face veils and permissible choices' (2014) 10 *International Journal of Law in Context* 64

McGoldrick, D, 'Religion in the European Public Square and in European Public Life –Crucifixes in the Classroom?' (2011) 11 *Human Rights Law Review* 451

Moller, K, 'Dworkin's Theory of Rights in the Age of Proportionality' (2018) 12 *Law and Ethics of Human Rights* 281

Palomino, R, 'Religion and Neutrality: Myth, Principle, and Meaning' (2011) 2011 *BYU Law Review* 657

Radacic, I, 'The Ban on Veils in Education Institutions: Jurisprudence of the European Court of Human Rights' (2008) 4 *Croatian Yearbook of European Law and Policy* 267

Ringelheim, J, 'State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach' (2017) 6 *Oxford Journal of Law and Religion* 24

Ronchi, P, 'Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber ruling in *Lautsi v Italy*' (2011) 3 *Ecclesiastical Law Journal* 287

Rorive, I, 'Religious Symbols in the Public Space: In Search of a European Answer' (2009) 30 *Cardozo Law Review* 2669

Vakulenko, A, ''Islamic Headscarves' and the European Convention on Human Rights: An Intersectional Perspective' (2007) 16 *Social and Legal Studies* 183

Wiles, E, 'Headscarves, Human Rights, and Harmonious Multicultural Society: Implications of the French Ban for Interpretations of Equality' (2007) 41 *Law and Society Review* 699

Tsarapatsanis, D, 'The Margin of Appreciation Doctrine: A Low-Level Institutional View' (2015) 35 *Legal Studies* 675

Zucca, L, 'Lautsi: A Commentary on a decision by the ECtHR Grand Chamber' (2013) 11 *International Journal of Constitutional Law* 218

EVALUATION OF PRICE REDUCTION DURING A SPECIAL OFFER PERIOD IN TERMS OF UNFAIR COMPETITION LAW

Belirli Dönemlerde Gerçekleştirilen Özel İndirimlerin Haksız Rekabet Hukuku Açısından Değerlendirilmesi

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Research Article

Abstract

The price reduction that took place in a special offer period among other countries also happened in Turkey. In this period, goods or services are offered to customers with highly promoted sales. However, this practice raises some questions about the authenticity of the campaigns offered to customers. For example, it is claimed by customers that the discounts are not real, prices are first increased and then reduced, so that no real discount is made. Another complaint in this opinion is that customers are deceived due to the fact that the stock information of the products claimed to be offered for sale below the supply price is not provided or because these products are offered for sale in very small quantities. Actually, there has been a significant increase in the number of objections raised to the Turkish Ministry of Commerce for these reasons. This paper discusses whether these misleading practices constitute unfair competition based on these objections.

Keywords: Unfair Competition Law, Consumer Protection Law, Misleading Commercial Practices, Deceptive Explanations

Özet

Çeşitli ülkelerde belirli dönemlerde gerçekleştirilen indirimler son yıllarda ülkemizde de gerçekleştirilmeye başlanmıştır. Mal veya hizmetlerin müşterilere oldukça indirimli fiyatlar üzerinden sunulduğu bu dönemler, gerçekleştirilen kampanyaların doğruluğu hakkında birtakım soru işaretlerini de beraberinde getirmektedir. Bu çerçevede, yapıldığı iddia edilen indirimlerin aslında gerçek olmadığı, fiyatlarda indirim yapılmadan önce fiyatların yükseltildiği, müşterilerin kampanyalı mal veya hizmetlere ilişkin stok bilgileri konusunda yeterince bilgilendirilmediği yahut stok miktarının son derece düşük olması başta olmak üzere Ticaret Bakanlığı'na sayısız şikayet yöneltildiği görülmektedir. Bu çalışmada, söz konusu ticari uygulamalar haksız rekabet hukuku açısından değerlendirilmeye çalışılacaktır.

Anahtar Sözcükler: Haksız Rekabet Hukuku, Tüketicilerin Korunması Hukuku, Aldatıcı Ticari Uygulamalar, Yanıltıcı Açıklamalar

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I. Legal framework of protection against unfair commercial practices

In cases where customers are deceived, it is possible to protect customers who have a consumer status according to the Code on the Protection of the Consumer numbered 6502[1] (hereinafter: CPC) or according to the unfair competition provisions of the Turkish Commercial Code numbered 6102 (hereinafter: TCC)[2]. In fact, the scope of unfair competition protection provisions of the TCC is wider than the protection provided by the provisions of the CPC[3]. While the CPC covers all kinds of *consumer*[4] transactions and *consumer-oriented* practices (art 2), regulations related to unfair competition of the TCC protect the interests of all participants (art 54(1)). As can be seen, the scope of the CPC is narrower because it only protects consumers[5]. Likewise, the purposes of protection provided by the CPC and the TCC are different from each other. CPC aims to take measures to protect the health, safety and economic interests of consumer in accordance with the public interest, to compensate their damages, to protect them from environmental dangers, to enlighten and raise awareness for consumer, to encourage consumer to protect themselves and to regulate the issues related to encouraging voluntary organizations in the formulation of policies on these issues (art 1)[6]. On the other hand, the purpose of the provisions of the TCC on unfair competition (art 54-63) is to ensure fair and undistorted competition for the benefit of all participants (art 54(1))[7]. Considering all of these, individuals who are accepted

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1 Official Journal, 28 November 2013, No 28836 <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6502.pdf> accessed 12 December 2020.

2 Official Journal, 14 February 2011, No 27846 <https://www.mevzuat.gov.tr/MevzuatMetin/1.5.6102-20130328.pdf> accessed 12 December 2020.

3 Sabih Arkan, 'Haksız Rekabet-Gelişmeler-Sorunlar' (2004) 22/4 Batider 6-7; Ünal Tekinalp, 'Yeni Haksız Rekabet Hukukuda Amaç-İlke ve Üç Boyutluluk' in *Prof. Dr. Seza Reisoğlu'na Armağan* (BTHAE 2016) 28, 33, 37; Metin Topçuoğlu, 'Türk Ticaret Kanunu ve Yeni Tüketicinin Korunması Hakkında Kanun Açısından Haksız Ticari Uygulamalar' (2016) 24 TAAD 26; Ayşe Tülin Yürük, 6102 sayılı Türk Ticaret Kanununun Haksız Rekabete İlişkin Hükümleri Konusunda Bazı Görüşler' (2013) Anadolu Üniversitesi Sosyal Bilimler Dergisi 46.

4 Consumer refers to a natural or legal person acting for commercial or non-professional purposes (CPC art 3(1)(k); Regulation on Commercial Advertising and Unfair Commercial Practices (Official Journal, 10 January 2015, No 29232 <https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=20435&MevzuatTur=7&MevzuatTertip=5> accessed 17 December 2020, hereinafter: CACPR) art (4)(1)(ö)).

5 Topçuoğlu (n 3) 26; for a similar opinion also see: Mehmet Ali Aksoy, '2005/29/AT Haksız Ticari Uygulamalar Direktifinde Düzenlenen Haksız Rekabet Halleri ve Uygulama Örnekleri' (2015) 73/1 IUHFM 280 fn 1.

6 For the further information on the purposes of the consumer protection also see: Lale Sirmen, 'Tüketici Hukukunun Amacı ve Özellikleri' (2013) 8 Yaşar Üniversitesi E-Dergisi 2466-2468.

7 For the further information on the purposes of the unfair competition protection also see:

as consumer, shall apply both the TCC and CPC in cases where these practices lead to distortion of competition due to unfair commercial practices[8] that are misleading about prices during the special offer period[9]. However, in the absence of the consumer statues, the articles of CPC cannot be applied, and in the absence of distortion of competition, the articles of TCC related to unfair competition cannot be applied[10].

Unfair commercial practices towards the consumer are prohibited. In case the commercial practice is claimed to be unfair, the practiced person is obliged to prove that this application is not an unfair commercial practice (CPC art 62(2)). However, it should not be forgotten that in order to base upon this provision, distortion of competition is not necessary, it is sufficient for customers to have the consumer status. According to art 62 of CPC, a commercial practice is deemed to be unfair if it does not comply with the requirements of professional care and if it significantly distorts or has the possibility of significantly distorting the economic attitude of the average consumer or group to which it reaches[11]. Especially the practices that are deceptive or offensive and the practices included in the annex of the provision are accepted as unfair commercial practices.

Misleading commercial practices are also regulated in art 55 of TCC. The source of this provision is art 3-8 of the Swiss Act Against Unfair Competition[12] and Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005[13]. In this article, first of all, the basic rule regarding which practices will be accepted as unfair competition is included: The advertisement and

Hamdi Pınar, 'Rekabet Hukuku ile Haksız Rekabet Hukuku İlişkisi' (2014) 15/2 Rekabet Dergisi 66-69.

8 Unfair commercial practice refers to any commercial practice that does not comply with the requirements of professional care and that significantly distorts or is likely to distort the economic behaviour of the average consumer or the average member of the group to which it is directed (CACPR art 4(1)(d)).

9 Aynur Yongalık, 'Genel İşlem Koşulları-Haksız Ticari Uygulamalar ve Haksız Rekabet İlişkileri' in Hüseyin Can Aksoy (ed) *Tüketici Hukuku Konferansı* (Yetkin 2016) 137; Sevilay Uzunallı, 'Genel İşlem Şartlarının Haksız Rekabet Hükümleriyle Denetlenmesi' (2013) 71/2 IUHFM 414-415; Şirin Güven, *Haksız Rekabet Hukukunun Amacı ve Koruduğu Menfaatler* (Adalet 2012) 94; Yürük (n 3) 46.

10 For a similar opinion also see: Topçuoğlu (n 3) 26.

11 For a similar opinion also see: Güven (n 9) 81.

12 Gesetz gegen den unlauteren Wettbewerb vom 19.12.1986, UWG, AS 1988 223 < https://www.fedlex.admin.ch/eli/cc/1988/223_223_223/de> accessed on 7 June 2021.

13 OJ L 149, 11 June 2005; For a similar opinion also see: TCC, General Preamble, para 50 <https://www2.tbmm.gov.tr/d23/1/1-0324.pdf?TSPD_101_R0=08ffcef486ab20000752df6ef1cb163cb8f2bd2e4cfd9fa32c2b5115e262e2132ab80e7f132ad8dd089d4a0e8014300010c5358aab260d3ca71cfbe9bbd003f31a3bc961ff01e5af9a0b29a23acd7a5f9014f8e71eebcb1268bac8dc6c663b6b> accessed 14 December 2020.

sales methods against good faith and other unlawful attitudes are accepted as unfair competition. After this general rule, various unfair commercial practices are given as non-restrictive examples in TCC art 55. When these examples are examined, it is possible to say that three requirements are needed for the existence of unfair competition: Commercial practice, act against good faith or deceptiveness and distortion of competition. However, it is not necessary to damage the assets of a person who is exposed to unfair competition, and there is also no need for the fault or benefit of the person leading to unfair competition[14].

One of the most common ways customers are deceived during discount periods is to increase the price before making a discount. In such cases, an exorbitant price is determined for which the product is never sold, and the customer is tried to be deceived by claiming that a huge discount is made on that price. In fact, that product was never sold at the specified higher price (no discounted raw price) or until recently, a serious discount was already made on the product. Another method of deception, which is frequently encountered in these periods, is to present the discounts that will shock the customers by offering the impression that all products are sold at the same price without giving the stock details. In such cases, customers enter the store or visit the shopping website to buy that product, but unfortunately those products are always out of stock. It is possible to say that these practices are against the good faith. In this opinion, according to art 55(1)(a)(2), making inaccurate or misleading statements about himself, his commercial enterprise, business signs, goods, business products, activities, prices, stocks, form of sales campaigns and business relations or putting the third party ahead in the competition regarded as unfair commercial practices. In addition, offering certain selected goods, business products or activities for sale more than once under the supply price, especially emphasizing these presentations in their advertisements, and thus misleading customers about their own or competitors' ability cause unfair competition (TCC art 55(1)(a)(6)). As stated before, in order to be able to upon these provisions, the customer does not have to be a consumer, the distortion of the competition is enough. Finally, it is possible to say that, if competition is intended to be protected, the provisions of TCC are *lex specialis*, on the other hand, when it is aimed to protect consumers against the unfair commercial practices instead of protecting the competition, the provisions of CPC are *lex specialis*.

[14] N. Füsun Nomer Ertan, *Haksız Rekabet Hukuku* (Oniki Levha 2016) 99.

II. Evaluation in terms of TCC art 55(1)(a)(2)

According to this provision, three conditions must occur together for the existence of unfair competition: existence of explanations[15], the fact that a person puts himself or the third party ahead of the competition with explanations, and these explanations being inaccurate or misleading[16].
Deceptive explanations refer to inaccurate or misleading statements that have the potential to affect the decisions of customers[17]. The subject of explanations is about the owner of the explanation, his commercial enterprise, business signs, goods, business products, activities, prices, stocks, form of sales campaigns, financial status or business relations[18]. The subject of the explanations is not limited to these. In other words, these are issued as examples of unfair commercial practices. It is necessary to state that unfair competition may also occur due to misleading or inaccurate explanations on other matters not listed here[19].

According to this provision, the second condition for unfair competition to occur is the fact that the explanations are to be inaccurate or misleading. Inaccurate explanation means that the explanations are not correct[20]. Inaccurate explanations can be in the form of giving false information or also in silence[21]. Customers do not need to be actually deceived here as the possibility of being deceived is sufficient[22]. Misleading explanations, on the other hand, are accurate statements, which can be misunderstood by the addressee when evaluated together with their nature, style and content[23]. In such a case, the existence of the will to mislead is not essential, the important thing is the impression left on the addressee and the possibility of the addressee being mistaken as a result of this impression[24]. Therefore, it is possible to say that the behaviour of those who present the prices of products or services higher than ever and make big discounts on this high (and unreal) price is inaccurate

15 Explanations refer to objectively verifiable statements of factual nature in Swiss law, Carl Baudenbacher, *Lauterkeitsrecht* (Helbing&Lichtenhahn 2001) 296 para 30; All of the communication relations are able to be accepted as explanations by the means of this provision in Swiss law, Mathis Berger, 'Art. 3 Abs. 1 lit. b' in Reto M. Hilty/Reto Arpagaus (eds) *Basler Kommentar UWG* (Helbing&Lichtenhahn 2013) 185 para 14.

16 The equivalent of this provision is UWG art 3(1)(b).

17 Nomer Ertan (n 14) 149.

18 For further examples also see: Lucas David and Reto Jacobs, *Schweizerisches Wettbewerbsrecht* (Stämpfli Verlag 2005) 65-66 para 216.

19 Nomer Ertan (14) 150.

20 Thus, the term inaccurate explanations include the term misleading explanations, Baudenbacher (n 15) 304 para 45.

21 Baudenbacher (n 15) 306 para 54-55, 309 para 58.

22 Baudenbacher (n 15) 312 para 64.

23 Nomer Ertan (n 14) 151.

24 Nomer Ertan (n 14) 151.

and so affects the will of the customers[25]. The behaviour of those who use a guarantee trademark even though it does not have the necessary standards for the use of that trademark; or the claim that a detergent is recommended by a good washing machine trade mark, but actually is not recommended, are examples of inaccurate commercial practices. On the other hand, although the discount rate and prices are accurate, if highly promoted discounts are made for only a very small amount of product, and the stock information or product information is not shared with the customers, it will constitute to misleading explanations, not inaccurate ones[26]. Because in such a situation, the impression created by customers is that the same discount will be made on all products and it misleads the customers. For example, the explanations, if a business that actually only offers a purple colour shoe size 13 (a size that can be used by very few people) to its customers at an extremely lower price gives the impression that there is such a discount on other shoes, are likely to be misleading. In such cases, mid-level consumers[27]/addressees should be taken as a basis for evaluation[28].

Finally, it is possible to talk about the existence of unfair competition if the person who causes unfair competition not only puts himself ahead with his explanations on these subjects, but also puts a third person ahead in the competition[29].

III. Evaluation in terms of TCC art 55(1)(a)(6)

Offering[30] certain selected goods, business products or activities for sale more than once under the supply price, especially emphasizing these presentations in their advertisements, and thus misleading customers about their own or competitors' ability is caused unfair competition. According to this provision, four conditions must occur cumulatively in order to speak of unfair competition. The first of these is that sales are made many times below the supply price[31], meaning that the person who causes unfair competition

25 Berger (n 15) 212 108.

26 For a similar opinion also see: Berger (n 15) 212 108.

27 According to art 4(1)(j) of CACPR the average consumer refers to the natural or legal person acting for commercial or non-professional purposes, having reasonable knowledge at every stage of the consumer transaction or consumer-oriented practices.

28 Nomer Ertan (n 14) 154; For a similar opinion also see: CACPR art 4(1)(d), 7(3), 18(1), 28, 29, 30.

29 Berger (n 15) 189 para 29.

30 What is meant here is not an offer in terms of the law of obligations (Turkish Code of Obligations art 3-10, cf. Swiss Code of Obligations art 3-9), it must be evaluated regarding unfair competition law, Baudenbacher (n 15) 538 para 73.

31 Baudenbacher (n 15) 540 para 81; Mario M. Pedrazzini and Federico A. Pedrazzini, *Unlautererwettbewerb UWG* (Stämpfli Verlag 2002) 140 para 6.62.

makes a sale at his loss and repeats it more than once. In other words, selling below the supply price is the sale of the product at a price lower than the real purchase price of this product. In such cases, a rebuttable presumption is regulated in TCC art 55(1)(a)(6). According to this provision, if the sales price is below the procurement price applied in the purchase of the same kind of goods, business products or services in similar volumes, the existence of deception is presumed; If the defendant proves the actual procurement price, this price becomes the basis for evaluation. During certain discount periods such as Black Friday, it is highly likely that the sale below the supply price will be repeated more than one time and lead to unfair competition[32].

