EMPLOYMENT AND RESIDENCE RIGHTS OF THE EUROPEAN UNION AND TURKISH CITIZENS WITHIN THE ASSOCIATION LAW*

Ortaklık Hukuku Kapsamında Avrupa Birliği ve Türk Vatandaşlarının Çalışma ve Oturma Hakları

Ebru AKDUMAN**

L&IR
Year: 16, Issue: 30
July 2025
pp.1-38

Article Information

Submitted : *18.10.2024*
Revision Requested : *02.01.2025*
Last Version Received : *16.01.2025*
Accepted : *22.04.2025*

Article Type

Research Article

Abstract

The third country citizens who want to work in an European Union (EU) Member State should comply with the necessities of the host country's immigration and employment regime. However, as discussed in our study the EU-Türkiye association law provide mutual rights and opportunities with regard to the employment of the Turkish citizens in the EU Member States and the EU citizens in Türkiye. The association law consists of the Ankara Agreement, the Additional Protocol, and the decisions of the Association Council. In principle, the favorable regulations of the association law take precedence of the national legislation. However, the Association Council Decision #1/80 applies only to the Turkish citizens who have already started working in a Member State legally and to their family members. In other words, the Decision does not regulate the work permits but, regulates the extension of an existing permission. Although the association law does not entitle Turkish citizens move to an EU Member State freely, it provides advantage to the Turkish migrant workers and their families when compared with many third country citizens. The *standstill* principle grants some protection not only for workers but, also self-employed. Accordingly, after the entry into force of the association law a Member State can only amend its respective legislation in favor of the Turkish citizens.

Keywords: EU and Türkiye association law, freedom of movement for workers, freedom of establishment, freedom to provide services, Turkish foreigners law.

---

* There is no requirement of Ethics Committee Approval for this study.

** Asst. Prof. Dr., İzmir University of Economics, Faculty of Law, Department of Private International Law, e-mail: ebru.akduman@ieu.edu.tr, ORCID ID: 0000-0002-6462-7887.

Özet

Avrupa Birliği (AB)'ne üye bir ülkede çalışmak isteyen üçüncü ülke vatandaşları ev sahibi ülkenin göç ve istihdam politikasının gereklerini yerine getirmek zorundadır. Diğer taraftan, çalışmamızda tartıştığımız üzere AB-Türkiye ortaklık hukuku Türk vatandaşlarının AB'de çalışması ve AB vatandaşlarının Türkiye'de çalışması hakkında karşılıklı hak ve imkanlar sunmaktadır. Ortaklık hukuku; Ankara Anlaşması, Katma Protokol ve Ortaklık Konseyi kararlarını içermektedir. Prensip olarak, ortaklık hukukunun lehe hükümleri milli hukuklara öncelikli olarak uygulanmaktadır. Ancak, 1/80 sayılı Ortaklık Konseyi Kararı sadece bir Üye Ülkede yasal olarak çalışmakta olan Türk vatandaşları ile ailelerine uygulanmaktadır. Diğer deyişle, Karar çalışma izinlerini değil çalışma izinlerinin uzatılması halini düzenlemektedir. Ortaklık hukuku, Türk vatandaşlarına serbestçe bir üye devlete yerleşme olanağı sunmamakla beraber Türk göçmen işçilere ve ailelerine birçok üçüncü dünya ülkesine kıyasla avantaj sağlamaktadır. Mevcut durumun korunması (*standstill*) ilkesi ise sadece işçilere değil serbest çalışanlara da koruma sağlamaktadır. Buna göre, ortaklık hukukunun yürürlüğe girmesinden sonra bir Üye Ülke, ilgili mevzuatını sadece Türk vatandaşlarının lehine olarak değiştirebilmektedir.

Anahtar kelimeler: AB ve Türkiye ortaklık hukuku, işçilerin serbest dolaşımı, yerleşim serbestisi, hizmet sunma serbestisi, Türk yabancılar hukuku.

INTRODUCTION

Türkiye is a candidate country and strategically important country for the EU in essential areas of common interest, such as migration, counterterrorism, economy, trade, energy and transport. Its relationship with the EU is dated back to many years. It was one of the first countries, in 1959, which wanted to establish a close cooperation with the "European Economic Community (EEC)" at that time. This cooperation was realized in the framework of an association agreement, known as the "Ankara Agreement"[1] which was signed on 12.09.1963 and entered into force on 01.12.1964. An important element in this association was establishing a customs union so that Türkiye could trade goods and agricultural products with the EEC countries without restrictions.

The aim of the Ankara Agreement was to achieve continuous improvement in living conditions in the EEC and Türkiye through accelerated economic progress and the harmonious expansion of trade, and to reduce the disparity between the Turkish economy and the Community[2]. The Ankara Agreement, apart from aiming to progressively establish a customs union between the EEC

1 [1973] OJ C 113/1; RG 17.11.1964/11858.

2 Serçin Kutucu, *Avrupa Birliği'nde Üçüncü Devlet Vatandaşlarının Serbest Dolaşımı* (Seçkin Yayıncılık 2014) 73.

and Türkiye, also included provisions regarding the freedom of movement for economically active persons. In other words, the Ankara Agreement envisioned creating a customs union but, went beyond a mere free trade agreement and mentioned movement of persons[3].

Türkiye applied for the EU membership on 14.04.1987 and has embarked on a long and arduous journey in order to attain this objective. The Helsinki European Council of December 1999 granted the status of candidate country to Türkiye on the basis of equal criteria with the other accession countries and stated that Türkiye was destined to join the EU.

From 2000 onwards, Türkiye has accelerated its efforts to fulfill the Copenhagen Criteria in order to get a date for starting the accession negotiations from the EU. As agreed at the European Council in December 2004, accession negotiations have been launched on 03.10.2005 with the adoption of the Negotiating Framework by the Council. The aim of the accession negotiations is to enable the accession country to align its legislation and practices with the EU's legislation *(acquis communautaire)* progressively during the pre-accession period.

The main obstacle to the progress in the accession negotiations of Türkiye relates to the Cyprus issues. The extension of the Ankara Agreement to the countries who joined the Union in the 2004 enlargement proved to be problematic due to one of those newcomers being Cyprus. On 29.07.2005, the "Additional Protocol extending the Ankara Agreement to the new Member States that accede to the EU in 2004"[4] was concluded by exchange of letters among Türkiye, the EU Presidency and the Commission. An official declaration was made by Türkiye at the time of signature and in the declaration, it was explicitly stated that Türkiye, by signing the Additional Protocol of 2005, did not recognize the Republic of Cyprus by any means[5]. The EU stipulates that Türkiye has to fulfill its obligation to ensure full and non-discriminatory implementation of the association law to all the EU Member States including the Republic of Cyprus.