According to TCC art 55(1)(a)(6), the second condition for unfair competition to occur is that the offer below the supply price has to be for some selected goods, products or services. Therefore, discounting on all products in a store does not constitute to unfair competition according to this provision[33]. Considering that the aim is to deceive the customer into the store and direct them to the products that are not discounted, according to this provision, in order to be able to talk about unfair competition, the presentation below the supply price must be in question for only certain products[34].

According to this provision, the third condition required for unfair competition to exist is that the offer below the supply price is particularly emphasized in the advertisements. In other words, unfair competition cannot be mentioned in cases where this situation is not specifically emphasized in advertisements[35]. Therefore, only announcing in advertisements that sales will be made below the procurement price is not sufficient for unfair competition to be in question according to this provision. It is also essential that this point be particularly and clearly emphasized in the advertisements[36]. Likewise, these activities of businesses (for example, discount markets) that implement a low price policy without advertising, will not constitute unfair competition according to this provision.

Finally, according to this provision, the last condition required to talk about unfair competition is that the person who causes unfair competition misleads[37] the customers about the ability of himself or his competitors[38]. Here,

32 For a similar opinion also see: Nomer Ertan (n 14) 226.

33 Baudenbacher (n 15) 538 para 74; Urs Wickihalder 'Art. 3 Abs. 1 lit. f' in Reto M. Hilty/ Reto Arpagaus (eds) *Basler Kommentar UWG* (Helbing&Lichtenhahn 2013) 331 para 10.

34 Nomer Ertan (n 14) 227.

35 Baudenbacher (n 15) 542 para 85; Pedrazzini/Pedrazzini (n 31) 140 para 6.64.

36 Wickihalder (n 33) 335 para 21; Baudenbacher (n 15) 542 para 86.

37 Misleading means manipulating the customers with false information, Baudenbacher (n 15) 543 para 91.

38 Pedrazzini/Pedrazzini (n 31) 141 para 6.65.

the general understanding (impression) is that the person who sells below the supply price generally offers cheaper goods or services compared to his competitors. Customers are given the impression that discounts are made on all products, and customers are directed to buy products that are not actually discounted, thus deceiving and misleading[39]. It is stated in Turkish doctrine that it would be more appropriate to regulate this provision in the legislation on consumer protection instead of provisions on unfair competition[40]. However, we do not agree with this view, considering that the provisions protecting the consumer and preventing distortion of competition, serve different purposes and complement each other. Moreover, even if this provision did not exist, and even if the conditions for its occurrence were not fulfilled, the provisions on unfair competition could already be applied in the presence of the conditions in TCC art 54(2)[41].

After all these evaluations, it is possible to talk about unfair competition in cases where the special offers to be made during certain discount periods are specially emphasized weeks in advance in the advertisements and it is stated that sales will be made below the supply price for only selected products. However, it is essential that the explanations are misleading to the customer and thus aim to gain an advantage over the competitors. What is important here is whether customers are misled by being left with impression that discounts are made on all products, even though it is not true. Therefore, in such cases, unfair competition will no longer be mentioned in cases where it is not implied that all products will be sold below the supply price. In this framework, it is no longer possible to talk about unfair competition in special offers where the discounts are particularly emphasized in their advertisements with accurate stock information and which products will be included to, i.e. in campaigns where sufficient transparency is provided on discount and campaign information.

IV. Evaluation in terms of provisions protecting the consumer

As stated before, in the presence of unfair commercial practices such as the behaviours considered within the scope of our study, it is also possible to apply the legislation that protects the consumer. The provisions of TCC on the protection of competition are broader provisions aimed at regulating both business to consumer (B2C) and business to business (B2B) transactions. It is stated that the purpose of the provisions of this Section (TCC art 54-

39 Nomer Ertan (n 14) 227.

40 Nomer Ertan (n 14) 227.

41 TCC Art 54(2): Misleading or other acts and commercial practices against good faith that affect relationships between competitors or between suppliers and customers are unfair and unlawful.

63) on unfair competition is to ensure fair and undistorted competition for the benefit of all participants (art 54(1)). Consumers are included in the scope of all participants. Especially in business to consumer commercial transactions, provisions protecting unfair competition are also included among the provisions protecting the consumer. These provisions are applicable together with the provisions of the TCC on unfair competition and complement the provisions of the TCC, in cases where the prevention of the distortion of competition and the protection of the consumer are aimed together in the relations where the consumers are one of the parties of a transaction[42]. The provisions that complement the provisions of the TCC on unfair competition are CPC art 61 ff and the provisions of the Regulation on Commercial Advertising and Unfair Commercial Practices (hereinafter CACPR). According to CPC art 61(2) advertisements must be accurate and fair (CACPR art 7). Advertisements should be prepared with an awareness of economic and social responsibility and of not causing unfair competition, prepared considering the level of perception of the average consumer and the possible effect of the advertisement on the consumer (CACPR art 7(2), (3)). Also, advertisements cannot abuse the consumer's trust and cannot contain expressions or images that may mislead the consumer directly or indirectly (CACPR art 7(4), (5)).

Art 13 and 14 of CACPR are directly relevant provisions in terms of possible problems to be experienced during the discount period considered within the scope of our study. In particular, CACPR art 13 titled as "Advertisements with price information" provides detailed rules on how such advertisements should be or should not be made. First of all, consumers cannot be misled by providing deficient information or causing ambiguity about the price (CACPR art 13(1)). In addition, if there is a time or stock limit regarding the validity of the price, this period and stock amount are clearly stated in the advertisements (CACPR 13(9)). In the advertisements that include any written, audio or visual statement indicating a discount for goods or services; If the starting and ending dates of the discounted sale and the quantity of the goods or services offered for sale at a discounts are limited, this amount must be stated clearly and understandably (CACPR art 14(1)). In discounted sales advertisements, expressions or images that may mislead consumers by causing confusion about which goods or services will be subject to discount or how much discount will be applied, or that may create the impression that more discounts are applied than they actually are, cannot be used (CACPR art 14(2)). The proof that the goods or services subject to discounted sale are offered for sale at a price lower than the supply price before the discount belongs to the advertiser (CACPR art 14(3)). In a similar framework, it was stated that unfair commercial practices

[42] Yongalık (n 9) 137; for a similar opinion also see: Yürük (n 3) 46.

and deceptive acts are prohibited (CACPR art 28-29), and such practices are included in the appendix of the regulation. Finally, advertisers are obliged to prove the accuracy of the claims in their commercial advertisements (CPC art 61(6), CACPR art 9(1)). Also it is stated in CPC art 62 (1) that unfair commercial practices are prohibited[43]. Whether this prohibition is violated or not will be audited by the Advertisement Board[44]. In case of violation of this prohibition, such as some penal sanctions will be applied by advertisement board.

Conclusion

Deceiving customers in certain discount periods brings to mind the provisions regarding the protection of competition as well as the provisions on consumer protection. Those who claim that competition is distorted and therefore whose economic interests are violated can make a claim based on the provisions of the TCC regarding unfair competition (art 56). In such cases, especially in B2C commercial transactions, since the interests of the consumers are also in question, it may be also possible to apply regulations that protect the consumer. These provisions in the legislation on consumer protection and also on unfair competition are complementary to the provisions on unfair competition in the TCC. However, in cases where the aim is not to prevent distortion of competition and only consumer protection is desired, only provisions to protect the consumer are applicable. Similarly, in cases where the interests of consumers are not violated, only the provisions on unfair competition of TCC are applicable.

In cases examined in our study, for example, deceiving consumers by giving the impression of discounts on goods or services or by not providing accurate and honest information about discounts may lead to unfair competition. Especially, consumers cannot be misled by providing deficient information or causing ambiguity about the price. Besides, misleading customers due to insufficient transparency regarding discounted goods or services and their stock information during discount periods may also constitute unfair competition depending on the situation. To avoid that, in the advertisements that include any written, audio or visual statement indicating a discount for goods or services, if the starting and ending dates of the discounted sale and the quantity

[43] In cases where unfair commercial practice is carried out through advertising, CPC art 61 is applied (CPC art 62(3).

[44] This Board refers to the Board in charge of determining the principles to be followed in commercial advertisements and making arrangements to protect the consumer against unfair commercial practices, examining within the framework of these issues and making inspections when necessary, stopping according to the results of the examination and inspection, or correcting with the same method, or to administrative fine. For further information about the structure of the advertisement board also see: CPC art 63.

of the goods or services offered for sale at a discount is limited, this amount must be stated clearly and understandable. In discounted sales advertisements, expressions or images that may mislead consumers by causing confusion about which goods or services will be subject to discount or how much discount will be applied, or that may create the impression that more discounts are applied than they actually are, cannot be used. Otherwise, those whose interests are violated are entitled to request compensation, as well as the advertisement board may decide to remove the unfair and inaccurate advertisements.

References

Aynur Yongalık, 'Genel İşlem Koşulları-Haksız Ticari Uygulamalar ve Haksız Rekabet İlişkileri' in Hüseyin Can Aksoy (ed) *Tüketici Hukuku Konferansı* (Yetkin 2016), 119-148.

Ayşe Tülin Yürük, 6102 sayılı Türk Ticaret Kanununun Haksız Rekabete İlişkin Hükümleri Konusunda Bazı Görüşler' (2013) Anadolu Üniversitesi Sosyal Bilimler Dergisi, 45-51.

Carl Baudenbacher, *Lauterkeitsrecht* (Helbing&Lichtenhahn 2001).

Hamdi Pınar, 'Rekabet Hukuku ile Haksız Rekabet Hukuku İlişkisi' (2014) 15/2 Rekabet Dergisi, 59-87.

Lale Sirmen, 'Tüketici Hukukunun Amacı ve Özellikleri' (2013) 8 Yaşar Üniversitesi E-Dergisi, 2465-2476.

Lucas David and Reto Jacobs, *Schweizerisches Wettbewerbsrecht* (Stämpfli Verlag 2005).

Mario M. Pedrazzini and Federico A. Pedrazzini, *Unlautererwettbewerb UWG* (Stämpfli Verlag 2002).

Mathis Berger, 'Art. 3 Abs. 1 lit. b' in Reto M. Hilty/Reto Arpagaus (eds) *Basler Kommentar UWG* (Helbing&Lichtenhahn 2013).

Mehmet Ali Aksoy, '2005/29/AT Haksız Ticarî Uygulamalar Direktifinde Düzenlenen Haksız Rekabet Halleri ve Uygulama Örnekleri' (2015) 73/1 IUHFM 280, 279-318.

Metin Topçuoğlu, 'Türk Ticaret Kanunu ve Yeni Tüketicinin Korunması Hakkında Kanun Açısından Haksız Ticari Uygulamalar' (2016) 24 TAAD, 15-57.

N. Füsun Nomer Ertan, *Haksız Rekabet Hukuku* (Oniki Levha 2016).

Sabih Arkan, 'Haksız Rekabet-Gelişmeler-Sorunlar' (2004) 22 Batider 4, 5-20.

Sevilay Uzunallı, 'Genel İşlem Şartlarının Haksız Rekabet Hükümleriyle Denetlenmesi' (2013) 71 IUHFM 2, 383-420.

Şirin Güven, *Haksız Rekabet Hukukunun Amacı ve Koruduğu Menfaatler*

(Adalet 2012).

Ünal Tekinalp, 'Yeni Haksız Rekabet Hukukuda Amaç-İlke ve Üç Boyutluluk' in *Prof. Dr. Seza Reisoğlu'na Armağan* (BTHAE 2016), 25-43.

Urs Wickihalder 'Art. 3 Abs. 1 lit. f' in Reto M. Hilty/Reto Arpagaus (eds) *Basler Kommentar UWG* (Helbing&Lichtenhahn 2013).

INVESTOR MISCONDUCT IN INTERNATIONAL INVESTMENT ARBITRATION: CAN THE UNCLEAN HANDS DOCTRINE BE A CURE?

Uluslararası Yatırım Tahkiminde Yatırımcı Suistimali: Kirli Eller Doktrini Bir Çare Olabilir Mi?

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Research Article

Abstract

The vast majority of international investment treaties enable foreign investors to bring claims against their host states without having to exhaust local remedies or to seek espousal from their home states. These international agreements form the backbone of the modern investor-state dispute settlement (ISDS) system, which has been subject to harsh criticism by states due to its chronic issues such as contentious legitimacy, inconsistency and unpredictability. Along with its structural deficiencies, asymmetries and pro-investor bias in the ISDS system have contributed to the proliferation of investor misconduct in international investment arbitration proceedings. These wrongful conducts involve not only abuse of process but also illegal conduct such as corruption and fraud. This article, in the first part, identifies the characteristics of the functional types of investor misconduct. Second part discusses the unclean hands doctrine in the context of public international law, in particular its applicability in cases involving investor misconduct.

Keywords: ISDS, unclean hands doctrine, abuse of process, corruption, fraud

Özet

Çeşitli ülkelerde belirli dönemlerde gerçekleştirilen iUluslararası yatırım anlaşmalarının büyük çoğunluğu yabancı yatırımcılara ev sahibi devlet aleyhine iç hukuk yollarını tüketmek veya kendi devletlerinin desteğini istemek zorunda kalmadan dava açma imkânı vermektedir. Bu uluslararası anlaşmalar meşruiyet sorunları, tutarsızlık ve öngörülemezlik gibi kronik hususlar nedeniyle eleştiri konusu olan yatırımcı-devlet uyuşmazlık çözümü sisteminin (ISDS) bel kemiğini oluşturmaktadır. Yapısal eksiklikler ile birlikte ISDS sistemindeki asimetriler ve yatırımcı yanlısı önyargı uluslararası yatırım tahkiminde yatırımcı suistimallerinin artmasına katkı sağlamıştır. Bu suistimallerin içinde sadece sürece ilişkin suistimaller değil aynı zamanda yolsuzluk ve hile gibi kanun dışı eylemler de yer alır. Bu makale, ilk kısımda, yatırımcı suistimalinin fonksiyonel çeşitlerinin özelliklerini ortaya koymaktadır. İkinci kısım ise kirli eller doktrinini uluslararası kamu hukuku bağlamında ele almakta ve özellikle doktrinin yatırımcı suiistimalini barındıran davalarda uygulanabilirliğini değerlendirmektedir.

Anahtar Kelimeler: ISDS, kirli eller doktrini, usulün suistimali, yolsuzluk, hile

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INTRODUCTION

In the early days of the investor-state disputes, the traditional method of resolution was state-to-state; the home state of an investor aggrieved at the host state's hands would engage in diplomacy or even war with the host state.[1] Investors who preferred not to seek espousal by their home states for diplomatic intervention simply ignored the conflict and accepted bad treatment from the host state as a cost of doing business or as a reasonable political risk.[2]

Treaties of commerce granting investment-related guarantees have been concluded between states for centuries. The first international adjudications on foreign investment conflicts date back to 1794, the year in which the Treaty of Amity between the United States and Great Britain was signed.[3] Under this treaty, to settle the debts to British creditors, mixed arbitral commissions were established.[4] After the Second World War, developed western countries exerted substantial effort to institute multilateral instruments with a view to protect their interests and properties in the countries recently liberated from colonization.[5] After lengthy negotiations and international conferences, the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (hereinafter ICSID Convention) was signed on 18 March 1965.[6] The ICSID Convention allowed aggrieved investors to invoke arbitration against host states without having to request the intervention of their home countries.[7] Today this protection is granted in almost all international investment agreements and lies at the heart of the contemporary investor-state dispute resolution.

Over the years, states have been increasingly expressing concerns over the structural deficiencies of the system such as unpredictability and inconsistency of awards, lack of transparency in the investment tribunals' procedures, poor treaty interpretation by tribunals and pro-investor bias. Despite all these concerns, developing states have been quite reluctant to pull themselves out entirely due to the concern that withdrawal would diminish the flow of foreign direct investment to their country that was attracted by active participation in this system. Whether the benefits of the ISDS system outweigh its costs,

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1 CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2 ed. 2017).

2 NATHAN JENSEN & GLEN BIGLAISER, POLITICS AND FOREIGN DIRECT INVESTMENT (2014).

3 Treaty of Amity, Commerce and Navigation, U.S.-Great Britain, 19 November1794

4 Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 American Journal of International Law 361–409 (2018), at 363.

5 *Id.*

6 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 18 March 1965, 17 UST 1290, 575 UNTS 192.

7 Puig, *supra* note 4, at 363.

including the chilling effect on the regulatory organs of a state, has been a debated matter. It has been common within the past decade for developing countries with vulnerable economies not to enact specific much-needed laws in fear of corporate retaliation through investor-state arbitration.[8]

The view that transnational companies exploit the investor-state arbitration system to make more profit at the expense of the host states' citizens has started to receive more sympathy.[9] In the same vein, encouraged by the pro-investor nature of the ISDS system, investors have been adapting some of the procedural tactics inherent in domestic litigations to the investor-state arbitration to undermine respondent states as well as to increase their chances of getting a favorable award.[10] These tactics have amounted to misconduct that threatens the reliability and the reputation of the international investment arbitration system beyond its chronic structural issues.[11]

This article first seeks to identify the types of investor misconduct and then discusses the applicability of the unclean hands doctrine as a tool to remedy it. The first part of this article deals with identifying and defining functional types of investor misconduct: corruption, fraud and abuse of process. The second part delves into the role of unclean hands doctrine in addressing investor misconduct in investor-state arbitration practice.

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8 Julia G. Brown, International Investment Agreements: Regulatory Chill in the Face of Litigious Heat, 3 W. J. Legal Stud. [i] (2013). In this article, the author discussed the tension between the foreign mining companies carrying out open-pit mining operations in the forested areas in Indonesia. A new Indonesian government formed after the fall of the New Order Regime in 1999. The new administration enacted new environmental protection laws that prohibited open-pit mining in protected forests. The old administration had signed contracts with certain mining companies granting them specific privileges. These contracts had insulated the companies from future changes in the law. Relying on these privileges, the mining companies alleged that the new law would not apply to them and wanted to continue their open-pit mining operations. Public outcry led the government to stop these mining activities. Investors responded by threatening the government with international arbitration. The government caved in and made exceptions to the related forestry law that allowed 22 companies to continue their open-pit operations in protected forest areas.

9 The article titled "Arbitration Game" published on 11 October 2014 in the Economist explained plainly: "If you wanted to convince the public that international trade agreements are a way to let multinational companies get rich at the expense of ordinary people, this is what you would do: give foreign firms a special right to apply to a secretive tribunal of highly paid corporate lawyers for compensation whenever a government passes a law to, say, discourage smoking, protect the environment or prevent a nuclear catastrophe. Yet that is precisely what thousands of trade and investment treaties over the past half century have done, through a process known as 'investor-state dispute settlement', or ISDS." Available at: https://www.economist.com/finance-and-economics/2014/10/11/the-arbitration-game (last visited 11 January 2021)

10 Emmanuel Gaillard, *Abuse of Process in International Arbitration,* ICSID Review, 2017, pp. 1–22, at 1.

11 *Id.*

PART I

FUNCTIONAL TYPES OF INVESTOR MISCONDUCT

Offering a typology of categories of investor misconduct requires an arduous effort in distilling investors' conduct, mostly due to the intertwined nature of the means and tactics employed by investors in their endeavor to manipulate the ISDS system to their fraudulent advantage.

In an attempt to minimize duplications and mischaracterizations in drawing a typology, in addition to examining available analogies, it is preferred in this article to make a distinction between the conducts that are *prima facie* illegal and those manifesting themselves in the form of abuse of process, which technically cannot be deemed illegal. This article examines corruption and fraud as forms of illegal misconduct. They both amount to breach of the host state law in almost every jurisdiction and need to be analyzed individually in-depth as they have frequently been referred to in arbitral awards.[12]

The conduct that is not regarded *prima facie* illegal denote abuse of process; a concept closely correlates with the lack of *bona fide*. This articles groups abuse of process into three categories: Devising plans to secure jurisdiction under an investment treaty, employing multiple arbitral proceedings to increase the likelihood of success, and bringing frivolous claims that have a low likelihood of success.

1. Corruption

In the context of international investment arbitration, corruption points out an illicit relationship between a foreign investor and a public official of the host state, which involves payments or other types of advantages in exchange for a favorable public decision.[13] In other words, corruption denotes bribery of an official of the host state to secure favorable treatment. The terms "corruption" and "bribery" have been used interchangeably in ISDS.

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[12] Some of the prominent awards addressing corruption and fraud are as follows: *Inceysa Vallisoletana v. Republic of El Salvador*, ICSID Case No. ARB/03/26), Award, 2 August 2006; *World Duty Free Company Limited v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award, 4 October 2006; *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008; *Cementownia "NowaHuta" S.A. v. Republic of Turkey*, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009; *Europe Cement Investment amp; Trade S.A. v. Republic of Turkey*, ICSID Case No.ARB(AF)/07/2, Award, 13 August 2009; *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011.

[13] Aloysius Llamzon & Anthony C.Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct,* in Albert Jan van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18 (© Kluwer Law International; Kluwer Law International 2015) pp. 451 – 530, at 460.

The bilateral nature of corruption distinguishes it from the other types of investor misconduct that usually point to investors' unilateral acts targeting host states. Corruption involves an agreement between an investor and a public official of the state. This agreement is a pre-condition of the consummation of corruption.[14]

Although corruption allegations are quite common in investor-state disputes, it is "notoriously difficult to prove"[15] due to the parties' mutual incentives to conceal the evidence of their illicit agreement. Yet, occasionally, although rare, evidence of corruption could be revealed. In these circumstances, parties usually prefer to settle their disputes behind closed doors rather than making their collusive activities available to the scrutiny of arbitral tribunals and trigger criminal investigations by national prosecutors.[16]

Corruption can be invoked both as a claim by the investor or as a defense by the host state. Compared to host states, investors invoke corruption far less frequently. It is mainly because the circumstances in which an investor invokes corruption without indicting himself are limited to unconsummated corruption.[17] Put differently, only in rare occasions, investors opt for initiating arbitration due to corruption before an international panel when they face extortions or bribe solicitations from public officials of the host state. This would be the case, in particular, where an investor suffers from damages stemmed from the public officials' retaliation for non-payment.[18]

Solicitation or extortion of a bribe from a foreign investor by a state official would constitute a violation of the states' obligations under the related corruption treaties as well as of that state's domestic law. Still, foreign investors have been quite hesitant to resort to arbitration in cases of corruption due to various considerations. Firstly, taking a contentious posture against the host state, let alone officially accusing it of corruption, would "poison the well" and could give rise to a break between the investor and the host State.[19] In most cases, severing the ties with a state is an undesirable avenue for foreign investors

14 *Id.* at 461.

15 *EDF (Services) Ltd. v. Romania,* ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 221.

16 Carolyn B. Lamm & Andrea J. Menaker, 'Chapter 31: *Consequences of Corruption in Investor State Arbitration*, in Meg Kinnear, Geraldine R. Fischer, et al. (eds), Building International Investment Law: The First 50 Years of ICSID, (© Kluwer Law International, 2016), at 435.

17 Llamzon, *supra* note 13, at 464.

18 Florian Haugeneder, *Corruption in Investor-State Arbitration*, 10 J. World Investment & Trade 323 (2009), at 332.

19 Bruce W. Klaw, *State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities*, 33 Berkeley J. Int'l L. 60 (2015), at 89.

as it could limit investment options for the disputant investor party while competitor investors step into action to fill the investment gap in that particular state. Secondly, due to the bilateral nature of corruption, fear of exposure to criminal or civil liability under the laws of both sending and host states is a factor that deters investors from bringing corruption claims against host states. If a foreign investor already paid a bribe, regardless of being solicited to pay it or not, resorting to arbitration would make little sense for him.[20] Lastly, the extortionate costs of international investment arbitration could be a deterrent factor for foreign investors as well.

With regard to the timing of corruption allegations, most of the arbitral institutions have rules requiring respondents to raise jurisdictional objections at the initial stages of the proceedings.[21] However, in the instances where new facts revealed at later stages, respondent states may be allowed to raise jurisdictional objections later on.[22] In the same vein, in bifurcated ICSID proceedings, it is a common practice that parties may put forward the corruption allegations at both the jurisdictional and merits phases.[23] Moreover, Article 51 of the ICSID convention allows the respondent party to apply for the revision of the award in the circumstances where the evidence of corruption was discovered after the award's issuance.[24]

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20 *Id,* at 90.

21 Thomas Kendra & Anna Bonini, *Dealing with Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus,* Journal of International Arbitration vol. 31, no. 4 (August 2014): p. 439-454., at 443.

22 Article 23(2) of the UNCITRAL Rules on Arbitration directly deals with the issue. According to the article: "A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than in the statement of defence or, with respect to a counterclaim or a claim for the purpose of a set-off, in the reply to the counterclaim or to the claim for the purpose of a set-off. … A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified."

23 Kendra, *supra* note 21, at 444; *See* also *SGS Societe Generale de Surveillance S.A. v. Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, 6 August 2003, ¶ 141. The tribunal stated in the award: "The Respondent therefore reserved the right to argue—in the event that it is found in those proceedings that the PSI Agreement had been procured through bribery and corruption— that this Tribunal does not have jurisdiction over the claims set forth in the Request for Arbitration submitted to the ICSID on the additional ground that the claimant SGS had not invested "in accordance with the laws and regulations" of Pakistan as required by Article 2 of the BIT."

24 Article 51(1) of the ICSID Convention reads: "Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence."

2. Fraud

A description of the concept of fraud is as follows: "Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional."[25] The overuse of the word "fraud" has produced excessive intellectual as well as terminological chaos. There has been no consensus on what the term "fraud" connotes in investor-state arbitration. In this field, "fraud" is frequently used out of the legal context in a loose manner and meant to encompass almost all sorts of undesirable conduct, including abuse of process, corruption, and breach of host states' laws.[26]

It is fair to propound that an investor's conduct involving an act of pure fraud cannot be categorized as abuse of process. Unlike the way abuses of process are tackled, it can be addressed by employing established legal tools.[27] Separation of fraud and abuse of process matters, especially in the context of legal consequences attributed to them. When it comes to distinguishing fraud from corruption, fraud's unilateral nature comes to the fore in the first place. While corruption needs a shared understanding and action of the parties, only one party's acts or omissions are sufficient for fraud to take place. The other party's participation in the act is not necessarily required. Realistically, if the other party knowingly or tacitly participates in the fraudulent conduct, it would be doubtful if that party was really defrauded.[28]

Except for rare circumstances,[29] fraud has been invoked by host states as a defense against investor claims. In their evaluation of such a defense,

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25 Black's Dictionary, Online, 2nd ed. (last accessed 22 January 2021), https://thelawdictionary.org/fraud/

26 Llamzon, *supra* note 13, at 470.

27 Gaillard, *supra* note 10, at 6.

28 Llamzon, *supra* note 13, at 471.

29 This was the case when Egypt concluded an agreement with two Belgium companies to have the Suez Canal dredged (*Jan de Nul N.V. amp; Dredging International N.V. v. Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008). Uncommonly, the investor claimed that the host State "made fraudulent misrepresentations at the tender stage about the scope and nature of the contract works, thereby inducing the Claimants to a loss-making investment […]" (¶ 112). In addition, the investor also asserted that the Suez Canal Authority (contracting government entity) intentionally withheld vital information from it by "failing to disclose that it had engaged into pre-dredging activities on the lot" and "failing to provide correct information to the bidders on geology and volumes […]"(¶ 210). To properly address the claims the tribunal examined Egypt's anti-fraud laws and find out that the intent was a necessary element for fraud to be occurred. The tribunal stated: "The Tribunal understands, however, from the Egyptian rules on fraud that intent is a necessary element and that there is no fraud when the alleged victim could have known about the relevant facts by another means" (¶ 208). The tribunal examined each fraudulent conduct allegation and ruled that the evidence was not sufficient to prove the fraud allegations in the case.

tribunals examine the host state's anti-fraud laws should the applicable bilateral investment treaty (hereinafter BIT) to the case contains a legality clause. Today, a majority of the BIT's have legality clauses that are referred to by the tribunals when examining the compliance of the conduct of the investors with national anti-fraud laws violation of which might have an international legal effect.[30] The following provision of the Canada – Trinidad and Tobago BIT sets an example of a typical legality clause:

> "' investment' means any kind of asset owned or controlled either directly, or indirectly through an investor of a third State, by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws […]"[31]

The result of examining the compliance of the challenged conduct with municipal law of the host state carries substantial weight over the determination as to whether the investment is entitled to protection under the applicable treaty.[32] In the cases where the relevant treaty does not contain a legality clause, tribunals may examine whether the alleged fraudulent conduct constitutes a violation of international or transnational public policy.[33] Tribunals usually refer to the maxim *nemo auditur propriam turpitudinem allegans* (no one can be heard to invoke his own turpitude) when they examine fraud allegations in the absence of legality clauses.[34]

Timing and types of the breach of the host state law and their effect on the legality of the investment have been frequently discussed in investment arbitration practice. As to the timing, it is widely accepted in current investor-state arbitration practice that the legality requirements, in other words, the "in accordance with law" clauses, concern national laws that govern not only the establishment of the investment but also its operation thereafter.[35] At this point,

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30 Thomas, Obersteiner, *"In Accordance with Domestic Law" Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors.* Journal of International Arbitration 31, no.2 (2014): 265-288; *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, ¶ 394.

31 Article 1(f) of the Agreement between the Government of Canada and the Government of the Republic of Trinidad and Tobago for the Reciprocal Promotion and Protection of Investments; *See* also the definition of investment in the Article 1.4 of the Indian Model BIT, which reads: "'Investment' means an enterprise constituted, organised and operated in good faith by an investor in accordance with the law of the party in whose territory the investment is made […]"

32 Llamzon, *supra* note 13, at 471.

33 *Id.*

34 *Id.*; *See* also *Plama Consortium Limited v. Bulgaria,* ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶¶ 138-146.

35 *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010, ¶ 119; Similarly, *Quiborax* tribunal suggested: "The Tribunal considers that the BIT's legality

the *Hamester* tribunal makes an interesting suggestion. Relying on Germany-Ghana BIT, the tribunal found that violation of the domestic laws that govern the establishment of the investment was an issue of jurisdiction, while breaking the laws that apply to the continuous operations of the investment could be an issue that needs to be addressed at the merits phase.[36] Simply put, following this logic, if the alleged fraud of investor perpetrated during the operations of the investment, tribunals would not find for the respondent state in the case of an objection to the jurisdiction of the tribunal.

3. Abuse of process

Procedural abuses in legal proceedings have been a common preoccupation for states. Different jurisdictions adopted different laws and strategies to tackle it. For instance, in France, various laws allow judges to impose fines in situations where an abusive request is made.[37] Depending on the law prohibiting abuse of process and the jurisdiction, the types of sanctions differ.[38] However, the possibility of these sanctions affecting the exercise of certain fundamental procedural rights makes states to use them quite carefully.[39]

According to Lowe, in international law, abuse of process is a doctrine that allows tribunals to decline exercising jurisdiction for vexatious actions such as frivolous or manifestly groundless claims and claims aimed at harassing the other party.[40] Another prominent commentator, Zimmermann, considers abuse of process as a special application of the principle of prohibition of abuse of rights.[41] To him, abuse of process points to misuse of rights or some procedural instruments for purposes that are incompatible with those for which the rights or instruments were established.[42] These purposes would include those with

requirement has both subject-matter and temporal limitations. The subject-matter scope of the legality requirement is limited to (i) non-trivial violations of the host State's legal order (ii) violations of the host State's foreign investment regime (iii) fraud – for instance, to secure the investment or profits. Additionally, under this BIT, the temporal scope of the legality requirement is limited to the establishment of the investment; it does not extend to the subsequent performance." (*Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012, para. 266.)

36 *Gustaf F. W. Hamester GmbH amp; Co KG v. Republic of Ghana,* ICSID Case No. ARB/07/24, Award, 18 June 2010, ¶ 127.

37 Herve Ascensio, *Abuse of Process in International Investment Arbitration*, 13 Chinese J. Int'l L. 763 (2014), at 765.

38 *Id.*

39 *Id.*

40 Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, AYBIL, Volume 20, 1999, at 203.

41 ZIMMERMANN ET AL., THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (2006). p. 831.

42 *Id.*

procrastinatory, frivolous, and fraudulent natures as well as purposes of causing harm or obtaining an illegitimate advantage.[43]

As opposed to other types of investor wrongdoings such as corruption and fraud, parties' conduct that amounts to abuse of process does not necessarily have to be illegal *per se*. Abuses of process in investor-state arbitration are mostly regarded as adapted versions of abusive litigation tactics peculiar to states' domestic judicial procedure.

Abuse of process in investor-state arbitration manifests itself in an array of types of conduct. These conducts can be classified into three categories: Manufacturing jurisdiction through corporate restructuring, initiating multiple arbitrations to maximize the chance of success, and bringing frivolous claims.

3.1. Manufacturing jurisdiction under an investment treaty

One can expect from a prudent international investor to take measures to have maximum protection for her investment in a foreign jurisdiction. These measures mainly aim at either obtaining treaty protection or expanding the already existing protection through making use of multiple investment treaties at the same time. Designing or changing the corporate structure in a way to secure such protection, according to arbitral case law, has accounted for a vast majority of the said measures.[44] Different expressions have been used to refer to this kind of practice such as "treaty shopping", "nationality planning", "treaty planning", and "corporate maneuvering."[45] Some commentators also called it "treaty abuse"[46]. Arbitral case law points out that "the mere fact of restructuring an investment to obtain BIT benefits is not *per se* illegitimate."[47]

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43 *Id.*

44 Although it is rarely seen, an investor could also transfer his or her treaty claims to a country that is a party to the same international investment treaty with his or her home state. *See, e.g., Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No ARB/00/2, Award, 25 March 2002; *Loewen Group Inc and Raymond Loewen v. United States of America*, ICSID Case No ARB(AF)/ 98/3, Award, 26 June 2003.

45 JORUN BAUMGARTNER, TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW (2016), at 7-8.

46 *Id*.; *See* also George Kahale III, '*The new Dutch sandwich: The issue of treaty abuse'*, Columbia FDI Perspectives, No: 48, 10 October 2011, available at: http://ccsi.columbia.edu/files/2014/01/FDI_48.pdf; (last accessed 10 January 2021. Referring to the term "Dutch sandwich" that was used for the process of corporate restructuring to benefit from the investor friendly tax regulations in Netherlands, Kahale pointed out international investors' increasing use of the same method to take advantage of large network of Dutch BITs.