The association law examined in the first part of our study is not only applied to the Turkish citizens living in the EU but, also to the EU citizens living in Türkiye (reciprocal effect) and provides convenience in their employment as examined in the second part of our study. In the first part, Turkish citizens' rights of employment, establishment and provision of services in the European Union (EU) within the scope of the EU-Türkiye association law are analyzed in the

---

3 Gözde Kaya, "Free Movement of Turkish Citizens after the Soysal Judgment" in Cengiz Fırat and Lars Hoffmann (eds.), *Turkey and the European Union: Facing New Challenges and Opportunities* (Routledge 2014)121, 121; Kutucu (n 2) 59; Arif Köktaş, *Avrupa Birliği'nde İşçilerin Serbest Dolaşım Hakkı ve Türk Vatandaşlarının Durumu* (Nobel Yayın 1999) 451.

4 [2005] OJ L 254/58.

5 https://www.mfa.gov.tr/ek-protokol-ve-deklarasyon-metni.tr.mfa (date of access: 12.07.2024).

light of the respective European Court of Justice (ECJ) decisions. In the second part, the reciprocal rights of the EU citizens in Türkiye are examined and the provisions concerning the EU citizens in the Turkish foreigners law are provided.

I. EU-TÜRKİYE ASSOCIATION LAW

A. ANKARA AGREEMENT AND ADDITIONAL PROTOCOL OF 1970

The relations between Türkiye and the EEC have initiated by signing of the Ankara Agreement. The "Additional Protocol"[6], which was signed on 13.11.1970 and entered into force on 01.01.1973, constitutes the integral part of this Agreement. They are both accepted as the primary sources of the association law[7]. This body of law, provides reciprocal rights for both Turkish nationals and nationals of the EU Member States, including employment related rights and freedoms[8].

The association agreements are binding both on the Member States and the Union and they create obligations for all the parties. Within the legal order of the Union, association agreements constitute *sui generis* international agreements which signify less than accesion to the Union but, much more than a mere trade agreement[9]. Ankara Agreement, establishes some sort of preliminary or preparatory stage for membership of Türkiye to the European integration. It is almost a "pre-accession agreement" or a "pre-accession association"[10].

Arts. 12, 13 and 14 of the Ankara Agreement are related to the freedom of movement for workers, freedom of establishment and freedom to provide services. The Ankara Agreement's provisions refer to Arts. 48, 49 and 50 of the EEC Agreement [now Arts. 45, 46 and 47 of the Treaty on the Functioning of the EU (TFEU)] in realization of the freedom of movement for workers; Arts. 55, 56 and 58 to 65 of the EEC Agreement (now Arts. 51, 52 and 55 to 62 of the TFEU) in realization of the freedom of establishment and Arts. 52 to 56 and 58 of the EEC Agreement (now Arts. 49 to 52 and 54 of the TFEU) with regard to the freedom to provide services.

---

6 [1973] OJ C 113/17; RG 03.08.1971/13915.

7 İlke Göçmen, *Türkiye - Avrupa Birliği İlişkileri: Hukuki Boyut* (Ankara Üniversitesi Yayınları 2022) 71.

8 Bülent Çiçekli, "Rights of EU Citizens in Turkey" in *Turkey-EC Association Law: Developments Since Ankara Agreement 1963 (The Rights of EU Citizens in Turkey and of Turkish Citizens in the EU Countries)* (Legal Yayınevi 2010) 77, 77.

9 Sanem Baykal, "Turkey-EC Association Laww and Recent Developments Regarding the Freedom of Establishment and Free Movement of Services" in *Turkey-EC Association Law: Developments Since Ankara Agreement 1963 (The Rights of EU Citizens in Turkey and of Turkish Citizens in the EU Countries)* (Legal Yayınevi 2010) 11, 12.

10 Ibid 12-13.

Art. 2 of the Ankara Agreement envisioned three phases for Türkiye's gradual accession to the EU Internal Market through the establishment of a customs union:

- Preparatory phase (1964 - 1970)
- Transition phase (1973 - 1995)
- Completion phase (1996 to full economic integration)

Although the time periods foreseen in Art. 4 (2)[11] of the Ankara Agreement and Art. 36[12] and Art. 61[13] of its Additional Protocol of 1970 have elapsed long time ago, the full accession of Türkiye to the Single Market has not been achieved yet due to political and economic obstacles[14]. While the goods are able to move freely under the customs union rules, their producers do not enjoy the same right. As a result, an unfair competition takes place between the Turkish producers and their European competitors, since the visa regime does not treat them equally but, puts the Turkish producers at a disadvantage in terms of establishing direct business links with their European counterparts[15]. This will, of course, have an adverse effect on the full implementation and proper functioning of the Customs Union[16].

---

11 "*This transitional stage shall last not more than twelve years, subject to such exceptions as may be made by mutual agreement. The exceptions must not impede the final establishment of the customs union within a reasonable period.*"

12 "*Freedom of movement for workers between the the Member States of the Community and Turkey shall be secured by progressive stages in accordance with the principles set out in Article 12 of the Agreement of Association between the end of the twelfth and the twenty-second year after the entry into force of that Agreement.*
The Council of Association shall decide on the rules necessary to that end."

13 "*Without prejudice to the special provisions of this Protocol, the transitional stage shall be twelve years.*"

14 Aysel Çelikel and Günseli Öztekin Gelgel, *Yabancılar Hukuku* (27th edn, Beta Basım 2022) 282; Ayşe Burcu Kaplan, *Avrupa Birliği'nde Türk Vatandaşlarının Serbest Dolaşımı* (Beta Basım 2008) 20; Baykal (n 9) 13; Burak Erdenir, "Vize" in Belgin Akçay and Sinem Akgül Açıkmeşe (eds.), *Yarım Asrın Ardından Türkiye-Avrupa Birliği İlişkileri* (Turhan Kitabevi 2013) 471, 480; Çınar Özen and Hacı Can, *Türkiye-Avrupa Topluluğu Ortaklık Hukuku* (Gazi Kitabevi 2005) 258; Hediye Ergin, *Türk Hukukunda Yabancıların Çalışma İzinleri* (Beta Basım 2017) 49; İlke Göçmen, "Türkiye-Avrupa Birliği (AB) Ortaklık Hukukunun Hukuki Çerçevesi" in Gülüm Bayraktaroğlu Özçelik and Elçin Aktan (eds.), *Avrupa ve Uluslararası Göç Hukuku* (Yetkin Yayınları 2022) 269, 276; İlke Göçmen, "Türkiye ve Avrupa Birliği Arasındaki Vize Meselesi" in Işıl Özkan and Kazım Sedat Sirmen (eds.), *Uluslararası Hukukta Göç ve Vatandaşlık* (Yetkin Yayınları 2022) 57. Kaya (n 3) 121; Kutucu (n 2) 59.

15 Narin Tezcan İdriz, "Free Movement of Persons between Turkey and the EU: To Move or not to Move? The Response of the Judiciary" (2009) 46 (5) Common Market Law Review 1621, 1631.

16 Bülent Çiçekli, "The Rights of Turkish Migrants in Europe under International Law and EU Law" (1999) 33 (2) International Migration Review 300, 311, 331.