47 *Philip Morris Asia Limited v. Commonwealth of Australia*, UNCITRAL, PCA Case No 2012-12, Award on Jurisdiction and Admissibility,17 December 2015, ¶ 540; The *Tidewater* tribunal noted: "It is a perfectly legitimate goal and no abuse of an investment protection treaty regime, for an investor to seek to protect itself from the general risk of future disputes with a host State in this way", *Tidewater Inc., Tidewater Investment SRL, Tidewater Caribe, C.A., Twenty Grand Offshore, L.L.C., Point Marine, L.L.C., Twenty Grand Marine*

However, restructuring an investment to acquire treaty protection that did not exist before has different dynamics as a result of which abuse of process may come into play.

Although some concerns related to the principle of reciprocity and legitimacy have been voiced against treaty shopping, it remains an acceptable practice for investors who seek enhanced legal protection.[48] Nevertheless, it also forms a convenient basis for treaty abuse. Reorganizing the structure of their corporations in an attempt to obtain treaty protection illicitly has been one of the most frequently employed abusive conduct of the investors. As indicated above, arbitral case law permits corporate restructuring unless it is abusive. But, how can a legitimate corporate restructuring be distinguished from the one that is done with *mala fide* and therefore constitutes an abuse of process? Where does the dividing line between them lie?[49] The answers to these questions mainly relate to the timing of the restructuring and foreseeability of a specific dispute at that moment. Tribunals have had divergent approaches in addressing these concepts.

The lack of *ratione temporis* jurisdiction of the arbitral tribunals is one of

Service, L.L.C., Jackson Marine, L.L.C. and Zapata Gulf Marine Operators, L.L.C. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/10/5, Decision on Jurisdiction, 8 February 2013, ¶ 184; In a similar vein, the Levy tribunal observed: "In the Tribunal's view, it is now well-established, and rightly so, that an organization or reorganization of a corporate structure designed to obtain investment treaty benefits is not illegitimate per se, including where this is done with a view to shielding the investment from possible future disputes with the host State", *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, ¶ 184; The *Mobil* tribunal adopted the same approach: "The aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.", *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction, 10 June 2010, ¶ 204; Similarly, Aguas del Tunari tribunal noted: "…to the extent that Bolivia argues that the December 1999 transfer of ownership was a fraudulent or abusive device to assert jurisdiction under the BIT, that:... (d) it is not uncommon in practice and—absent a particular limitation—not illegal to locate one's operation in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT", *Aguas del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, ¶ 330.

48 BAUMGARTNER, *supra* note 45, at 39, 49.

49 The *Aguas* tribunal noted: "it is not uncommon in practice and – absent a particular limitation – not illegal to locate one's operation in a jurisdiction perceived to provide a beneficial regulatory and legal environment in terms, for example, of taxation or the substantive law of the jurisdiction, including the availability of a BIT.", *Aguas, supra* note 189, ¶ 330(d).

the most invoked arguments in host states' jurisdictional objections. Related arbitral case law points out that if an investor redesigns the structure of his corporation after the date of the challenged conduct of the host state with a view to acquiring treaty protection that he did not have before, the tribunal would lack *ratione temporis* jurisdiction.[50] Put another way, an investor's attempt to transform a pre-existing dispute with the host state into an arbitration claim may culminate in dismissal of the claim due to lack of jurisdiction. As arbitral case law demonstrates, this type of conduct constitutes an abuse of process.[51]

In light of the arbitral case law it is fair to say that the examination of *ratione temporis* jurisdiction is of a factual nature. It has no concern with the investor's foresight as to a future dispute or with his knowledge of an actual one. The question concerns the existence of an actual dispute at the time of corporate restructuring. If that is the case, there would be no need to consider abuse of process as the claim would be dismissed due to lack of jurisdiction. There is no place for subjectivity here. When it comes to foreseeability, however, an investor's ability to perceive a future dispute comes into play. The subjective nature of foreseeability has complicated tribunals' work as to determining if abuse of process took place. Tribunals' interpretations of the concept of the foreseeability of a future dispute have remained to be somewhat inconsistent to date. This inconsistency provides comfort to investors who engage in abusive corporate restructuring.

In analyzing host states' treaty violations, in the form of either a one-off measure or a continuous one, tribunals' level of reliance on the parties' subjective perceptions as to the occurrence of the dispute is critical as it has a substantial effect over the proceedings. In cases where corporate restructuring is involved, investors tend to employ tactics to move forward the date on which the dispute came about to sometime later than the date of restructuring to avoid dismissal of their claims due to the lack of *ratione temporis* jurisdiction. Along the same lines, one may expect from a respondent state to try to pre-date the dispute to make it look like it occurred before the restructuring so that it can raise jurisdictional objections as well. Admittedly, it is not entirely realistic to expect a tribunal to isolate itself from parties' subjective perceptions as to the timing of the dispute. Still, giving more weight to objective criteria rather than relying mainly on parties' perceptions and assertions would help a tribunal to disallow the parties' aforesaid maneuvers manipulating the dispute in question.

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50 *E.g., Vito G Gallo v. The Government of Canada*, NAFTA, UNCITRAL Case No: 55798, Award, 15 September 2011; Libananco *Holdings Company Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Award, 2 September 2011.

51 *Phoenix Action, supra* note 183.

3.2. Employing multiple arbitral proceedings simultaneously to increase the likelihood of success

It is only natural for a prescient investor to submit his or her claims to a venue from where he could obtain the most favorable award, as long as the said venue is permissible under the terms of the parties' agreement to arbitrate. However, in contemporary international investment arbitration practice, where litigiousness has been increasing considerably, investors have tended to simultaneously initiate multiple arbitral proceedings before multiple arbitral fora concerning the same dispute to increase the likelihood of success. This is a strategy that may amount to abuse of process. Putting this strategy into practice against the respondent states is rather injurious as they would be required to defend themselves before multiple arbitral tribunals for the same dispute.[52] It brings along additional costs, procedural unfairness, delays, and risk of multiple recoveries for the same damage. Furthermore, the divergent interpretations of different ISDS tribunals lead to contradictory outcomes arising from the same facts and thus engender lack of consistency.[53]

In contemporary international investment practice, cross-border investments are generally made by way of multinational corporations, the structures of which involve several layers of entities. The ISDS system allows these entities to bring treaty claims against the host state individually. Being protected by the same treaty does not affect the main corporation's and sub-entities' ability to commence separate claims. Again, these entities' claims do not necessarily have to originate from the violation of the same treaty either. Depending on their nationality, different entities within the same corporate structure can initiate claims under different BITs. Moreover, they also can employ the mechanisms for dispute resolution provided in the investment contract.

In addition to initiating the arbitration himself directly, an investor may bring claims through a locally incorporated company he controls, as well as through a subsidiary operating under his company.[54] In these kinds of circumstances, the investor's chance of prevailing would be much higher than the chance of the respondent state. This unfair advantage of investors goes against party equality and procedural justice in an investment arbitration setting. To illustrate, if an investor initiated three arbitrations for the same dispute and if three different tribunals constituted accordingly, the respondent state would need to convince the majority of each tribunal, which would require the affirmative vote of six

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52 *Id,* at 7.

53 UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), Possible reform of investor-State dispute settlement (ISDS) Multiple proceedings and counterclaims, Note by the Secretariat, (Document No: A/CN.9/WG.III/WP.193), 22 January 2020, at 2.

54 Article 25(2)(b) of the ICSID Convention allows a foreign controlled locally incorporated company to initiate arbitral proceedings against the respondent state.

out of nine arbitrators.[55] On the other hand, the investor would need to convince only two arbitrators.[56] In other words, while the respondent state needs to prevail in all three arbitrations to be able to avoid paying compensation, the investor needs to win in just one to get paid.

3.3. Filing frivolous claims

Frivolous claims are the claims that lack legal merit. This fault manifests itself in various ways such as lack of a basis to establish jurisdiction and inadequacy of legal arguments. Determining whether a claim is frivolous typically necessitates a case-by-case evaluation. If the claim is originated from a violation of a settled rule, this evaluation process would be relatively straightforward for arbitrators. Nonetheless, imprecise standards reign in investor-state arbitration procedures, which complicates arbitrators' job to determine if a claim truly lacks legal merit. This complication creates a fertile ground for an unscrupulous investor who is disposed to exploit the arbitration process.

Although lacking palpable legal merit, frivolous claims are still able to harm the respondent states.[57] They also impair the efficiency of the ISDS system.[58] Since these claims are deprived of legal merit, they could be easily created and initiated by investors who seek to abuse the system.[59] An UNCTAD note frames these concerns:

> "The significant increase in investment disputes over the last decade has given rise to the concern that investors may abuse the system. Investors may be eager to claim as many violations of the applicable IIA as possible in order to increase their chances of success. This may take a heavy toll in terms of time, effort, fees and other costs, not only for the parties to the dispute, but also for the arbitral tribunal. It is within this context that several countries have advocated a procedure to avoid "frivolous claims" in investment-related disputes, namely claims that evidently lack a sound legal basis."[60]

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55 Emmanuel Gaillard, *Chapter 9: Concurrent Proceedings in Investment Arbitration*, in Patricia Shaughnessy and Sherlin Tung (eds), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer, (© Kluwer Law International; Kluwer Law International 2017) pp. 79 – 92, at 87.

56 *Id.*

57 Tsai-Fang Chen, *Deterring Frivolous Challenges in Investor-State Dispute Settlement,* 8 Contemp. Asia Arb. J. 61 (2015), at 65.

58 *Id.*

59 *Id.*

60 UNCTAD, *'Investor–State Dispute Settlement and Impact on Investment Rulemaking'*

Identifying a frivolous claim in an ISDS setting poses some difficulties due to various reasons. First, instead of periodically receiving a predetermined salary, arbitrators are generally paid per hour or case.[61] This form of remuneration might entice arbitrators to exercise their discretion to interpret the "frivolousness" of the claims in their best interests and proceed with them as if they are legitimate. In so doing, they ensure the continuity of their remuneration, which is generally commensurate with the time they spend on the case. Second, arbitrators are not bound by the way the states interpret investment treaties. Therefore, there is always a possibility that arbitral tribunals' interpretations of a treaty provision are at variance with the intent of the states that drafted the said provision.[62] Simply put, a claim may be frivolous in the eyes of the states, while tribunals may think otherwise. Third, since there is no binding precedent or appeal practice in investor-state arbitration, a rejected claim due to lack of legal merit may be raised again without being barred.[63] All these grounds hand the opportunity of bringing frivolous cases to investors on a silver platter.

(UNCTAD/ITE/ IIA/2007/3), at 82, available at: https://unctad.org/en/Docs/iteiia20073_en.pdf, (last accessed 20 February 2021)

61 Brooke Guven & Lisa Johnson, *The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement*, Columbia Center on Sustainable Investment, CCSI Working Paper (2019), at 22.

62 *Id.* at 21.

63 *Id.* at 22.

PART II

THE UNCLEAN HANDS DOCTRINE

Many national legal systems contain, in one way or another, the unclean hands doctrine, which manifests itself through the maxim, "he who comes into equity must come with clean hands."[64] The doctrine's primary aim is safeguarding the integrity of a judicial system.[65] It also promotes justice and the public interest.[66] It allows barring a claimant's claims that are connected with the claimant's improper or illegal conduct.[67]

A due analysis requires, in the first instance, a review of the status of the doctrine at the international level. Article 38(1)(c) of the statute of the International Court of Justice (hereinafter ICJ) lists "the general principles of law recognised by civilised nations" as a source of international law. Since the unclean hands doctrine is welcomed in a large number of countries' domestic legal orders, it was suggested in regard to the said article that the doctrine qualifies as a "general principle of law."[68] However, there have been different approaches to the application and the status of the doctrine in international law. For example, despite having had opportunities, the ICJ has not upheld the doctrine of unclean hands via a majority opinion so far.[69] James Crawford, United Nations International Law Commission's Special Rapporteur on State Responsibility, noted in his report that the unclean hands doctrine would not operate "as a circumstance precluding wrongfulness or responsibility" and concluded that "It is not possible to consider the 'clean hands' theory as an institution of general customary law."[70]

The ICJ did not reject, however, the existence of the doctrine in the form of a general principle of international law either. Although the existence of the

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64 Aloysius Llamzon, *'Chapter 2: On Corruption's Peremptory Treatment in International Arbitration'*, in Domitille Baizeau and Richard H. Kreindler (eds), Addressing Issues of Corruption in Commercial and Investment Arbitration, Dossiers of the ICC Institute of World Business Law, Volume 13 (© Kluwer Law International; International Chamber of Commerce (ICC) 2015) pp. 32 – 50, at 37.

65 Caroline Le Moullec, *The Clean Hands Doctrine: A Tool for Accountability of Investor Conduct and Inadmissibility of Investment Claims,* The International Journal of Arbitration, Mediation and Dispute Management, Volume 84, Issue 1, February 2018, at 15.

66 William J. Lawrence, *"Application of the Clean Hands Doctrine in Damage Actions"* (1982), Volume 57, Issue 4, Notre Dame L. Rev. 673, at 675.

67 Llamzon, *supra* note 13, at 508.

68 *Id.* at 511.

69 *Id.* at 512.

70 James Crawford, Second Report on State Responsibility, 1999, DOCUMENT A/CN.4/498, at 83, paras. 333, 334, 336. Available at http://legal.un.org/ilc/documentation/english/a_cn4_498.pdf , (last accessed 12 January 2021)

doctrine has never been explicitly recognized by any of the international courts or arbitral tribunals, several judges, arbitrators, and commentators endorsed the doctrine. To illustrate, in the *Case Concerning the Diversion of Water from the River Meuse,* judge Ottmer pointed to the weight of the doctrine in international law by noting that " a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness."[71]

The dissenting opinion of judge Schwebel in the *Nicaragua* case before the ICJ is another example of a depiction of the nature and the scope of the unclean hands doctrine in international law.[72] To him, misleading the court regarding its wrongful conduct was sufficient to accept that Nicaragua had unclean hands, and therefore, its claims needed to fail.[73] In his opinion, judge Schwebel also referred to the comments of Fitzmaurice who, before his election to the ICJ, had noted: "Thus a State which is guilty of illegal conduct may be deprived of the necessary *locus standi in judicio* for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality-in short were provoked by it."[74]

1. The unclean hands doctrine in international investment arbitration

The ISDS system safeguards foreign investments against host states by holding the governments accountable in the circumstances where they misuse their sovereign powers over investors. Bearing in mind the fact that the ISDS system was designed to protect foreign investors, the argument according to which investors with unclean hands should not be granted their claims in arbitral proceedings may not be easy to substantiate. Ascertaining if investors'

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71 Mojtaba Dani & Afshin Akhtar-Khavari, *Rethinking the Use of Deference in Investment Arbitration: New Solutions against the Perception of Bias,* 22 UCLA J. Int'l L. Foreign Aff. 37 (2018), at 60.

72 Carolyn B. Lamm, Hansel T. Pham, et al., *'Fraud and Corruption in International Arbitration'*, in Miguel Angel Fernandez-Ballester and David Arias (eds), Liber Amicorum Bernardo Cremades, (© Wolters Kluwer España; La Ley 2010) at 724.

73 *Id.* Judge Schwebel stated: "Nicaragua has not come to Court with clean hands. On the contrary, as the aggressor, indirectly responsible — but ultimately responsible — for large numbers of deaths and widespread destruction in El Salvador apparently much exceeding that which Nicaragua has sustained, Nicaragua's hands are odiously unclean. Nicaragua has compounded its sins by misrepresenting them to the Court. Thus both on the grounds of its unlawful armed intervention in El Salvador, and its deliberately seeking to mislead the Court about the facts of that intervention through false testimony of its Ministers, Nicaragua's claims against the United States should fail."

74 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, Dissenting Opinion of Judge Schwebel, I.C.J. Reports 1986 at 394, § 271, available at https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-09-EN.pdf (last accessed 26 February 2021)

actions were conducted with unclean hands could be rather complicated as the relevant provisions of the applicable treaties differ.[75] In the same vein, the ISDS system's notoriety as to investor obligations also complicates invoking the unclean hands doctrine.[76] Still, host states have repeatedly invoked the doctrine as a fulcrum in their quests to hold the investors accountable for their wrongdoings.

Arbitral tribunals' have adopted three approaches in their assessment of the cases involving unclean hands defenses against investors: (i) dismissal due to the lack of jurisdiction, (ii) dismissal due to inadmissibility, and (iii) addressing the issue at the merits phase.[77] To date, the majority of the tribunals have taken the first two approaches. The third approach was adopted by the *Yukos* tribunal that denied the doctrine's existence as a general principle of international law.[78] In some instances, tribunals prefer not to use the term "unclean hands" in their awards in which they apply the doctrine. Instead, they refer to a number of Latin maxims deemed as expressions or manifestations of the doctrine.[79] In this sense, the principle *"nemo auditur propriam turpitudinem allegans"* is regarded as one of the most frequently applied ones by tribunals.[80]

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75 Le Moullec, *supra* note 65, at 7.

76 *Id.*

77 Dani, *supra* note 71, at 58.

78 *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227, Final Award, 18 July 2014, ¶¶ 1358, 1359.