Many Turkish citizens went to the EU Member States within the scope of the bilateral agreements entered into in the 1960s before signing of the Ankara Agreement but, their rights to continue to work in that EU Member State were secured by the association law[17]. Although the association law does not entitle Turkish citizens move to a EU Member State freely, it provides advantage to the Turkish migrant workers and their families when compared with many third country citizens as discussed in *Eroğlu*[18] case [19].

Ms. Eroğlu is a Turkish national who entered into Germany in April 1980 in order to carry out her studies in a German university. Although her father had been living there and working lawfully without interruption for a long time, her entry was not under family reunification rules. During her studies, she was granted several residence permits until October 1989, all limited to one year and marked "valid only for the purposes of study". Following her studies, she was also granted corresponding work permits but her last application of 29.02.1992, for an extension of her residence permit to allow her to continue her activity with her last employer was rejected. Although Ms. Eroğlu was not eligible for family reunification, she satisfied the conditions set out in Art. 7 (2) of the Decision #1/80 for extension of her work permit. Therefore, the European Court of Justice (ECJ) rendered a favoring judgment.

B. ASSOCIATION COUNCIL DECISIONS

Ankara Agreement created a flexible model which indicated the general direction and nature of the EU-Türkiye relations but, left the details to the decisions of the Council of Association[20]. The Association Council decisions[21] constitute the secondary sources of the association law[22]. The Association Council has determined the principles of the freedom of movement for Turkish migrant workers in the EU in its "Decision #1/80 of 19 September 1980 amending the Decision #2/76".

---

17 Köktaş (n 3) 94-95.

18 Case C-355/93 *Hayriye Eroglu v Land Baden-Württemberg,* ECR [1994] I-05113, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61993CJ0355 (date of access: 13.08.2024).

19 Ceyda Ümit, *Avrupa Birliği Hukukunda Üçüncü Ülke Vatandaşları* (Seçkin Yayıncılık 2013) 271; Çiçekli (n 16) 316; Erdenir (n 14) 480, 487; Göçmen, *Avrupa ve Uluslararası Göç Hukuku* (n 14) 280; Kutucu (n 2) 59; Rıdvan Karluk, *Avrupa Birliği Türkiye İlişkileri: Bir Çıkmaz Sokak* (Beta Basım, 2013) 162-163; Savaş Bozbel, "Türk Vatandaşlarının Avrupa Birliği Ortaklık Konseyi Kararlarından Doğan Çalışma ve Serbest Dolaşım Hakları" (2004) VIII (1-2) AÜEHFD 351, 360.

20 Baykal (n 9) 14.

21 https://www.ab.gov.tr/Files/Ab_Iliskileri/Okk_Tur.Pdf (date of access: 07.08.2024).

22 Göçmen (n 7) 71.

Art. 6 of the Decision #1/80 mainly regulates the extension of the work permit duration of the foreign workers. According to Art. 6 (1); "*The foreign workers who are legally employed in an EU Member State and who are duly registered as belonging to the labor force there have the following rights:*

- After one year legal employment, they are entitled to a renewal of the work permit for the same employer if a job is available.

- After three years legal employment, they may change employers and respond to any other offer of employment for the same occupation subject to the priority to be given to the EU citizens.

- After four years legal employment, they enjoy free access to any paid employment in that EU Member State."

Turkish migrant workers and their families cannot rely on the Agreement to gain entry to the EU labor market or that of any Member State. However, it does provide certain rights within a Member State to those Turkish workers and their families who have been admitted under national regulations to live and work in that state[23]. According to Art. 7; "*The members of the family of a foreign worker duly registered as belonging to the labor force of a Member State, are authorized to join him and they shall be entitled to;*

- Respond to any offer of employment (priority given to the EU citizens) after they have been legally resident for at least three years in that Member State.

- Enjoy free access to any paid employment of their choice provided they have been legally resident there for at least five years.

Children of the foreign workers who have completed a course of vocational training in the host country may respond to any offer of employment there, irrespective of the length of time they have been resident in that Member State, provided one of their parents has been legally employed in the Member State concerned for at least three years."

In the second paragraph of Art. 7, the children of the foreign workers are given privilege, and they are not required to reside or work in an EU Member State before they are entitled to their rights. This does not preclude them to use their rights according to the first paragraph[24].

Turkish nationals should be given priority over other non-EU nationals (after EU nationals) in regard to eligibility for employment in the EU Member States. This is clearly provided in Art. 8[25] of the Decision #1/80.

---

23 Çiçekli (n 16) 331.

24 Özen and Can (n 14) 251.

25 "*1. Should it not be possible in the Community to meet an offer of employment by calling on the labor available on the employment market of the Member States and should the Member States, within the framework of their provisions laid down by law, regulation or administrative*

The "Decision #3/80 of 19.09.1980 on the activation of the Association Agreement and the Additional Protocol" covers solely the issues related to social security. The "Decision #1/95 of 22.12.1995 on the Customs Union" only refers to the liberalization of the public procurement.

The provisions of the Ankara Agreement does not entitle the Turkish citizens with full freedom of movement like the EU citizens. The Turkish citizens are not entitled to move freely throughout the EU but, can benefit from certain rights in the host Member State. The ECJ confirmed this by its decisions in various cases including *Birden*[26] and *Tetik*[27].

Birden case is about a Turkish citizen who was permitted to enter Germany as a result of his marriage with a German citizen. Mr. Birden initially received social assistance and was unemployed for some time. He entered into a contract of employment. After working for a year, that employment relationship was subsequently extended. But, the competent authorities refused to extend Mr. Birden's permit to reside in Germany, on the grounds that he is divorced and his position is temporary since the sole purpose of his contracts was to enable a limited group of persons, in this case recipients of social assistance, to integrate into working life and funded by the public authorities. The ECJ gave a favoring judgment stating that a Turkish national who has lawfully pursued a genuine and effective economic activity in a Member State under an unconditional work permit for an uninterrupted period of more than one year for the same employer, in return for which he received the usual remuneration, is a worker duly registered as belonging to the labor force of that Member State and in legal employment there within the meaning of Art. 6 (1) and therefore, entitled to extension of his permits.

Tetik case is about a Turkish worker who left his job and seek new employment after being employed as a sailor in Germany for a period in excess of four years. The ECJ decided that within Art. 6 (1) of the Decision #1/80, the right of Turkish workers to free access to the labor market after four years lawful employment includes the ones who have voluntarily left their employment. The ECJ decided that a Turkish worker must be able, for a reasonable period, to seek effectively new employment and must have corresponding right of residence

---

action, decide to authorize a call on workers who are not nationals of a Member State of the Community in order to meet the offer of employment, they shall endeavour in so doing to accord priority to Turkish workers. 2. The employment services of the Member State shall endeavour to fill vacant positions which they have registered and which the duly registered Community labor force has not been able to fill with Turkish workers who are registered as unemployed and legally resident in the territory of that Member State."