79 Patric Dumberry, *State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration After the Yukos Award*, 17 Journal of World Investments and Trade (2016), 229-259. at 235.; See also *Inceysa, supra* note 12, ¶ 240, The tribunal stated a number of Latin maxims that apply to the case before it: *Ex dolo malo non oritur actio"* (an action does not arise from fraud), *"Malitiis nos est indulgendum"* (there must be no indulgence for malicious conduct), *"Dolos suus neminem relevat"* (no one is exonerated from his own fraud), *"In universum autum haec in ea re regula sequenda est, ut dolos omnimodo puniatur"* (in general, the rule must be that fraud shall be always punished). *"Unusquique doli sui poenam sufferat"* (each person must bear the penalty for his fraud), *"Nemini dolos suusprodesse debet"* (nobody must profit from his own fraud); See also Aloysius Llamzon, *'Yukos Universal Limited (Isle of Man) v The Russian Federation: The State of the "Unclean Hands" Doctrine in International Investment Law: Yukos as Both Omega and Alpha'* ICSID Review, Vol. 30, No. 2 (2015), pp. 315–325, at 316, in the footnote 8 Llamzon gives examples of the Roman maxims from which the unclean hands doctrine stemmed: "ex delicto non orituractio (an unlawful act cannot serve as the basis of an action at law), nemo ex suo delicto meliorem suam conditionem facit (no one can put himself in a better legal position by means of a delict), ex turpi causa non oritur (an action cannot arise from a dishonourable cause), inadimplenti non est adimplendum (one has no need to respect his obligation if the counter-party has not respected its own) and nullus commodum capere potest de in juria sua propria (no one can be allowed to take advantage of his own wrong)."

80 *E.g., Inceysa, supra* note 12; *Plama, supra* note 34.

2. The Unclean hands doctrine and investor misconduct

Arbitral case law points to a correlation between the unclean hands doctrine and "in accordance with the law" clauses in investment treaties.[81] Following this, some commentators argue that the doctrine manifests itself in the form of the legality requirement.[82] In other words, to them, tribunals need to apply the unclean hands doctrine in considering if an investment is under the protection of an investment treaty containing an "in accordance with the law" clause.[83] As per this interpretation, the doctrine could be invoked by a host state against an investor whose conduct is of an illegal nature. Hence, it is fair to say that arbitral case law points to the employment of this doctrine in relation to corruption and fraud allegations.

On the other hand, the *Hamester* tribunal took a broader approach according to which the unclean hands doctrine can also be invoked where the conduct in question is not illegal but violates the principle of good faith.[84] The tribunal suggested that an investment established in violation of the principle of good faith would not be protected by international investment agreements.[85] This reasoning of the *Hamester* tribunal opened the door for the possibility that the doctrine could be invoked by aggrieved host states as a remedy for almost any type of investor misconduct, including abuse of process, committed at the time of the making of the investment.

In order to perform a due analysis of the role the doctrine plays in remedying investor misconduct, salient examples of relevant arbitral case law need to be studied. The *Niko Resources* tribunal discussed the doctrine thoroughly.[86] The tribunal expressed doubt as to whether the doctrine was a part of international law and noted that its content was ill-defined.[87] The tribunal observed: "The

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81 *E.g., Inceysa, supra* note 12, ¶ 195; *World Duty Free, supra* note 12.

82 Dumberry, *supra* note 79, at 232.

83 *Id.* at 235.

84 *Hamester, supra* note 36.

85 *Id*. ¶ 123. The tribunal noted that "An investment will not be protected if it has been created in violation of national or international principles of good faith; by way of corruption, fraud, or deceitful conduct; or if its creation itself constitutes a misuse of the system of international investment protection under the ICSID Convention. It will also not be protected if it is made in violation of the host State's law."

86 *Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla")*, ICSID Case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, 19 August 2013.

87 *Id*. ¶ 477. The respondent state invoked the doctrine as "jurisdiction should be denied because the Claimant has violated the principles of good faith and international public policy, in a manner intimately linked to the alleged investment. The Tribunal is empowered to protect the integrity of the ICSID dispute settlement mechanism by dismissing a claim which represents a violation of fundamental principles of law. The Claimant does not bring

principle of clean hands is known as part of equity in common law countries. The question whether the principle forms part of international law remains controversial and its precise content is ill defined."[88] In its assessment, the tribunal partly relied upon the award issued by a United Nations Convention on the Law of the Sea (hereinafter UNCLOS) tribunal in the *Guyana v. Surinam* case.[89] The tribunal noted that there was no generally accepted definition of the unclean hands doctrine in international law, and its application had been inconsistent.[90] The *Niko Resources* tribunal preferred to shy away from the contentions involving issues such as transnational public policy, bad faith, and the doctrine being a general principle of international law. Instead, it noted that the doctrine required reciprocity between the relief the investor seeks and the investor's past actions characterized as involving unclean hands by the host state.[91] In other words, in the tribunal's view, if the misconduct is not related to the investor's claims before the tribunal, the doctrine would not be triggered.[92] The tribunal employed a legal test made up of three elements that were used by the abovementioned UNCLOS arbitral tribunal and concluded that the respondent government failed the test.[93]

As has been discussed above, per arbitral case law, the unclean hands doctrine relates to "in accordance with law" clauses.[94] *Inceysa* is a notable

this claim with clean hands." ¶ 376.

88 *Id.* ¶ 477.

89 *Guyana v. Suriname*, PCA, Award of 17 September 2007 (under UNCLOS Ch VII). The Tribunal was composed of Judge Dolliver M. Nelson, Professor Thomas Franck, Dr. Kamal Hossain, Professor Ivan Shearer and Professor Hans Smit.

90 *Niko Resources*, *supra* note 86, ¶ 477. The tribunal quoted the following observation of the Guyana v. Surinam UNCLOS tribunal: "No generally accepted definition of the clean hands doctrine has been elaborated in international law. Indeed, the Commentaries of the ILC Draft Articles on State Responsibility acknowledge that the doctrine has been applied rarely and, when it has been invoked, its expression has come in many forms. The ICJ has on numerous occasions declined to consider the application of the doctrine, and has never relied on it to bar admissibility of a claim or recovery. However, some support for the doctrine can be found in dissenting opinions in certain ICJ cases, as well as in opinions in cases of the Permanent Court of International Justice ('PCIJ'). [...] These cases indicate that the use of the clean hands doctrine has been sparse, and its application in the instances in which it has been invoked has been inconsistent."

91 *Niko Resources*, *supra* note 86, ¶ 483.

92 Llamzon, *supra* note 13, at 516.

93 *Niko Resources*, *supra* note 86, ¶ 481. To the tribunal the components of the test was as follows: "(i) the breach (investor's conduct said to engender unclean hands) must concern a continuing violation, (ii) the remedy sought must be 'protection against continuance of that violation in the future', not damages for past violations and (iii) there must be a relationship of reciprocity between the obligations considered."; See also *Guyana v. Suriname*, Award of 17 September 2007, ¶¶ 420-421.

94 Dumberry, *supra* note 79, at 232.

example of the interpretation and the application of this clause.[95] The tribunal examined whether an investment made in violation of the host state law qualifies as an investment under the relevant treaty. In response to the investor's claims, objecting to the jurisdiction of the tribunal, the government argued that the claimant had obtained the concession contract by defrauding the government in the bidding process and therefore violated the legality clause contained in the BIT. In its investigation, the tribunal found out that the claimant intentionally lied about the identity, experience, and capacity of its strategic partner with the intention of making the government believe that its partner was qualified enough to comply with the terms of the contract.[96] The tribunal explained:

> "Applying the first principle indicated above to the case at hand, we can affirm that the foreign investor cannot seek to benefit from an investment effectuated by means of one or several illegal acts and, consequently, enjoy the protection granted by the host State, such as access to international arbitration to resolve disputes, because it is evident that its act had a fraudulent origin and, as provided by the legal maxim, 'nobody can benefit from his own fraud.'"[97]

The tribunal decided that Inceysa's investment violated the principle *"nemo auditur propriam turpitudinem allegans"* and noted: "No legal system based on rational grounds allows the party that committed a chain of clearly illegal acts to benefit from them."[98]

In *Inceysa,* the tribunal considered the application of unclean hands doctrine through the legality clause in the relevant BIT. Yet, how do the tribunals consider the applicability of the doctrine in the situations where the applicable treaty does not contain an express "in accordance with the law" provision? The consideration of the *Plama* tribunal constitutes a good illustration of a case where the applicable treaty is the Energy Charter Treaty (hereinafter ECT), a treaty that does not have a legality clause.[99] The tribunal ruled that the absence of legality clause in the ECT did not necessarily mean that it covers the investments made contrary to domestic or international law. The tribunal noted that the claimant made the investment with a deliberate concealment that amounted to fraud.[100] In lieu of mentioning the term "unclean hands" in its award, the tribunal, as was the case in *Inceysa*, preferred to refer to the *"nemo auditur propriam turpitudinem allegans"* principle: "The Tribunal is of the view that granting the ECT's protections to Claimant's investment would be

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95 *Inceysa, supra* note 12.
96 Llamzon, *supra* note 13, at 475; *Inceysa, supra* note 12, ¶¶ 111-118, 236.
97 *Inceysa, supra* note 12, ¶ 242.
98 *Id.* ¶¶ 240, 244.
99 *Plama, supra* note 34.
100 *Id.* ¶¶ 134, 135.

contrary to the principle nemo auditur propriam turpitudinem allegans […]"[101] By referring to a principle that is deemed a manifestation of the clean hands doctrine, the tribunal implicitly applied the doctrine.

The *Yukos* tribunal, however, adopted a drastically different approach in assessing the status of the unclean hands doctrine in international law.[102] The tribunal, stressing the controversy over the issue, rejected the existence of the clean hands doctrine as a general principle of law:

> "The Tribunal is not persuaded that there exists a 'general principle of law recognized by civilized nations' within the meaning of Article 38(1)(c) of the ICJ Statute that would bar an investor from making a claim before an arbitral tribunal under an investment treaty because it has so-called 'unclean hands.' General principles of law require a certain level of recognition and consensus. However, on the basis of the cases cited by the Parties, the Tribunal has formed the view that there is a significant amount of controversy as to the existence of an 'unclean hands' principle in international law."[103]

The *Yukos* tribunal preferred to base its decision mostly on the issue of legality and noted that, as was in *Plama*, the lack of a legality clause in the treaty would not rule out the requirement that investments need to be made in accordance with the law of host state.[104] In this context, some commentators argue that the tribunal recognized the unclean hands doctrine, with a limited range.[105]

The *Al-Warraq* tribunal, rendering its decision only six months after the *Yukos* award, had a different perspective.[106] The claim was filed under the UNCITRAL Arbitration Rules and Agreement on the Promotion, Protection and Guarantee of Investments among Member States of the Organization of Islamic Conference (hereinafter OIC Agreement). Neither of them contains

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101 *Id.* ¶ 143.

102 *Yukos, supra* note 78, ¶¶ 1358, 1359.

103 *Id.*

104 *Id.* ¶ 1352. The tribunal noted: "In imposing obligations on States to treat investors in a fair and transparent fashion, investment treaties seek to encourage legal and *bona fide* investments. An investor who has obtained an investment in the host State only by acting in bad faith or in violation of the laws of the host state, has brought itself within the scope of application of the ECT through wrongful acts. Such an investor should not be allowed to benefit from the Treaty."

105 Dumberry, *supra* note 79, at 239; Andrea K. Bjorklund & Lukas Vanhonnaeker, *Yukos: The Clean Hands Doctrine Revisited* (2015) vol. 9:2 Diritti umani e diritto internazionale, pp. 365-386, at 372.

106 *Hesham Talaat M. Al-Warraq v. Indonesia,* Arbitration under the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, Final Award ,15 December 2014.

a legality requirement clause. The tribunal noted that the claimant violated the OIC Agreement by failing to abide by the Indonesian laws and therefore was not entitled to the protection by OIC Agreement.[107] Using the term "clean hands doctrine" in the award, the tribunal concluded that the claims were inadmissible as a result of the application of the unclean hands doctrine.[108] The tribunal opined:

> "The tribunal is of the view that the doctrine of 'clean hands' renders the Claimant's claim inadmissible. […] The Tribunal finds that the Claimant's conduct falls within the scope of application of the 'clean hands' doctrine, and therefore cannot benefit from the protection afforded by the OIC Agreement."[109]

This author believes that limiting the invocation of unclean hands doctrine to the instances where a violation of the "in accordance with the law" clauses at stake would reduce the scope and effectiveness of the doctrine by leaving out the instances of abuse of process. After all, an abusive conduct of an investor has nothing to do with the "in accordance with the law" clause in the applicable treaty as the said conduct is not illegal *per se.* Although the reasoning of the *Hamester* tribunal is a positive step in a broader application of the doctrine, it is not enough since it refers to the principle good faith only at the time of the making of the investment.[110] If the tribunal's referral involved the operational period of the investment, the doctrine would cover a larger variety of investor misconduct.

3. Can the unclean hands doctrine remedy investor misconduct?

A due examination of the status of the doctrine in international law is needed in the first place to answer this question. Whether the doctrine is among the general principles of law is of great importance as these principles serve as a source of international law.[111] Undoubtedly, tribunals do not have the luxury of being indifferent to these principles. In other words, recognition of the unclean hands doctrine as a general principle of law would enable an arbitral tribunal to apply it when deciding the cases involving investor misconduct. Bassiouni put it wisely:

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107 *Id.* ¶ 645.

108 *Id.* ¶¶ 646, 647.

109 *Id.* The tribunal referred to the decision of Lord Mansfield in Holman v. Johnson (1775) tribunal. The relevant part of the said decision reads: "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted."

110 *Hamester, supra* note 36, ¶ 123.

111 M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law*, 11 Mich. J. Int'l L. 768 (1990), at 768.

> "how could one redress an *abus de droit* without resort to "General Principles"? A pragmatic approach to this function of "General Principles" is that the judge, in the absence of an applicable rule of international law, in order to fill a legal gap, may rely on a principle derived from the national legal systems which represent the major systems of jurisprudence in the world, or from those systems whose legal traditions more particularly apply to the specific case at hand."[112]

The *Yukos* tribunal clearly expressed that being deemed a general principle of law requires a certain level of recognition and consensus.[113] Still, where should we seek this recognition and consensus? Article 38(1)(c) of the ICJ points out that the general principles of law are those that are recognized by civilized nations. Similarly, *Inceysa* tribunal noted that the general principles of law "are rules of law on which the legal systems of the states are based."[114] This begs the question: How many states need to endorse the doctrine for it to be considered as a general principle of law? Bassiouni says no quantitative or numerical test exists for states in this sense and universal acceptance is not needed for a rule to be deemed a general principle of law.[115] The doctrine's application rests in the interpretation of the tribunals in this regard. There exist substantial arguments supporting the status of the doctrine as a general principle of law.

As the *Yukos* award put it correctly, the status of the unclean hands doctrine in international law is not well-established. International courts and arbitral tribunals have had different considerations, and there has been unwillingness as to the recognition of the existence of the doctrine.[116] Still, as indicated above, there has also been a considerable amount of support for the application of the doctrine. A vast number of scholars regard the doctrine a general principle of law.[117] Even when they do not directly refer to "unclean hands doctrine", tribunals referred the Latin maxims that are used as manifestations of the doctrine. Besides, prominent judges endorsed the doctrine. A large number of states included the doctrine in their domestic law as well.[118]

CONCLUSION

The ISDS system was established in an attempt to provide foreign investors with substantial protections and rights against host states in which they operate.

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112 *Id.* at 779.
113 *Yukos, supra* note 78, ¶¶ 1358, 1359.
114 *Inceysa, supra* note 12, ¶ 227.
115 Bassiouni, *supra* note 111, at 788; *See* also Dumberry, *supra* note 79, at 248.
116 Dumberry, *supra* note 79, at 246.
117 *Id.* at 250.
118 *Id.*

These protections were secured through international investment treaties. Despite the system's asymmetries favoring foreign investors, states have signed bilateral and multilateral treaties in the expectation that these treaties would contribute to attracting foreign investment and cash flow therewith to their land. Within the last two decades, investor-state arbitration has become more popular than ever. Taking advantage of the pro-investor nature of the system as well as its structural defects, investors have increasingly resorted to wrongful conduct to maximize their profits or achieve favorable results in their disputes with host states. Moreover, investors are using ISDS as leverage to extract favorable concessions or payoffs. This article has categorized investor misconduct as corruption, fraud and abuse of process; then discussed the applicability of the unclean hands doctrine as a cure.

Arbitral case law points to the inconsistent application of the doctrine by tribunals. Despite its unsettled nature, the unclean hands doctrine remains a useful tool for tribunals to curb investor misconduct especially where there is no legality clause in the applicable treaty. In cases where legality clauses in treaties do not matter much due to the fact that investor misconduct in question is not *prima facie* illegal, the doctrine is functional as it helps arbitrators to effectively employ fundamental values such as justice, integrity and the public interest when deciding a case. These values play a vital role in addressing *mala fide* conduct including investors' abusive practices.

REFERENCES

Andrea K. Bjorklund & Lukas Vanhonnaeker, *Yukos: The Clean Hands Doctrine Revisited* (2015) vol. 9:2 Diritti umani e diritto internazionale.