26 Case C-1/97 *Mehmet Birden v Stadtgemeinde Bremen,* ECR [1998] I-07747, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61997CJ0001 (date of access: 08.07.2024).

27 Case C-171/95 *Recep Tetik v Land Berlin,* ECR [1997] I-00329, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61995CJ0171 (date of access: 08.07.2024).

during that period.

The national laws of the Member States regulate the entry, residence and first employment of the third country citizens in that country. The Decision #1/80 applies only to the Turkish citizens who have already started working in a Member State legally and to their family members. In other words, the Decision does not regulate the work permits but, regulates the extension of an existing permission[28]. With regard to the matters within its scope, the provisions of the Decision #1/80 take precedence of national legislation[29]. However, according to Art. 14 (2) of the Decision, if any, the favorable provisions of national laws or bilateral agreements between the Member States and Türkiye shall apply.

The Decision #1/80 does not entitle the family reunification right and therefore, entry and residence of family members are also subject to national laws as stated in *Kadıman*[30] and *Eyüp*[31] cases[32]. The "Council Directive 2003/86/EC of 22.09.2003 on the right to family reunification (Reunification Directive)"[33] filled this gap and the family of the Turkish workers may claim family reunification grounding on this Directive[34].

Residence right is not regulated under the association law but, acknowledged as a component of the employment right by the decisions of the ECJ in various

---

28 Andrea Ott, "The Savas Case - Analogies between Turkish Self-Employed and Workers?" (2000) 2 European Journal of Migration and Law 445, 457; Baykal (n 9) 24; Bozbel (n 19) 355-356; Çiçekli (n 16) 318, 320-321; Erdenir (n 14) 480; Göçmen, *Uluslararası Hukukta Göç ve Vatandaşlık* (n 14) 57; Kaplan (n 14) 21; Fiona Kinsmann and Nuray Ekşi, *Avrupa Birliği'nin Kişilerin Serbest Dolaşımı Müktesebatı ve Türkiye'nin Uyumu* (İktisadi Kalkınma Vakfı 2002) 28; Özen and Can (n 14) 239, 244; Ümit (n 19) 269.

29 Bozbel (n 19) 357-358; Bülent Çiçekli, "Türk-AB Ortaklık Hukuku Çerçevesinde Türkiye'deki AB Vatandaşlarının Çalışma ve İkamet Hakları Üzerine Bir Değerlendirme" (1999) 19 (1-2) Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni 213, 214-215, 221, 225; Bülent Çiçekli, *Yabancılar ve Mülteci Hukuku* (6th edn, Seçkin Yayıncılık 2016) 128-129; Bülent Çiçekli, *Yabancıların Çalışma İzinleri* (Türkiye İşveren Sendikaları Konfederasyonu Yayınları 2004) 65-68; Ergin (n 14) 48; Hamit Tiryaki, *Yabancıların Türkiye'de Çalışma İzinleri* (2nd edn, Bilge Yayınevi 2016) 106; Kaplan (n 14) 19, 21.

30 Case C-351/95 *Selma Kadiman v Freistaat Bayern,* ECR [1997] I-02133, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61995CJ0351 (date of access: 08.07.2024).

31 Case C-65/98 *Safet Eyüp v Landesgeschäftsstelle des Arbeitsmarktservice Vorarlberg,* ECR [2000] I-04747, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61998CJ0065 (date of access: 08.07.2024).

32 Özen and Can (n 14) 244-245.

33 [2003] OJ L 251/12.

34 Ümit (n 19) 234.

cases including *Sevince*[35], *Kuş*[36] and *Günaydın*[37]. When a Turkish migrant worker leaves working life permanently, the residence right expires as well[38]. In *Bozkurt*[39] case, the ECJ ruled that the rights of the Turkish migrant workers, who are permanently incapacitated for work, to remain in an EU Member State are governed exclusively by the national laws of the host state concerned. However, according to the "Council Directive 2003/109/EC of 25.11.2003 concerning the status of third-country nationals who are long-term residents (Directive on Long-term Residents)"[40], long term-residents may remain in the host country if their working life expires due to situations like retirement or incapacity to work. According to Art. 4 (1) of the Directive, Member States shall grant long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years.

According to Art. 14 (1) of the Decision #1/80, the rights regulated under the association law can only be restricted on grounds of public policy, public security and public health parallel to Art. 45 (3) of the TFEU in compliance with the proportionality principle[41].

These detailed rights cannot be transposed automatically on the self-employed Turkish citizens. The national laws applicable to self-employment enumerate other criteria for setting up an independent business than working as a dependent for a company. In other words, the national laws of the Member States regulate the entry and residence of the self employed third country citizens in that country but, in compliance with the *standstill* principle[42].

Since services and establishment rights have a broader scope and the countries are sensitive with this respect, it is hard to achieve freedom of movement on these before full membership[43]. Freedom of establishment grants the right to

---

35 Case C-192/89 *S. Z. Sevince v Staatssecretaris van Justitie,* ECR [1990] I-03461, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61989CJ0192 (date of access: 08.07.2024).

36 Case C-237/91 *Kazim Kus v Landeshauptstadt Wiesbaden,* ECR [1992] I-06781, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61991CJ0237 (date of access: 08.07.2024).

37 Case C-36/96 *Faik Günaydin, Hatice Günaydin, Günes Günaydin and Seda Günaydin v Freistaat Bayern,* ECR [1997] I-05143, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61996CJ0036 (date of access: 08.07.2024).

38 Özen and Can (n 14) 257; Ümit (n 19) 274-275.

39 Case C-434/93 *Ahmet Bozkurt v Staatssecretaris van Justitie,* ECR [1995] I-01475, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61993CJ0434 (date of access: 13.08.2024).

40 [2004] OJ L 016/44.

41 Göçmen, *Avrupa ve Uluslararası Göç Hukuku* (n 14) 279.

42 Göçmen, *Uluslararası Hukukta Göç ve Vatandaşlık* (n 14) 58; Ott (n 28) 454.

43 Anonymous, *Avrupa Birliği'nin Hizmetlerin Serbest Dolaşımı ve Bankacılık Müktesebatı ve*

do business with no remuneration, to establish and govern enterprises and partnerships in another Member State under the same conditions as its own citizens. Freedom to provide services comprises industrial, commercial, craftsmen and self-employed activities, normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons. The personal and material scope of these freedoms are set by the ECJ decisions[44].

Art. 41 (2) of the Additional Protocol of 1970 states that; "*The Association Council shall, in accordance with the principles set out in Arts. 13 and 14 of the Ankara Agreement, determine the timetable and rules for the progressive abolition by the Contracting Parties, between themselves, of restrictions on freedom of establishment and on freedom to provide services.*" Although 51 years passed upon entrance into force of the Additional Protocol of 1970, no decision was taken by the Association Council regarding the freedom of establishment and to provide services[45]. In this sense, the Turkish citizens are likely to feel that they are subjected to discrimination, since Türkiye is the only EU candidate country whose citizens still need a visa to travel to the EU[46].