Aloysius Llamzon & Anthony C.Sinclair, *Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct,* in Albert Jan van den Berg (ed), Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18 (© Kluwer Law International; Kluwer Law International 2015)

Aloysius Llamzon, *'Chapter 2: On Corruption's Peremptory Treatment in International Arbitration'*, in Domitille Baizeau and Richard H. Kreindler (eds), Addressing Issues of Corruption in Commercial and Investment Arbitration, Dossiers of the ICC Institute of World Business Law, Volume 13 (© Kluwer Law International; International Chamber of Commerce (ICC) 2015)

Brooke Guven & Lisa Johnson, *The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement*, Columbia Center on Sustainable Investment, CCSI Working Paper (2019)

Bruce W. Klaw, *State Responsibility for Bribe Solicitation and Extortion: Obligations, Obstacles, and Opportunities*, 33 Berkeley J. Int'l L. 60 (2015)

CAMPBELL MCLACHLAN, LAURENCE SHORE & MATTHEW WEINIGER, INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2 ed. 2017)

Caroline Le Moullec, *The Clean Hands Doctrine: A Tool for Accountability of Investor Conduct and Inadmissibility of Investment Claims,* The International Journal of Arbitration, Mediation and Dispute Management, Volume 84, Issue 1, February 2018

Carolyn B. Lamm, Hansel T. Pham, et al., *'Fraud and Corruption in International Arbitration'*, in Miguel Angel Fernandez-Ballester and David Arias (eds), Liber Amicorum Bernardo Cremades, (© Wolters Kluwer España; La Ley 2010)

Carolyn B. Lamm & Andrea J. Menaker, 'Chapter 31: *Consequences of Corruption in Investor State Arbitration*, in Meg Kinnear, Geraldine R. Fischer, et al. (eds), Building International Investment Law: The First 50 Years of ICSID, (© Kluwer Law International, 2016)

Emmanuel Gaillard, *Chapter 9: Concurrent Proceedings in Investment Arbitration*, in Patricia Shaughnessy and Sherlin Tung (eds), The Powers and Duties of an Arbitrator: Liber Amicorum Pierre A. Karrer, (© Kluwer Law International; Kluwer Law International 2017)

Emmanuel Gaillard*, Abuse of Process in International Arbitration,* ICSID Review, (2017)

Florian Haugeneder, *Corruption in Investor-State Arbitration*, 10 J. World Investment & Trade 323 (2009)

George Kahale III, '*The new Dutch sandwich: The issue of treaty abuse'*, Columbia FDI Perspectives, No: 48, (10 October 2011)

Herve Ascensio, *Abuse of Process in International Investment Arbitration*, 13 Chinese J. Int'l L. 763 (2014)

JORUN BAUMGARTNER, TREATY SHOPPING IN INTERNATIONAL INVESTMENT LAW, (2016)

Julia G. Brown, *International Investment Agreements: Regulatory Chill in the Face of Litigious Heat*, 3 W. J. Legal Stud. [i] (2013)

Mojtaba Dani & Afshin Akhtar-Khavari, *Rethinking the Use of Deference in Investment Arbitration: New Solutions against the Perception of Bias,* 22 UCLA J. Int'l L. Foreign Aff. 37 (2018)

M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law*, 11 Mich. J. Int'l L. 768 (1990)

NATHAN JENSEN & GLEN BIGLAISER, POLITICS AND FOREIGN DIRECT INVESTMENT (2014).

Patric Dumberry, *State of Confusion: The Doctrine of 'Clean Hands' in*

Investment Arbitration After the Yukos Award, 17 Journal of World Investments and Trade (2016)

Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 American Journal of International Law 361–409 (2018)

Thomas Kendra & Anna Bonini, *Dealing with Corruption Allegations in International Investment Arbitration: Reaching a Procedural Consensus,* Journal of International Arbitration vol. 31, no. 4 (August 2014)

Thomas, Obersteiner, *"In Accordance with Domestic Law" Clauses: How International Investment Tribunals Deal with Allegations of Unlawful Conduct of Investors.* Journal of International Arbitration 31, no.2 (2014)

Tsai-Fang Chen, *Deterring Frivolous Challenges in Investor-State Dispute Settlement,* 8 Contemp. Asia Arb. J. 61 (2015)

Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, AYBIL, Volume 20, (1999)

William J. Lawrence, *Application of the Clean Hands Doctrine in Damage Actions* (1982) 57 Notre Dame L. Rev. 673

ZIMMERMANN ET AL., THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (2006)

CASES

ICJ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, Dissenting Opinion of Judge Schwebel.

Gustaf F. W. Hamester GmbH amp; Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award, 18 June 2010

Guyana v. Suriname, PCA, Award of 17 September 2007 (under UNCLOS Ch. VII)

Hesham Talaat M. Al-Warraq v. Indonesia, Arbitration under the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, Final Award ,15 December 2014.

Inceysa Vallisoletana v. Republic of El Salvador, ICSID Case No. ARB/03/26), Award, 2 August 2006

Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited ("Bapex") and Bangladesh Oil Gas and Mineral Corporation ("Petrobangla"), ICSID Case No. ARB/10/11 and ARB/10/18, Decision on Jurisdiction, 19 August 2013.

Plama Consortium Limited v. Bulgaria, ICSID Case No. ARB/03/24, Award, 27 August 2008

Yukos Universal Limited (Isle of Man) v The Russian Federation, UNCITRAL, PCA Case No AA 227, Final Award, 18 July 2014

TOWARDS A TALE OF TWO CITIES: WEST JERUSALEM AND INTERNATIONAL LAW IN 21ST CENTURY

İki Şehrin Hikayesine Doğru: 21. Yüzyılda Batı Kudüs ve Uluslararası Hukuk

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Research Article

Abstract

This article aims at analysing the long-standing debate on Jerusalem rekindled by the decision on relocation of U.S. Embassy while taking into account the legal framework behind the division of Jerusalem into East and West sectors. Recent state practices through international organisations such as UN and OIC imply that the idea of corpus separatum (independent and international city) is abandoned in order to secure two-state solution based on 1967 borders. Noting that no firm and persistent objection have been raised for the status of West Jerusalem, potential legal ramifications of the stances that states take on the future of West Jerusalem will be evaluated herein from an international law perspective in the light of Judgments of International Court of Justice and UN and OIC Resolutions.

Keywords: West Jerusalem, International Law, International Organisations, State Practice, Persistent Objection

Özet

Bu makale ABD büyükelçilik kararı ile yeniden alevlenen Kudüs tartışmasına Doğu Kudüs ve Batı Kudüs ayrılığının hukuki zemini üzerinden bakmaya çalışacaktır. Devletlerin BM ve İİT gibi uluslararası örgütler bünyesinde son yıllarda ortaya koyduğu pratik, 1967 sınırları çerçevesinde öngörülen iki devletli çözümü temin etmek için corpus separatum (bağımsız ve uluslararası şehir) fikrinin terk edildiğini işaret etmektedir. Ayrıca belirtmek gerekir ki Batı Kudüs'ün statüsü hakkında da kararlı ve ısrarlı bir itiraz söz konusu değildir. Bu anlamda çalışmada, Uluslararası Adalet Divanı kararları ile BM ve İİT kararları ışığında, devletlerin tutumunun özellikle Batı Kudüs'ün geleceği açısından ortaya çıkaracağı muhtemel neticeler uluslararası hukuk perspektifinden ele alınacaktır.

Anahtar Kelimeler: Batı Kudüs, Uluslararası Hukuk, Uluslararası Örgütler, Devlet Pratiği, Israrlı İtiraz

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INTRODUCTION

Palestinian territories have yielded a laboratory for international law as of 1917. The most critical one among the conflicts between Palestine and Israel arises out of their disagreement on Jerusalem. The city of Jerusalem intended to be designed as a *corpus separatum* in accordance with Resolution 181 adopted in 1947 by United Nations General Assembly (UNGA) has never attained this status because of the *de facto* partition taking place in 1948. Israel proclaimed West Jerusalem as its capital in 1950 and has continued to use as its capital since then, and afterwards took control of entire Jerusalem after occupying East Jerusalem in the Six-Day War of 1967. Proclamation of the whole of Jerusalem as the capital of Israel in 1980 caused Unite Nations Security Council (UNSC) to pass Resolution 478 ordering the embassies of other states be moved out of Jerusalem. U.S. President Trump's decision of 2017 to relocate the U.S Embassy to Jerusalem and his announcement of the "Deal of Century" in 2020, both of which are construed as the unilateral declaration of the intention that Israel must legally take hold of the currently *de facto* controlled Jerusalem under occupation of Israel, reignited the debates on the status of Jerusalem.

Although a great majority of states have objected to this situation, a complicated picture turns out in consequence of examination of United Nations' (UN) principal resolutions and political attitudes of states. Despite the fact that U.S. and Israel claim the sole ownership of Jerusalem to belong to Israel, the general outcome reveals the impression that Jerusalem is substantially deemed to be divided. Recent UN Resolutions and The Organisation of Islamic Cooperation (OIC) declarations draw remarkable attention in terms of putting an emphasis on the facts that East Jerusalem is the capital of Palestine and Israel is required to withdraw from East Jerusalem as per 1967 boundaries. No persistent objection or protest has been aroused on West Jerusalem lately. USA and Israel expect this silent situation about West Jerusalem to be likewise simulated about East Jerusalem as is observed in "Deal of Century". Lack of persistent objection might have been resulted in considering of the "facts should become law" policy of Israel about the status of West Jerusalem to be successful in international law. Nevertheless, the practice of states indicates that a partitioned city is likely to emerge, based on 1967 borders, when considering history of the state practices demonstrated through international organisations. However, Israel has conducted its "facts should become law" policy in some parts of occupied territories inclusive of East Jerusalem since 1967. Therefore, states must be cautious while persistently objecting to Israel's annexation policy.

Jerusalem which houses numerous holy places cherished by Islam, Christianity and Judaism was once a province with a special status directly

governed by the Sublime Porte *(Bab-ı Ali)* in Istanbul during the reign of Ottoman Empire.[1] Having been captured by the United Kingdom (UK) towards the end of World War I, the city was granted as a mandate to the UK according to the League of Nations Mandate System. Meanwhile, pursuant to categorisation specified in Article 22 of the Covenant of the League of Nations, the regions conceded by the Turkish Empire cover the most developed areas.[2] The Mandatory Power was vested with the authority to give advice and guide on administrative issues until the Palestine became a self-reliant independent state.[3] Jerusalem used to be recognised as the capital of Palestine throughout the British Mandate between 1922 and 1948.[4] Nevertheless, the British Government promised a National Home to the Jewish Community in the Palestinian region under the Balfour Declaration of 1917[5]. To this end, after becoming a Mandatory Power, it transferred Jews to the region, thereby leading to change of the demographic structure thereof. In this respect, the Peel Commission report, which was drawn up under the leadership of the United Kingdom and proposed a partition plan, incorporated such views that the Palestinian territories should be divided.[6]

Consequently, the Partition Plan was approved by the United Nations General Assembly in Resolution 181 in 1947. However, this Plan could not be implemented. The intensifying conflicts that broke out while the United Kingdom relinquished its Mandate ended up in de facto division of Jerusalem into East Jerusalem (occupied by Jordan) and West Jerusalem (occupied by Israel).[7] The series of events taking place since 1948 led to uncertainty of legal status of Jerusalem. U.S. President Donald Trump's announcement about

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1 Mordecai Lee, 'Governing the Holy Land: Public Administration in Ottoman Palestine, 1516-1918', *Digest of Middle East Studies*, Vol. 9(1), 2000, p.6.

2 Berdal Aral, 'Oslo Peace Process as a Rebuttal of Palestinian Self-Determination', *Ortadoğu Etütleri / Middle Eastern Studies*, Vol.10, No.1, 2018, p.11.

3 'Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory'. The Covenant of the League of Nations, art.22. https://avalon.law.yale.edu/20th_century/leagcov.asp#art22 (retrieved 06.05.2021).

4 Ruth Kark and Michal Oren-Nordheim, 'Colonial Cities in Palestine? Jerusalem under the British Mandate', *Israel Affairs*, Vol.3/2, 1996, p.50.

5 The Balfour Declaration, November 1917. http://www.balfourproject.org/wp-content/uploads/2016/11/The-Balfour-Declaration.pdf (retrieved 06.05.2021).

6 Penny Sinanoglou, 'British Plans for the Partition of Palestine, 1929-1938', *The Historical Journal*, Vol.52/1, 2009, p.131.

7 UNGA Resolution 181, 29 November 1947, p.132 et. seq. https://undocs.org/A/RES/181(II) (retrieved 06.05.2021).

relocating to Jerusalem its embassy for Israel drew the attention of the whole world to the issue of Jerusalem.[8]

The Organisation of Islamic Cooperation held an extraordinary meeting in Istanbul on 13 December, 2017 and shortly afterwards, published the 'Istanbul Declaration' which emphasized that the decision of USA on relocation of its embassy was illegal according to Resolution 478 of UNSC[9] and further reiterated that all sorts of attempts and practices of Israel with a view to exploiting Jerusalem were rendered null and void. Additionally, two-state solution was admitted in the Declaration with further reaffirmation that the borders of Sovereign Palestine would be as agreed on June 4, 1967. OIC proclaimed the East Jerusalem as the occupied capital of Palestine and called for recognition thereof by other states.[10] The given declaration of OIC did not include any statement with regard to status of West Jerusalem. In this respect, endorsement of two-state solution, recognition of the borders of Palestine as agreed on June 4, 1967 and proclamation of East Jerusalem as the capital gave such an impression that OIC states admitted the de facto situation brought about by the Armistice Agreement of 1949.

On the other hand, the United Nations Security Council convened on 18 December 2017 to vote on rescission and rendering illegal of the decision of the USA which recognized Jerusalem as the capital of Israel, but failed to pass a resolution due to *14 votes in* favour and 1 *vote* against (vetoed by the USA). So eyes focused on the UN General Assembly. UNGA held an extraordinary meeting on 21 December, 2017 and passed a resolution with 129 votes in favour, 9 votes against and 35 abstentions. Resolution 10/19 adopted in this Emergency Session of UNGA on 22 December, 2017 stated that all kinds of actions likely to damage or preclude two-state solution must be avoided, and moreover, highlighted that states must refrain from locating their embassies in Jerusalem by reminding the UNSC Resolution 478. Furthermore, UNGA "stressed that Jerusalem is a final status issue to be resolved through negotiations in line with

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8 Israel's new 'nation-state law' of 2018 which affirms disregarding of Palestinian right to self-determination has nourished the controversy. Muhammed Hüseyin Mercan, 'Reconsidering the Palestine Issue in the Shade of Israel's Expanding Sovereignty Claim', *New Middle Eastern Studies*, Vol.8(2), 2018, pp.77-78.

9 UNSC Resolution 478, 20 August 1980, parag.5.3. http://unscr.com/en/resolutions/doc/478 (retrieved 06.05.2021).

10 OIC, Final Communiqué of the Extraordinary Islamic Summit Conference to Consider the Situation in Wake of US Administration's Recognition of the City of Al-Quds Al-Sharif as the So-Called Capital of Israel, the Occupying Power, and Transfer of the US Embassy to Al-Quds. Istanbul, Republic of Turkey, 13 December 2017, OIC/EX-CFM/2017/PAL/FC, parag. 1-2-3-5-8. https://www.oic-oci.org/docdown/?docID=1699&refID=1073 (retrieved 06.05.2021).

relevant United Nations resolutions".[11] OIC states putting their signatures to the Istanbul Declaration voted in favour of Resolution 10/19 of UNGA. This chaotic scene is in fact the outcome of aggravation of wide divergences of opinions about long-standing controversial status of Jerusalem. This study will analyse the status of Jerusalem, investigate into causes of current chaos from an international law perspective and, to this end, will focus on UN Resolutions and state practice.

I. U.S. Decision of Recognition and Jerusalem Embassy Act of 1995

It is not a new agenda for USA to recognise Jerusalem as the capital of Israel. The U.S. Congress enacted in 1995 the 'Jerusalem Embassy Act' which ordered relocation of the U.S Embassy in Israel from Tel-Aviv to Jerusalem. Noting that each sovereign nation is authorised to designate its own capital, and that Jerusalem has been used as the capital of Israel since 1950, and that Jerusalem has been administered as a united and undivided city by Israel since 1967, the Jerusalem Embassy Act therefore stipulated that USA would recognise Jerusalem as the capital of Israel and move its Embassy to Jerusalem based on the above-cited grounds.[12]

Even though the same Act envisions establishment of US Embassy in Jerusalem no later than May 31, 1999, this relocation has been constantly postponed by then-current presidents since the given date. In this respect, Donald Trump's announcement as to recognition of Jerusalem as the capital of Israel or transfer of US Embassy to Jerusalem solely has meant to implement the existing Act of 1995. Nevertheless, the Act itself constitutes a violation of International Law. Because pursuant to customary international law rules with regards to the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), if and when states enact laws contrary to international law or their government representatives violate international law, then international responsibility arises.[13]

Both the Act of 1995 adopted by the U.S. Congress and the U.S. President's proclamation of Jerusalem as the capital of Israel in reliance upon this Act are against the international law rules explicitly set down in UN Resolutions. According to Kattan, the USA violated the international law through adoption

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11 UNGA Resolution 10/19, Status of Jerusalem, Tenth Emergency Session, A/RES/ES-10/19, 22.12.2017, parag.4. https://undocs.org/en/A/RES/ES-10/19 (retrieved 06.05.2021).

12 Jerusalem Embassy Act of 1995, Public Law 104-45, 104th Congress, 8 November 1995, p.1-2. https://www.congress.gov/104/plaws/publ45/PLAW-104publ45.pdf (retrieved 06.05.2021).