C. OTHER DOCUMENTS

Upon acceptance of Türkiye as a candidate country, apart from the Ankara Agreement, the Additional Protocols and the Association Council Decisions, other documents, including "Negotiating Framework of 2005", "Accession Partnership Documents of 2001, 2003, 2006 and 2008", "National Programmes of 2001, 2003 and 2008", "National Action Plans of 2016-2019 and 2021-2023", "Türkiye-EU Common Action Plan of 2015", "Türkiye-EU Summit Statements of 2015 and 2016", "Statement of the EU Heads of State or Government of 2016", yearly country reports and enlargement strategy papers, were issued[47].

Negotiating Framework regulates the principles, substance and procedures of the negotiations to be realized for accession to the EU. Accession Partnership Documents set out the areas in which the candidate country needs to make progress in the short and medium term, based on the accession criteria. National Programmes show the obligations of the candidate country for adoption of the *acquis*. Similarly, National Action Plans are the main roadmaps in the accession process and reveal steps for the period covered in respect to legislative alignment,

Türkiye'nin Uyumu (İktisadi Kalkınma Vakfı 2004) 76; Kaya, (n 3) 122.

44 Ender Bozkurt and Arif Köktaş, *Avrupa Birliği Hukuku* (9th edn, Legem Yayınları 2024) 464.

45 Erdenir (n 14) 480; Karluk (n 19) 133, 167; Kutucu (n 2) 66; Özen and Can (n 14) 260.

46 Kaya (n 3) 122.

47 https://www.ab.gov.tr/main-documents_113_en.html (date of access: 09.07.2024).

as well as institutional and administrative measures. The EU-Turkey Summits held and the Joint EU-Turkey Action Plans activated first in 2015 to strenghten the dialogues and render joint decisions. Country reports are the annual reports prepared by the European Commission evaluating the progress achieved by the candidate countries with respect to the Copenhagen criteria. Similarly, enlargement strategy papers are the reports on progress towards accession by each of the candidate countries. In summary, all this documents are required to accelerate and monitor the course towards accession.

D. NON-DISCRIMINATION PRINCIPLE

The Turkish citizens working legally in an EU Member State are also entitled to the same working conditions as the citizens of that country.

According to Art. 9 of the Ankara Agreement; "*The Contracting Parties recognize that within the scope of this Agreement and without prejudice to any special provisions which may be laid down pursuant to Article 8, any discrimination on grounds of nationality shall be prohibited in accordance with the principle laid down in Article 7 of the Treaty Establishing the Community.*"

Under Art. 37 of the Additional Protocol of 1970; "*As regards conditions of work and remuneration, the rules which each Member State applies to workers of Turkish nationality employed in the Community shall not discriminate on grounds of nationality between such workers and workers who are nationals of other Member States of the Community.*"

Art. 37 of the Additional Protocol of 1970 prohibits discrimination only for the Turkish citizens working in the EU but, the EU citizens may rely on Art. 9 of the Ankara Agreement which contains a general ban on discrimination on grounds of nationality[48].

Non-discrimination principle is also regulated by the Decision #1/80. According to Art. 10;

"*1. The Member States of the Community shall as regards remuneration and other conditions of work grant Turkish workers duly registered as belonging to their labor forces treatment involving no discrimination on the basis of nationality between them and Community workers.*

2. Subject to the application of Articles 6 and 7, the Turkish workers referred to in paragraph 1 and members of their families shall be entitled, on the same footing as Community workers, to assistance from the employment services in their search for employment."

---

[48] İlke Göçmen and Orhan Ersun Civan, "The Principle of Non-Discrimination on Grounds of Nationality with regard to Turkish Workers in the European Union and Union Workers in Turkey" in Belgin Akçay and Şebnem Akipek (eds.), *Turkey's Integration into the European Union* (Lexington Books 2013) 95, 110-111.

In the case of *Commission v. Netherlands*[49], the ECJ found a national measure, contrary to the general rule of non-discrimination laid down in Art. 9 of the Ankara Agreement. It is therefore clear that the ECJ considers this provision directly effective. Besides, Art. 9 of the Ankara Agreement contains a clear and precise obligation (prohibition of discrimination on the grounds of nationality) which is not subject, in its implementation or effects, to the adoption of any subsequent measure[50]. In its preliminary ruling for the *Verfassungsgerichtshof (Austria)* [51], the ECJ interpreted Art. 10 (1) of the Decision #1/80 having direct effect in the Member States. Similarly the ECJ ruled in *Real Sociedad de Fútbol SAD and Nihat Kahveci*[52] case that Art. 10 (1) of the Decision #1/80, which repeats the rule laid down in Art. 37 of the Additional Protocol of 1970, lays down in clear, precise and unconditional terms a prohibition precluding the Member States from discriminating, on the basis of nationality, against Turkish migrant workers duly registered as belonging to their labor force as regards remuneration and other conditions of work.

E. STAND-STILL PRINCIPLE

Standstill principle means that a Member State can only amend its respective legislation in favor of the Turkish citizens. Otherwise, the Turkish citizens can demand the application of the more favorable provisions of the national laws existed at the date the instruments of the association law entered into force[53].

Art. 13[54] of the Decision #1/80, precludes the Member States from adopting new restrictive measures to the employment of the foreign workers already obtained residence and work permits. The *standstill* clause is also foreseen

---

49 Case C-508/10 *European Commission v Kingdom of the Netherlands,* [2012] OJ C 174/7, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010CJ0508 (date of access: 08.07.2024).

50 İlke Göçmen, "The Freedom of Establishment and to Provide Services: A Comparison of the Freedoms in European Union Law and Turkey-EU Association Law" (2011) 8 (1) Ankara Law Review 67, 86-87.

51 Case C-171/01 *Wählergruppe Gemeinsam Zajedno/Birlikte Alternative und Grüne GewerkschafterInnen/UG, and Bundesminister für Wirtschaft und Arbeit and Others,* ECR [2003] I-04301, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:C2003/146/15 (date of access: 08.07.2024).

52 Case C-152/08 *Real Sociedad de Fútbol SAD and Nihat Kahveci v Consejo Superior de Deportes and Real Federación Española de Fútbol,* ECR [2008] I-06291, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62008CB0152 (date of access: 08.07.2024).

53 Kutucu (n 2) 63-64.

54 "*The Member States of the Community and Turkey may not introduce new restrictions on the conditions of access to employment applicable to workers and members of their families legally resident and employed in their respective territories.*"

for freedom of establishment and to provide services under Art. 41 (1)[55] of the Additional Protocol of 1970.

The rights stemmed from the *standstill* clause were confirmed by some decisions of the ECJ namely, *T. Şahin*[56]*, F. Toprak and I. Oğuz*[57]*, C. Demir*[58] regarding the freedom of movement for workers and *Savaş*[59]*, Abatay and Şahin*[60]*, Tüm and Darı*[61]*, Soysal and Savatlı*[62]*, Tural Oğuz*[63]*, Leyla Ecem Demirkan*[64] regarding the freedom of establisment and to provide services. Accordingly, the Member States cannot bring heavier restrictions like, visa requirements and additional custom duties, after entry into force of the related documents of the association law. Otherwise, they impede the rights of Turkish citizens and therefore, act against the Association Agreement[65]. Even so, visa requirements for Turkish citizens have been reintroduced in some Member States such as the Netherlands, Belgium, France and Germany in 1980 in accordance with the "European Agreement on

---

55 "*The Contracting Parties refrain from bringing new restrictions on the freedom of establishment and freedom to provide services of their citizens.*"

56 Case C-242/06 *Minister voor Vreemdelingenzaken en Integratie v T. Sahin,* ECR [2009] I-08465, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62006CA0242 (date of access: 06.08.2024).

57 Joint Cases C-300/09 and C-301-09 *Staatssecretaris van Justitie v F. Toprak and I. Oguz,* ECR [2010] I-12845, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62009CJ0300 (date of access: 06.08.2024).

58 Case C-225/12 *C. Demir v Staatssecretaris van Justitie,* [2014] OJ C 9/9, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62012CA0225 (date of access: 06.08.2024).

59 Case C-37/98 *The Queen v Secretary of State for the Home Department, ex parte Abdulnasir Savas,* ECR [2000] I-02927, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61998CJ0037 (date of access: 08.07.2024).

60 Joint Cases C-317/01 and C-369/01 *Eran Abatay and Others and Nadi Sahin v Bundesanstalt für Arbeit,* ECR [2003] I-12301, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62001CJ0317 (date of access: 08.07.2024).

61 Case C-16/05 *The Queen, Veli Tum and Mehmet Dari v Secretary of State for the Home Department,* ECR [2007] I-07415, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62005CJ0016 (date of access: 08.07.2024).

62 Case C-228/06 *Mehmet Soysal and Ibrahim Savatli v Bundesrepublik Deutschland,* ECR [2009] I-01031, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62006CJ0228&qid=1720455511118 (date of access: 08.07.2024).

63 Case C-186/10 *Tural Oguz v Secretary of State for the Home Department,* ECR [2011] I-06957, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62010CA0186 (date of access: 08.07.2024).

64 Case C-221/11 *Leyla Ecem Demirkan v Federal Republic of Germany,* [2011] OJ C 232/15, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62011CA0221 (date of access: 08.07.2024).

65 Kutucu (n 2) 65, 67-68.

Regulations governing the movement of persons between the Member States of the Council of Europe"[66] and the situation worsened for the Turkish citizens[67].

In *T. Şahin* case, the ECJ determined that the standstill clause in Art. 13 of the Decision #1/80 is of the same kind as that contained in Art. 41 (1) of the Additional Protocol of 1970 and that the objective pursued by those two clauses is identical and both should be interpreted equally.

In 2000 the ECJ, in Savaş case for the first time dealt with the establishment provisions. The case is about a couple who entered the UK with tourist visa. Although their entry visa carried an express condition prohibiting them from taking employment or engaging in any business or profession they started to operate a shirt factory. The Secretary of State refused the application for leave to remain and informed the couple of the intention to serve a deportation order to them. The Court reinforced that the *standstill* clause implies that Art. 41 (1) of the Additional Protocol of 1970 precludes a Member State from adopting any new measure having the object or effect of making the establishment and, as a corollary, the residence of a Turkish national in its territory subject to stricter conditions than those which applied at the time when the Additional Protocol of 1970 entered into force with regard to the Member State concerned and it is for the national court to determine whether the applied domestic rules are worsening the position of the applicant. In other words, the *standstill* clause is not in itself capable of conferring upon a Turkish national the benefit of the right of establishment and the right of residence.

In *Demirkan* case, the ECJ decided that in the association law, the freedom to provide services do not include the right to receive services. Because the freedom to provide services is interpreted and accepted as to include passive services in *Luisi and Carbone*[68] case long after the Ankara Agreement and the Additional Protocol of 1970 entered into force long before that.

In conclusion, the *standstill* clause does not necessarily lead to a right to a residence permit, national laws regulate the entry and residence of the individual. The national courts have to assess if the situation for the self-employed has worsened since the entry into force of the related provision in the association law[69].

---

66 *https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=025* (date of access: 11.08.2024).

67 For the discussions see Göçmen, *Uluslararası Hukukta Göç ve Vatandaşlık* (n 14) 57-61; Ott (n 28) 457.

68 Joint Cases C-286/82 and C-26/83 *Graziana Luisi and Giuseppe Carbone v Ministero del Tesoro,* ECR [1984] 00377, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61982CJ0286 (date of access: 08.07.2024).

69 Ott (n 28) 457.

F. DIRECT EFFECT PRINCIPLE

According to the case law of the ECJ[70], direct effect of a provision means that it grants to individuals rights that can be invoked before national administrations and national courts which must be protected by them[71].

With regard to the direct effect of the association law, the Association Council can forward the respective disputes to the ECJ (Art. 25 of the Ankara Agreement)[72] or the Turkish citizens can request from the national courts to ask for a preliminary ruling of the ECJ (Art. 267 of the TFEU)[73].

On the other hand, direct applicability is about the application of the EU norms in the Member States. No implementation laws or no other local law mechanisms are required for the direct application of the EU Treaties and regulations. The respective case law changed in time in a way that the nationals can ground their rights on other norms such as the EU directives if these are eligible to have direct effect. In such cases, it is encountered that the Member State did not realize the necessities for the direct application of these instruments within the duration given[74]. Direct applicability thus makes direct effect possible, but the former will not automatically imply the latter. Direct effect is therefore narrower than direct applicability: all provisions of the EU law are directly applicable, whereas not all provisions of the EU law will have direct effect[75].

As per Art. 216 (2) of the TFEU, *"Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States"*. Accordingly, the international agreements form an integral part of the EU legal system, they would be directly applicable in the Member States and have the capacity to

---

70 This principle was emerged in Case C-26/62 *van Gend en Loos v Netherlands Inland Revenue Administration,* [1963] ECR 1, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A61962CJ0026 (date of access: 11.08.2024).

71 Deniz Tekin Apaydın, "Monizm ve Düalizm İkileminde Türk Hukuk Sistemi: Uluslararası Hukuka Bakış Üzerine Doktrinel Uzlaşmazlığın Nedenleri ve AB Hukuku Işığında Bir Değerlendirme" (2018) 9 (1) İnÜHFD 529, 546.

72 "*1 . The Contracting Parties may submit to the Council of Association any dispute relating to the application or interpretation of this Agreement which concerns the Community, a Member State of the Community, or Turkey. 2. The Council of Association may settle the dispute by decision; it may also decide to submit the dispute to the Court of Justice of the European Communities or to any other existing court or tribunal.*"

73 Işıl Özkan, *Yabancıların Çalışma Hürriyeti ve Avrupa Topluluğunda Kişilerin Serbest Dolaşımı* (Kazancı Hukuk Yayınları 1987) 122-123.