13 Responsibility of States for Internationally Wrongful Acts, A/56/49(Vol. I)/Corr.4., art.4-5. https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (retrieved 06.05.2021).

of the Jerusalem Embassy Act. The UN Resolutions prescribe that it is an international responsibility for each state not to recognise the de facto status of occupied East Jerusalem and not to establish any Embassy in Jerusalem without determination of final status of Jerusalem.[14] It seems Biden Administration is not interested in relocating US embassy to Tel Aviv again. Therefore, controversy over Trump's move may be deepened in future and several other states may follow US.

II. Roots of Division into East and West Jerusalem

In Resolution 181 passed in 1947, UN General Assembly rendered a decision in favour of dividing the Palestine territories between Israel and Palestine and also founding of two separate states.[15] UN Partition Plan was accepted by the Jewish Agency while the Arab States showed reaction thereto with the assertion that Palestinians' right to self-determination is completely disregarded.[16] While this matter was hotly discussed, the United Kingdom announced that it would withdraw its military forces from the region. Meanwhile, one day before the termination of British Mandate, the Jewish Agency which gathered in Tel Aviv under the leadership of David Ben Gurion formally proclaimed establishment of State of Israel on May 14, 1948.[17]

The issue of Jerusalem has remained unresolved up until today since the UN Partition Plan of 1947. In accordance with the Plan suggested in Resolution 181, Jerusalem would not belong to either party and would attain an independent international status (corpus separatum). In fact, Golani argues that Jewish Movement, before even the introduction of UN Partition Plan, advocated Jerusalem to be partitioned as West and East between Jews and Arabs respectively. However, as for the Holy Places in the Eastern sector, they envisioned an international management. Although they did not insist on their plan to be accepted in order not to risk their statehood to be recognised, the status of Jerusalem in UN Partition Plan was mostly in favour of Jewish Movement. In this regard, their allegation that West Jerusalem should be a part of Jewish State was upheld even in Peel Commission hearings.[18]

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14 Victor Kattan, 'Why U.S. Recognition of Jerusalem Could Be Contrary to International Law', *Journal of Palestine Studies*, Vol. 47, No. 3, 2018, p.85.

15 UNGA Resolution 181, 29 November 1947, p.132 et. seq. https://undocs.org/A/RES/181(II) (retrieved 06.05.2021).

16 Iain Scobbie and Sarah Hibbin, 'The Israel Palestine Conflict in International Law: Territorial Issues', *The U.S./Middle East Project*, SOAS, 2009, p.53.

17 Israeli Declaration of Independence, Issued at Tel Aviv on May 14, 1948. https://cmes.arizona.edu/sites/cmes.arizona.edu/files/7%20Doc%20C%20Israeli%20Declaration%20of%20Independence%20Rdg_0.pdf (retrieved 06.05.2021).

18 Motti Golani, 'Zionism without Zion: The Jerusalem Question, 1947-1949', *Journal of Israeli History*, Vol.16(1), 1995, pp.40-41.

Nevertheless, Israel occupied the West Jerusalem during the war whereas Jordan captured the East Jerusalem including Al-Aqsa Mosque and other historical places. As a result of the Armistice Agreement executed between the Arab States and Israel in 1949, the de facto division of Jerusalem remained same, i.e. West Jerusalem remained under the control of Israel and the East Jerusalem under the control of Jordan.[19] According to the Green Line, Jerusalem was divided into two parts. Haram al-Sharif, where the Al-Aqsa Mosque stands, and other historical places (Old City) were included in the East Jerusalem. On account of this de facto division, the UN General Assembly reminded once again the special status of Jerusalem designed and conferred as corpus separatum under Resolutions 194 and 303.[20] Other states did not raise any strong objection to the Armistice Line drawn up in 1949. This situation continued until 1967 when Six-Day War broke out between Israel and Arab States which resulted in occupation of East Jerusalem by Israel. All the territories acquired and occupied in and after 1967 were declared invalid in many UN resolutions.[21]

According to Cattan, the UN Security Council Resolutions 252, 452, 465 and 476 adopted after the 1967 War endorsed the status of corpus separatum formerly prescribed in Resolution 181. The expression of "legal status of Jerusalem" mentioned in the given resolutions was used in the meaning of corpus separatum.[22] Knesset proclaimed Jerusalem as the capital of Israel on January 23, 1950 and transferred his government offices to Jerusalem in a short period of time. Nevertheless, none of states has opened any embassy in the city of Jerusalem until 1967 because they had no desire for the then-current de facto division to turn into de jure division. Despite this approach, the support provided for the idea of corpus separatum tends to lessen as time passes.

As for the views held by Elihu Lauterpacht and Stephen Schwebel, withdrawal of military forces by the United Kingdom in 1948 caused a

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19 Avi Shlaim, 'Britain and the Arab Israeli War of 1948', *Journal of Palestine Studies*, Vol.16, No. 4, 1987, pp. 59-60.

20 UNGA Resolution 194(III), 11 December 1948, p.23, parag.7-8. https://undocs.org/A/RES/194%20(III)(retrieved06.05.2021).UNGAResolution303,9December1949,parag.1-2. https://unispal.un.org/DPA/DPR/unispal.nsf/0/2669D6828A262EDB852560E50069738A (retrieved 06.05.2021).

21 As per Resolution 476 and 478, in particular, which condemn the adoption of Basic Law and actions of Israel in the whole Jerusalem, it has been emphasized that Israel operates as an occupying power both in the territory seized in 1967 and in Jerusalem, and therefore that Israel has to act in accordance in cognizance of this fact. UNSC Resolution 476, 30 June 1980, parag.7.3-7.5. http://unscr.com/en/resolutions/doc/476 (retrieved 06.05.2021). UNSC Resolution 478, 20 August 1980, parag.5.3. http://unscr.com/en/resolutions/doc/478 (retrieved 06.05.2021).

22 Henry Cattan, 'The Status of Jerusalem under International Law and United Nations Resolutions', *Journal of Palestine Studies*, Vol.10, 1981, p.9.

vacuum in the sovereignty of the region. Right after the withdrawal, Israel took control of West Jerusalem while Jordan captured the East Jerusalem. As Jordan's occupation was deprived of a legal ground or basis, the Armistice Line of 1949 was deemed to draw temporary borders. During the outbreak of Six-Day War in 1967, Jordan's attacks constituted a breach of the Armistice Agreement of 1949 signed with Israel. This further caused Israel to construe this situation as the termination of Armistice Agreement. As a result of lawful self-defence against Jordan in the War of 1967, Israel acquired the control of East Jerusalem[23]. Cattan reminds that forcible acquisition of any territory is not acceptable in international law and, therefore, international community does not recognise Israel's attempts at annexing the East Jerusalem.[24] The author argues that the right to exercise legal sovereignty over Jerusalem without any partition into East and West belongs to Palestinians.[25] On the other hand, Cassese reasserts that the legal status of Jerusalem is subject to Resolution 181 adopted in 1947 and has to be designed as corpus separatum.[26]

In fact, it is impossible to share the views of Lauterpacht and Schwebel on East Jerusalem due to following reasons. Firstly, the right to self-defence can only be exercised to proportionately ward off any actual military attack as specified in Article 51 of UN Charter of 1945.[27] This indicates that self-defence does not legitimise appropriation of territory as it extends beyond limits of defence and results in another unlawful attack. Secondly, the argument for filling the vacuum created by withdrawal of British military forces can be reasonable to discuss for the conflict of 1948, but cannot a matter of discussion when the conflict of 1967 is concerned. Even though the status of Jerusalem was primarily planned as corpus separatum, this plan failed to be put into effect and, moreover, states have not raised a general objection, from 1949 up until now, to the effective control by Israel over West Jerusalem. In this sense, it can be claimed that Israel has the de facto sovereignty over West Jerusalem. De jure sovereignty will be actualised via an agreement to be reached through peace negotiations. Such an agreement will most probably be a kind of confirmation of the actual de facto situation in West Jerusalem. As a matter of fact, over the recent years, UN Resolutions, states and even ICJ Advisory Opinion on

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23 Elihu Lauterpacht, '*Jerusalem and the Holy Places*', Anglo-Israel Association Publishing, 1968, p.47. Stephen Schwebel, 'What Weight to Conquest?' *American Journal of International Law*, Vol.64, Issue 2, 1970, p.346.

24 Henry Cattan, '*Jerusalem*', St. Martin's Press, 1981, p.111 et seq.

25 Cattan, *Ibid*, p.64.

26 Antonio Cassese, 'Legal Considerations on the International Status of Jerusalem', *The Palestine Yearbook of International Law*, Vol.3, Issue 1, 1986, pp.36.37.

27 UN Charter, 1945, art.51. https://treaties.un.org/doc/publication/ctc/uncharter.pdf (retrieved 06.05.2021).

Wall of 2004 have been mostly concerned with the status of East Jerusalem.[28] When the current situation is assessed in the light of legal decisions, it seems improbable for Israel to establish sovereignty over East Jerusalem.

On November 15, 1988, the Palestinian Declaration of Independence was proclaimed and the UN Partition Plan enshrined in Resolution 181 was generally accepted. Notwithstanding, Jerusalem was declared as the capital of Palestine. The expression of Arab Jerusalem mentioned in this Declaration preserves its ambiguity because of lack of explanation therein. Most probably it refers to entire Jerusalem when other usages in the text are taken into account.[29] On the other hand, Israel also accepts Jerusalem as its capital and still keeps a tight grip over it. Meanwhile, it seems that majority of states have given up the idea of corpus separatum designed for Jerusalem and that they have admitted the borders drawn before 1967.

What is more, it seems that acceptance of two-state solution by Palestinian authorities from now on can lead to recognition of the borders drawn before 1967 as specified in UN Resolutions. Current UNSC Resolutions regard and treat as the 'occupied Palestinian territories' the regions occupied by Israel after 1967 and call for avoidance by Israel from any actions precluding or rendering the two-state solution meaningless. Resolution 2334 of UNSC can be found below as an example:

> "Reaffirming the obligation of Israel, the occupying Power, to abide scrupulously by its legal obligations and responsibilities under the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, and recalling the advisory opinion rendered on 9 July 2004 by the International Court of Justice, Condemning all measures aimed at altering the demographic composition, character and status of the Palestinian Territory occupied since 1967, including East Jerusalem, including, inter alia, the construction and expansion of settlements, transfer of Israeli settlers, confiscation of land, demolition

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28 'The territories situated between the Green Line and the former eastern boundary of Palestine under the Mandate were occupied by Israel in 1967 during the armed conflict between Israel and Jordan. Under customary international law, these were therefore occupied territories in which Israel had the status of occupying Power. Subsequent events in these territories, as described in paragraphs 75 to 77 above, have done nothing to alter this situation. All these territories (including East Jerusalem) remain occupied territories and Israel has continued to have the status of occupying Power'. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ, Advisory Opinion, 9 July 2004, parag.78.

29 Palestine National Council and Declaration of Independence of 15 November 1988. Annexed in UN Document A/43/827, S/20278, 18 November 1988. https://unispal.un.org/UNISPAL.NSF/0/6EB54A389E2DA6C6852560DE0070E392 (retrieved 06.05.2021).

> of homes and displacement of Palestinian civilians, in violation of international humanitarian law and relevant resolutions, Expressing grave concern that continuing Israeli settlement activities are dangerously imperilling the viability of the two-State solution based on the 1967 lines".[30]

Krystall argues that Israel started to depopulate Arab neighbourhoods in West Jerusalem from in the first place. By the end of 1949, all of West Jerusalem's Arab neighbourhoods had been settled by Israelis.[31] Furthermore, Israel tried to govern the city of Jerusalem as one single city as from 1967 and changed the demographic composition and management style of the city accordingly.[32] In this respect, UN Resolutions have stated that Israel stands and rules there only as an occupying power, and that the change by Israel of demographic composition and construction plans, expropriation of land and building settlements constitute violation of international law. Likewise, Fourth Geneva Convention grants limited powers to the Occupying Power. Nevertheless, Israel claims that Fourth Geneva Convention is inapplicable to the territories occupied in 1967 because no sovereignty has been established by any legitimate authority in this region since termination of the British Mandate in 1948. To the contrary, as Cassese highlights, UN and all the states, except for Israel, recognise the Palestinians' right to self-determination.[33] It is not even obligatory for Palestinians to first found a state in order to acquire their right to self-determination. It is because modern international law confers the right to self-determination to the population under occupation.[34]

As Israel has kept the de facto control of the East Jerusalem for a long period of time since 1967, some states have inclined to accept the armistice line drawn before 1967. On the other hand, some other states have accepted the borders of Israel as those determined before 1967 and have recognised the West Jerusalem as the capital of Israel. For instance, the Ministry of Foreign Affairs of Russia declared through its announcement on April 6, 2017 that

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30 UNSC Resolution 2334, 23 December 2016, parag.3-4-5. http://unscr.com/en/resolutions/doc/2334 (retrieved 06.05.2021).

31 Nathan Krystall, 'The De-Arabization of West Jerusalem 1947-50', *Journal of Palestine Studies*, Vol. 27(2), 1998, p.5.

32 John Quigley, 'Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory', *Pace International Law Review*, Vol.10/1, 1998, p.7.

33 Antonio Cassese, '*Self-Determination of Peoples: A Legal Reappraisal*', Cambridge University Press, 1995, p.240.

34 Orna Ben-Naftali et al., 'Illegal Occupation: Framing the Occupied Palestinian Terrority', *Berkeley Journal of International Law*, Vol.23/3, 2005, p.554.

the West Jerusalem was the capital of Israel and the East Jerusalem would be recognised as the capital of a prospective Palestinian state.[35]

On the other hand, on December 13, 2017, the Organisation of Islamic Cooperation called for recognition of the East Jerusalem as the capital of Palestine, which gave the impression of implicitly accepting the West Jerusalem as a part of Israel, thus leading to ambiguity or uncertainty in its stance. In a similar vein, UN Resolutions explicitly specify that that East Jerusalem is under occupation while there is not such clarity when West Jerusalem is concerned. To put in plain words, neither the phrase of West Jerusalem nor any expression suggesting that the West Jerusalem is also under occupation has been mentioned in the resolutions. Some resolutions use the word 'Jerusalem' while others prefer 'East Jerusalem'.

Right after Israel proclaimed the whole and undivided Jerusalem as its capital through enactment of Basic Law on July 29, 1980, UNSC passed Resolution 478 with regard to breach of international law through this action by Israel and called upon member states to move embassies out of Jerusalem. UNSC accordingly:

> "[2] Affirms that the enactment of the "basic law" by Israel constitutes a violation of international law and does not affect the continued application of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, in the Palestinian and other Arab territories occupied since June 1967, including Jerusalem; [3] Determines that all legislative and administrative measures and actions taken by Israel, the occupying Power, which have altered or purport to alter the character and status of the Holy City of Jerusalem, and in particular the recent "basic law" on Jerusalem, are null and void and must be rescinded forthwith; [5] Decides not to recognize the "basic law" and such other actions by Israel that, as a result of this law, seek to alter the character and status of Jerusalem and calls upon: (a) All Member States to accept this decision; (b) Those States that have established diplomatic missions at Jerusalem to withdraw such missions from the Holy City".[36]

Thereupon, states began to transfer their embassies to Tel-Aviv. With the latest transfers of embassies of El-Salvador and Costa Rica in 2006, Jerusalem was completely cleared of embassies.

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35 Foreign Ministry Statement regarding Palestinian-Israeli Settlement. https://unispal.un.org/DPA/DPR/unispal.nsf/0/FE99331E0C3D55E8852580FF005A8806 (retrieved 06.05.2021).

36 UNSC Resolution 478, 20 August 1980, parag.5/2-3-5. http://unscr.com/en/resolutions/doc/478 (retrieved 06.05.2021).

III. *De facto* Control by Israel over West Jerusalem and State Practice

Both UN resolutions and state practices clearly demonstrate that East Jerusalem is accepted to be under occupation and this is contrary to international law. Despite this, there is a huge gap with respect to status of West Jerusalem. Israel asserts that as the withdrawal of United Kingdom left the region without any sovereign power, it has acquired the sovereign-free territory and therefore, Israel's sovereignty over the West Jerusalem is not open to question or discussion.[37] In Brownlie's opinion, inhabited territory cannot be regarded as terra nullius in case of abandonment by the existing sovereign.[38] Similarly, in the Advisory Opinion on Western Sahara, ICJ highlighted that Western Sahara was not terra nullius at the time of occupation by Spain on the grounds that that this region was inhabited by people.[39] The demarcation line known also as Green Line formalised through armistice agreements in 1949, which divided Jerusalem into West and East sectors, ensured that East Jerusalem and West Jerusalem remained under respective de facto rules of Jordan and Israel.[40] Even though use of West Jerusalem by Israel as its capital had formerly been objected to in the UN Resolutions and actions of Israel had been rendered null or void, no strong objection was raised by either UN or states after 1967 to locating of Israel's government offices in West Jerusalem.

UN used to put a stronger emphasis on the international status of Jerusalem in its former resolutions. However, the recent resolutions have laid relatively more focus on East Jerusalem. This dilemma reveals a shift from idealism to realism. The status of the entire Jerusalem still harbours many uncertainties due to lack of reaction or remaining silent. The European Parliament does not recognise the borders emerging after 1967 and highlights that Jerusalem will be the prospective capital of both states concerned.[41] On the other hand, some other states like Russia and China recognise West Jerusalem as the capital of Israel and East Jerusalem as the capital of Palestine within the borders of 1967.[42]

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37 John Quigley, '*Palestine and Israel: A Challenge to Justice*', Duke University Press, 1990, p.91.