74 Ahmet Güneş, *Avrupa Birliği Hukukuna Giriş* (5th edn, Ekin Yayınları 2022), 140; Apaydın (n 72) 547; İlke Göçmen, *Avrupa Birliği Hukukunun Temelleri* (2nd edn, Seçkin Yayıncılık 2023)396-397; Robert Schütze, "Direct Effects and Indirect Effects of Union Law" in Robert Schütze and Takis Tridimas (eds.), *Oxford Principles of European Law: European Legal Order V. I* (Oxford University Press 2018) 268.

75 Schütze (n 74) 268.

contain directly effective provisions[76]. Beginning with *Demirel*[77] and *Sevince* cases, the ECJ analysed the direct effect of the EU-Türkiye association law stating clearly that the Ankara Agreement and the secondary law constitute an integral part of the Community legal order[78]. Since then, the ECJ has discussed in its various cases if the foreign workers and their families have direct rights based on Art. 12 of the Ankara Agreement, Art. 36 of the Additional Protocol of 1970 and the Arts. 6-7 of the Decision #1/80.

Demirel case is about Mrs. Demirel who went to Germany to rejoin her husband. However, she did not possess a visa issued for family reunification but, only for a visit. Therefore, she faced an order to leave the country. The ECJ firstly stated that it had no jurisdiction to investigate the compatibility of the national rules on family reunification with Art. 8 of the "European Convention on Human Rights"79, since those rules were outside the scope of the Community law. After the adoption of the Reunification Directive, those national rules are considered within the scope of the Community law, and subject to review by both national courts and the ECJ. With regard to the application of the respective provisions of the association law, the ECJ decided that: "*A provision of an international agreement is directly effective when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. Article 12 and Article 36 of the Ankara Agreement essentially serve to set out a programme, whilst Article 7, which does no more than impose on the contracting parties a general obligation to cooperate in order to achieve the aims of the agreement, cannot directly confer on individuals rights which are not already vested in them by other provisions of the agreement.*"

In Sevince case, the ECJ ruled that Art. 6 (1) of the Decision #1/80 has direct effect in the Member States and Turkish nationals who satisfy its conditions may therefore rely directly on the rights given them by the various indents of this provision. *Sevince* case concerns Mr. Sevince who had obtained permission to stay in the Netherlands in order to be with his Turkish wife, who lived in the Netherlands. After he ceased living with his wife the Dutch authorities refused to extend his residence permit. This case has significant importance since it defined that the Ankara Agreement and the Decisions of the Association Council are a part of the Community legal order and the provisions of these instruments are directly applicable.

---

76 Ibid 283.

77 Case C-12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd,* ECR [1987] 03719, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61986CJ0012 (date of access: 08.07.2024).

78 Baykal (n 9) 14; Çiçekli (n 16) 315; Göçmen (n 7) 72-73; Ott (n 28) 445.

79 RG 19.03.1954/8662.

In the subsequent cases concerning these provisions, namely *Savaş, Abatay* and *Şahin*, *Tüm* and *Darı* and *Soysal* and *Savatlı* cases, the ECJ clarified the interpretation of Arts. 1380 and 1481 of the Ankara Agreement regarding self-employed persons.

In *Savaş* case, The ECJ interpreted Art. 13 of the Ankara Agreement and Art. 41 (2) of the Additional Protocol of 1970 stating that they do not constitute rules of the Community law that are directly applicable in the internal legal order of the Member States but, accepted that Art. 41 (1) has direct effect in the Member States.

In *Soysal and Savatlı* case, it paved the way for certain Turkish citizens to travel to some of the Member States without a visa which was met with rousing enthusiasm in Türkiye[82].

II. REGULATIONS IN THE TURKISH FOREIGNERS LAW CONCERNING THE EU CITIZENS

A. GENERAL

The association law examined in Part I[83] of our study is not only applied to the Turkish citizens living in the EU but, also to the EU citizens living in Türkiye and provides convenience in their employment. According to Art. 11 of the Decision #1/80; "*Nationals of the Member States duly registered as belonging to the labor force in Turkey, and members of their families who have been authorized to join them, shall enjoy in that country the rights and advantages referred to in Articles 6, 7, 9 and 10 if they meet the conditions laid down in those Articles.*"

Since neither the entrance rights nor the employment rights of foreign workers are regulated and only the EU citizens already working in the Turkish market are covered by the Decision #1/80, the necessities foreseen in the Turkish foreigners law for entrance, residence and employment should be complied with. Only after obtaining the permits accordingly, the facilities provided in the association law are activated[84].

---

80 "*The Contracting Parties agree to be guided by Articles 52 to 56 and Article 58 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom of establishment between them.*"

81 "*The Contracting Parties agree to be guided by Article 55, 56 and 58 to 65 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom to provide services between them."*

82 Göçmen (n 51) 72.

83 See Part I "EU-Türkiye Association Law", Chapter B "Association Council Decisions" above.

84 Çiçekli, *Yabancıların Çalışma İzinleri* (n 29) 69; Ergin (n 14) 52; Tiryaki (n 29) 106.

The EU citizens who want to obtain residence and work permits in Türkiye should comply with the general principles and rules of the Turkish foreigners law like the other countries' citizens. The difference of the EU citizens from the other countries' citizens is that they are exempt from some formalities. It should be noted that the provisions of the Decision #1/80 take precedence of national rules[85]. On the other hand, according to Art. 14 (2) of the Decision, if any, the favorable provisions in national laws or bilateral agreements between the Member States and Türkiye shall apply.

Ankara Agreement and the Additional Protocol of 1970 constitute an integral part of the Turkish law but, the status of the Association Council decisions is under discussion[86]. The international agreements of Türkiye which are enforced in compliance with the procedure foreseen under Art. 90 (5) of the Turkish Constitution #2709 of 18.10.1982[87], have the same strength and applicability with the Turkish laws. The citizens may claim their rights arisen from the said international agreements before the Turkish courts. The Turkish courts have an affirmative practice in resolving the disputes according to the said international agreements including the EU-Türkiye association law[88]. Furthermore, in interpretation of the association law instruments, the Turkish courts may consider the respective decisions of the ECJ but, they are not binding on them[89].

According to the *standstill* clause mentioned in Art. 13 of the Decision #1/80, Türkiye can only amend its foreigners law in favor of the EU citizens. Otherwise, the EU citizens can demand the application of the more favorable provisions existed at the enforcement date of the Decision[90]. An identical *standstill* clause is foreseen as per Art. 41 (1) of the Additional Protocol of 1970 for freedom of establishment and to provide services. Accordingly, the Member States and Türkiye refrain from bringing new restrictions on the freedom of establishment and freedom to provide services of their citizens.