38 James Crawford, '*Brownlie's Principles of Public International Law*', Oxford University Press, 2012, p.228.

39 ICJ, Western Sahara, Advisory Opinion of 16 October 1975, parag.81.

40 Nabil Elaraby, 'Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements', *Law and Contemporary Problems*, Vol.33, No.1, 1968, p.104 et seq.

41 European Parliament, Jerusalem: The Heart of the Israeli-Palestinian Conflict, p.20. https://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2012/491443/EXPO-AFET_SP(2012)491443_EN.pdf (retrieved 06.05.2021).

42 In order to see statement of China: https://www.un.org/unispal/document/auto-

The states that attended in the OIC meeting on December 13, 2017 accepted East Jerusalem as the capital of Palestine while they remained unresponsive to and silent on West Jerusalem. Additionally, they did not make any statement as to recognition of Tel Aviv as the capital of Israel. It is quite understandable for the states having embassies in Tel-Aviv to recognise Tel-Aviv as the capital of Israel. However, neither UN nor states have made a plain and clear statement about the current status of West Jerusalem or the necessity for Israel to move its capital-oriented activities to Tel-Aviv.[43] Noting that UN emphasizes that the borders prior to 1967 have to be respected and observed and that final status of Jerusalem will be determined through bilateral negotiations, and knowing that the states defending independence of Palestine bring to the forefront the division of East-West sectors rather than unity of Jerusalem, it can then be inferred that UN does not pay much attention to international city status any more, and that the current de facto situation (West Jerusalem/Israel and East Jerusalem/Palestine) has been accepted. If they wish to preclude the current de facto situation in Jerusalem from turning into a customary international law rule, it is requisite for states to break their silence and decide on status of Jerusalem from every aspect in plain words.

This conundrum is also very obvious in the text drawn up by the members of UN General Assembly that convened urgently right upon hearing the decision of U.S. to move its embassy. After the draft resolution issued by the UN Security Council against the Embassy decision of the USA was vetoed[44] by the USA with 14 votes in favour and 1 vote against on 18.12.2017, the General Assembly, which convened urgently on 21.12.2017, passed a resolution with 128 votes in favour, 9 votes against and 35 abstentions. The legal basis of this resolution stems from the Uniting for Peace Resolution No. 377 passed in regards to the Korean War in 1950.[45] Pursuant to Resolution 377, in the event that the Security Council reaches a deadlock due to the right to veto and fails to fulfil its primary duty of maintaining and safeguarding peace and security, UNGA can summon an urgent meeting to take necessary measures.[46]

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43 The facts that Trump underlines in his announcement that Israel has been using Jerusalem as its capital for years and that no serious or strong objection has been raised to this situation are actually of high significance in this regard.

44 The Security Council adopts resolutions in proportion of 9/15 (9 in favour) on the primary condition of no negative vote by any of five permanent members. Absention by any permanent members are not counted as a negative vote.

45 UNGA Resolution 377(V), 3 November 1950. https://unispal.un.org/DPA/DPR/unispal.nsf/0/55C2B84DA9E0052B05256554005726C6 (retrieved 06.05.2021).

46 UN has convened 10 emergency meetings so far. The most recent General Assembly meeting is a continuation of 10th Emergency meeting which began in 1997 and later continued in many separate sessions at various dates. In accord with Article 18 of UN

As the draft resolution of the Security Council about Jerusalem was vetoed by the USA, the states in the leadership of Turkey and Yemen called for 'an urgent meeting' to be held by the General Assembly as in the case of Uniting for Peace Resolution 377. The decisions taken in the meeting on 21.12.2017 primarily affirmed each and every previous UN Resolution which made a reference to Resolution 181, and further declared null and void the occupation of East Jerusalem and actions thereabout carried out by Israel after 1967. Furthermore, UN reiterated the resolution 478 passed in 1980 which emphasized the necessity for states to refrain from establishing an embassy in Jerusalem, and called for desisting from such actions. Additionally, it was restated therein that the final status of Jerusalem would be determined through two-state solution-oriented negotiations. In essence, this Resolution is highly significant for international law-making. The call, which was supposed to be issued by the Security Council, for abiding by the previous UN Resolutions, was made by the General Assembly. The Resolution generally repeats the former findings of UN and does not envision or impose any new and effective sanction. It bears additional importance in terms of being an indicator of complexity of state attitudes because it incorporates many contradictory and conflicting statements.

Despite being controversial, many authors argue that states cannot remain silent and unresponsive when actions of other states are concerned; otherwise, they lose their chance of 'rejecting a rule' in case a new international law rule emerges in the future. What states do not say is legally as important as what they say. Any state which opposes a situation is called 'persistent objector' and the newly emerging rule is not applicable to this persistent objector.[47] In the Resolution on Anglo-Norwegian Fisheries, ICJ referred to the persistent objector rule as follows: 'in any event the 10-mile rule would appear to be in-applicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.'[48] As a result of this rule, pursuant to international customary law and UN Resolutions, states are under the obligation not to recognise any actions contrary to international law. As emphasized by Talmon, both illegal use of force and violation of right to self-determination come to the forefront as the actions not to be recognised.[49]

Charter, decisions on some specific matters including 'recommendations on maintenance of peace and security' are taken by qualified majority of General Assembly members. This proportion refers to two thirds of members present and voting.

47 Jonathan I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law', *British Yearbook of International Law*, Vol.56(1), 1986, pp.5-16.

48 Fisheries Case (United Kingdom v. Norway), Judgment of December 18th, 1951, ICJ Reports, p.131.

49 Stefan Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without

ICJ reflects the same obligation in Its Wall advisory opinion: "Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction".[50] The same obligation is valid for the Israeli governmental acts on East Jerusalem. In this respect, such unilateral actions as 'condemnation, not recognising or declaring null or void' are indeed critically important in order to ensure that actions contrary to international law do not lead to any negative consequence for other states. Under ordinary circumstances, selection of capital is a domestic issue. Sovereign states are free to designate as their capital any province they legally own and other states have to respect this process.

Nevertheless, the issue of Jerusalem is the concern of international law, whose final status has not yet determined. UN resolutions, state practices and judicial decisions with regard to Jerusalem demonstrate that the status of Jerusalem is still controversial and that this issue can be resolved through negotiations or through other procedures stipulated by international law. It has to be born in mind that Israel has been gaining more and more effective control over the region through occupying Palestinian territories and building settlements therein since 1948. What is more, Israel first used the West Jerusalem as its capital as from 1950 to 1967 since when the entire Jerusalem have been used as capital. President's Office, Parliament (Knesset), Supreme Court, many ministries and government bodies operate in Jerusalem. Many issues that emerged as *de facto* have the potential to turn into *de jure* by virtue of the support of other states like USA or silence of other states. To this end, clear, explicit and appropriate objection of states is essential in international law.

CONCLUSION

A complicated picture comes out when the resolutions adopted by UN General Assembly and Security Council from 1947 up to now are examined. In some resolutions passed even after the occupation of East Jerusalem in 1967, the General Assembly highlighted that the actions of Israel in Jerusalem (without mentioning any division into East-West) which might affect the legal

Real Substance?' Christian Tomuschat and Jean-Marc Thouvenin (ed.), '*The Fundamental Rules of the International Legal Order: Jus Cogens And Obligations Erga Omnes*', Martinus Nijhoff Publishers, 2006, p.99.

[50] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ, Advisory Opinion, parag.159.

status of Jerusalem were invalid. However, in the more recent UN resolutions issued especially after 2000s, a particular emphasis on East Jerusalem draws attention, East Jerusalem is counted as a part of the Palestinian territories under occupation, Israel is called upon to refrain from any action that might jeopardize peace in the region because such actions might preclude two-state solution and constitute a breach of armistice line of 1949. These resolutions place its focus on East Jerusalem rather than international status of Jerusalem.

Likewise, the earlier resolutions of UN Security Council emphasized the necessity for Israel to refrain from all sorts of action that could damage the status of the whole Jerusalem and such actions would be rendered null and void whereas the latest resolutions, under the influence of two-state solution-oriented negotiations, have focused on 'East Jerusalem under Occupation'. The Security Council declared that occupation of East Jerusalem beyond the 1967 borders would not be recognized. Many resolutions of UN come to the forefront with their emphasis on 'avoiding from actions that might damage two-state solution' and 'solution through peaceful methods'.

Despite being few, some UN resolutions remind Resolution 181 even in 2000s. In fact, Resolution 181 supports two-state solution; but this solution is deemed today to be found within 1967 borders. UNSC Resolution 2334 adopted in 2016 made references solely to the UNSC Resolutions passed after 1967. Resolution 2334 mentions neither Resolution 181 nor *corpus separatum*. Similarly, UNGA Resolution 10/19 adopted in 2017 made references only to UN resolutions passed after 1967 and does not touch upon Resolution 181 or *corpus separatum*. In this regard, both Resolutions 2334 and 10/19 give the impression that states recognize the divided city of Jerusalem according to 1967 borders, thus showing the current course of events.

Jerusalem as envisioned by UN to be under international governance (*corpus separatum*) is no longer considered to be realistic and applicable. In this sense, the recent resolutions of UN, which reflect the state practices and also place its main focus on East Jerusalem, suggest strong evidences with respect to the facts that the status of city might remain as divided as per 1967 borders and this might be accepted by both parties. Therefore, the status of West Jerusalem might not be debated by states anymore. It seems improbable for this division to take place as designed in the proposal announced as the 'Deal of the Century' in which Israel unlawfully demands "facts on East Jerusalem should become law", and offers annexation of whole Jerusalem to be recognised and furthermore envisions a new city for Palestinians close to Jerusalem. Thus, other states and Palestinian authorities must keep persistently objecting to such unilateral plans for East Jerusalem and avoid being silent as is seen in the case of West Jerusalem.

BIBLIOGRAPHY

Antonio Cassese, 'Legal Considerations on the International Status of Jerusalem', *The Palestine Yearbook of International Law*, Vol.3, Issue 1, 1986, pp.36.37.

Antonio Cassese, '*Self-Determination of Peoples: A Legal Reappraisal*', Cambridge University Press, 1995, p.240.

Avi Shlaim, 'Britain and the Arab Israeli War of 1948', *Journal of Palestine Studies*, Vol.16, No. 4, 1987, pp. 59-60.

Berdal Aral, 'Oslo Peace Process as a Rebuttal of Palestinian Self-Determination', *Ortadoğu Etütleri / Middle Eastern Studies*, Vol.10, No.1, 2018, p.11.

Elihu Lauterpacht, '*Jerusalem and the Holy Places*', Anglo-Israel Association Publishing, 1968, p.47.

European Parliament, Jerusalem: The Heart of the Israeli-Palestinian Conflict, p.20. https://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2012/491443/EXPO-AFET_SP(2012)491443_EN.pdf (retrieved 06.05.2021).

Fisheries Case (United Kingdom v. Norway), Judgment of December 18th, 1951, ICJ Reports, p.131.

Foreign Ministry Statement regarding Palestinian-Israeli Settlement. https://unispal.un.org/DPA/DPR/unispal.nsf/0/FE99331E0C3D55E8852580FF005A8806 (retrieved 06.05.2021).

Henry Cattan, '*Jerusalem*', St. Martin's Press, 1981, p.111 et seq.

Henry Cattan, 'The Status of Jerusalem under International Law and United Nations Resolutions', *Journal of Palestine Studies*, Vol.10, 1981, p.9.

Iain Scobbie and Sarah Hibbin, 'The Israel Palestine Conflict in International Law: Territorial Issues', *The U.S./Middle East Project*, SOAS, 2009, p.53.

Israeli Declaration of Independence, Issued at Tel Aviv on May 14, 1948. https://cmes.arizona.edu/sites/cmes.arizona.edu/files/7%20Doc%20C%20Israeli%20Declaration%20of%20Independence%20Rdg_0.pdf (retrieved 06.05.2021).

James Crawford, '*Brownlie's Principles of Public International Law*', Oxford University Press, 2012, p.228.

Jerusalem Embassy Act of 1995, Public Law 104-45, 104th Congress, 8 November 1995, p.1-2. https://www.congress.gov/104/plaws/publ45/PLAW-104publ45.pdf (retrieved 06.05.2021).

John Quigley, 'Living in Legal Limbo: Israel's Settlers in Occupied Palestinian Territory', *Pace International Law Review*, Vol.10/1, 1998, p.7.

John Quigley, '*Palestine and Israel: A Challenge to Justice*', Duke University Press, 1990, p.91.

Jonathan I. Charney, 'The Persistent Objector Rule and the Development of Customary International Law', *British Yearbook of International Law*, Vol.56(1), 1986, pp.5-16.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ, Advisory Opinion, 9 July 2004, parag.78.

Mordecai Lee, 'Governing the Holy Land: Public Administration in Ottoman Palestine, 1516-1918', *Digest of Middle East Studies*, Vol. 9(1), 2000, p.6.

Motti Golani, 'Zionism without Zion: The Jerusalem Question, 1947-1949', *Journal of Israeli History*, Vol.16(1), 1995, pp.40-41.

Muhammed Hüseyin Mercan, 'Reconsidering the Palestine Issue in the Shade of Israel's Expanding Sovereignty Claim', *New Middle Eastern Studies*, Vol.8(2), 2018, pp.77-78.

Nabil Elaraby, 'Some Legal Implications of the 1947 Partition Resolution and the 1949 Armistice Agreements', *Law and Contemporary Problems*, Vol.33, No.1, 1968, p.104 et seq.

Nathan Krystall, 'The De-Arabization of West Jerusalem 1947-50', *Journal of Palestine Studies*, Vol. 27(2), 1998, p.5.

OIC, Final Communiqué of the Extraordinary Islamic Summit Conference to Consider the Situation in Wake of US Administration's Recognition of the City of Al-Quds Al-Sharif as the So-Called Capital of Israel, the Occupying Power, and Transfer of the US Embassy to Al-Quds. Istanbul, Republic of Turkey, 13 December 2017, OIC/EX-CFM/2017/PAL/FC, parag. 1-2-3-5-8. https://www.oic-oci.org/docdown/?docID=1699&refID=1073 (retrieved 06.05.2021).

Orna Ben-Naftali et al., 'Illegal Occupation: Framing the Occupied Palestinian Terrority', *Berkeley Journal of International Law*, Vol.23/3, 2005, p.554.

Palestine National Council and Declaration of Independence of 15 November 1988. Annexed in UN Document A/43/827, S/20278, 18 November 1988. https://unispal.un.org/UNISPAL.NSF/0/6EB54A389E2DA6C6852560DE0070E392 (retrieved 06.05.2021).

Penny Sinanoglou, 'British Plans for the Partition of Palestine, 1929-1938', *The Historical Journal*, Vol.52/1, 2009, p.131.

Responsibility of States for Internationally Wrongful Acts, A/56/49(Vol. I)/Corr.4., art.4-5. https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (retrieved 06.05.2021).

Ruth Kark and Michal Oren-Nordheim, 'Colonial Cities in Palestine? Jerusalem under the British Mandate', *Israel Affairs*, Vol.3/2, 1996, p.50.

Statement of China: https://www.un.org/unispal/document/auto-insert-195150/ (retrieved 06.05.2021).

Stefan Talmon, 'The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?' Christian Tomuschat and Jean-Marc Thouvenin (ed.), '*The Fundamental Rules of the International Legal Order: Jus Cogens And Obligations Erga Omnes*', Martinus Nijhoff Publishers, 2006, p.99.

Stephen Schwebel, 'What Weight to Conquest?' *American Journal of International Law*, Vol.64, Issue 2, 1970, p.346.

The Balfour Declaration, November 1917. http://www.balfourproject.org/wp-content/uploads/2016/11/The-Balfour-Declaration.pdf (retrieved 06.05.2021).

The Covenant of the League of Nations, art.22. https://avalon.law.yale.edu/20th_century/leagcov.asp#art22 (retrieved 06.05.2021).

UN Charter, 1945, art.51. https://treaties.un.org/doc/publication/ctc/uncharter.pdf (retrieved 06.05.2021).

UNGA Resolution 10/19, Status of Jerusalem, Tenth Emergency Session, A/RES/ES-10/19, 22.12.2017, parag.4. https://undocs.org/en/A/RES/ES-10/19 (retrieved 06.05.2021).

UNGA Resolution 181, 29 November 1947, p.132 et. seq. https://undocs.org/A/RES/181(II) (retrieved 06.05.2021).

UNGA Resolution 194(III), 11 December 1948, p.23, parag.7-8. https://undocs.org/A/RES/194%20(III) (retrieved 06.05.2021).

UNGA Resolution 303, 9 December 1949, parag.1-2. https://unispal.un.org/DPA/DPR/unispal.nsf/0/2669D6828A262EDB852560E50069738A (retrieved 06.05.2021).

UNGA Resolution 377(V), 3 November 1950. https://unispal.un.org/DPA/DPR/unispal.nsf/0/55C2B84DA9E0052B05256554005726C6 (retrieved 06.05.2021).

UNSC Resolution 2334, 23 December 2016, parag.3-4-5. http://unscr.com/en/resolutions/doc/2334 (retrieved 06.05.2021).

UNSC Resolution 476, 30 June 1980, parag.7.3-7.5. http://unscr.com/en/resolutions/doc/476 (retrieved 06.05.2021).

UNSC Resolution 478, 20 August 1980, parag.5.3. http://unscr.com/en/resolutions/doc/478 (retrieved 06.05.2021).

Victor Kattan, 'Why U.S. Recognition of Jerusalem Could Be Contrary to International Law', *Journal of Palestine Studies*, Vol. 47, No. 3, 2018, p.85.

Western Sahara, Advisory Opinion of ICJ, 16 October 1975, parag.81.