The "Foreigners and International Protection Act #6548 of 04.04.2013 (Foreigners Act)"[91] and the "Regulation on the Foreigners Act"[92], cover and

---

85 Bozbel (n 19) 357-358; Çiçekli, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni (n 29) 213, 214-215, 221, 225; Çiçekli, *Yabancılar ve Mülteci Hukuku* (n 29) 128-129; Çiçekli, *Yabancıların Çalışma İzinleri* (n 29) 65-68; Ergin (n 14) 48; Tiryaki (n 29) 106; Kaplan (n 14) 19, 21.

86 Göçmen (n 7) 91-97.

87 RG 09.11.1982/17863.

88 Özen and Can (n 14) 371.

89 Çiçekli, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni (n 29) 216-217, 230; Çiçekli (n 8) 84.

90 Çiçekli, Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni (n 29) 219-220.

91 RG 11.04.2013/28615.

92 RG 17.03.2016/29656.

regulate such areas as the right to enter in and leave Türkiye, issuance of residence permits, right to asylum, deportation.

The "International Labor Force Act #6735 of 28.07.2016 (ILF Act)"[93] and the "Regulation on the ILF Act"[94], regulate the determination, application and monitoring of the policies related to employment of international labor force as well as the procedures and principles and the responsibilities and authority related to processes and transactions to be followed on work permits and work permit exemptions granted to foreigners and to regulate the rights and obligations in the field of employment of international workforce.

According to the ILF Act Art. 2 (1), the Act applies to foreigners who applied to work or actively working in Türkiye; foreigners applied to receive or already receiving vocational training with an employer; cross-border service providers staying in the country for the purpose of providing temporal service; and real persons and legal entities applied to employ or employing foreigners in Türkiye. According to pr. (3), this Act shall be implemented without prejudice to provisions of international bilateral or multilateral agreements to which Türkiye is a party. As it is expressly stated in this Article, the working rights of the EU citizens which are guaranteed by the association law should be considered first but, the more favored provisions of the ILF Act, if any, shall be applied.

In order to regulate the principles to encourage foreign direct investments; to protect the rights of foreign investors; to define investment and investor in line with international standards; to establish a notification-based system for foreign direct investments rather than screening and approval; and to increase foreign direct investments through established policies, the "Foreign Direct Investments Act #4875 of 06.06.2003 (FDI Act)"[95] and the "Regulation on the FDI Act"[96] have been enacted. According to the "Regulation on the Key Staff Working in the FDI (Key Staff Regulation)"[97], the work permits of the key staff to be occupied by the investments considered special are subject to a simplified regime.

Apart from the matters regulated by the above-mentioned laws, the "Labor Act #4857 of 22.05.2003"[98] will be applicable, except for the exceptions in the Labor Act Art. 4[99], to the employment relationships of foreign employees working in Türkiye.

---

93 RG 13.08.2016/29800.

94 RG 02.02.2022/31738.

95 RG 17.06.2003/25141.

96 RG 20.08.2003/25205.

97 RG 29.08.2003/25214.

98 RG 10.06.2003/25134.

99 "*The provisions of this Act shall not apply to the activities and employment relationships mentioned below:*
a) Sea and air transport activities.

Refugees, conditional refugees and subsidiary protection beneficiaries as well as persons under temporary protection are excluded from the scope of this second part of our study.

B. RESIDENCE PERMIT AND RESIDENCE PERMIT EXEMPTION

According to the Foreigners Act Art. 19 (1), "*The foreigners who would stay in Türkiye beyond the duration of a visa or a visa exemption or, in any case longer than ninety days should obtain a residence permit. The residence permit shall become invalid if not used within six months.*"

According to the Foreigners Act Art. 20 (1), some foreigners are exempt from obtaining residence permit. Among them, we should mention; "*c) members of the diplomatic and consular missions in Türkiye, ç) family members of diplomatic and consular officers, provided they are notified to the Ministry of Foreign Affairs, d) members of the representations of international organizations in Türkiye whose status has been determined by virtue of agreements, e) persons who are exempt from a residence permit by virtue of international agreements which Türkiye is a party to.*"

According to the Foreigners Act Art. 21 (1), applications for residence permits shall be lodged with the consulates in the foreigner's country of citizenship or legal stay. According to pr. (5), the assessment of the applications shall be finalized in no later than ninety days. The foreigners are obliged to register to the "Address Registration System" within the latest twenty days from the date they have entered the country.

---

b) In establishments and enterprises employing a minimum of 50 employees (50 included) where agricultural and forestry work is carried out.
c) Any construction work related to agriculture which falls within the scope of family economy.
d) In works and handicrafts performed in the home without any outside help by members of the family or close relatives up to 3rd degree (3rd degree included).
e) Domestic services.
f) Apprentices, without prejudice to the provisions on occupational health and safety.
g) Sportsmen.
h) Those undergoing rehabilitation.
i) Establishments employing three or fewer employees and falling within the definition given in the Tradesmen and Small Handicrafts Act Art. 2,
However, the following shall be subject to this Act:
a) Loading and unloading operations to and from ships at ports and landing stages.
b) All ground activities related to air transport.
c) Agricultural crafts and activities in workshops and factories manufacturing implements, machinery and spare parts for use in agricultural operations.
d) Construction work in agricultural establishments.
e) Work performed in parks and gardens open to the public or subsidiary to any establishment.
f) Work by seafood producers whose activities are not covered by the Maritime Labor Act and not deemed to be agricultural work."

According to the Foreigners Act Art. 22 (1), in some cases applications for residence permits may exceptionally be lodged in Türkiye. Among the ones listed we should mention the ones who apply for; "*c) long-term residence permits, f) changing from a family residence permit to a short-term residence permit, h) residence permit applications lodged within the scope of Art. 20 (2).*" According to Art. 20 (2), in cases the foreigners listed in subparagraphs (c), (ç), (d) and (e) of pr. (1) wish to stay in Türkiye, after the end of their status that entitled them to exemption from a residence permit, shall apply to the governorates within ten days to obtain a residence permit.

According to the Foreigners Act Art. 27 (1), work permit and work permit exemption confirmation documents shall be considered as residence permit.

According to the Foreigners Act Art. 28 (1), "*For the purposes of this Act, any stay outside of Türkiye exceeding a total of six months within one year or a total of one year within the last five years for reasons other than compulsory public service, education or health shall be considered interruption of residence.*"

Under the Foreigners Act Art. 30, the types of residence permits are listed as: "*a) Short-term residence permit, b) Family residence permit, c) Student residence permit, ç) Long-term residence permit, d) Humanitarian residence permit, e) Victim of human trafficking residence permit.*"

Among the ones who are qualified for short-term residence permit under the Foreigners Act Art. 31 (1), we should mention the ones who; "*a) arrive to conduct scientific research, b) own immovable property in Türkiye, c) establish business or commercial connections, i) apply within six months upon graduation from a higher education programme in Türkiye, j) do not work in Türkiye but will make an investment within the scope and amount that shall be determined by the Turkish President, and their foreign spouses, his and her minor children or foreign dependent children, ğ) transfer from a family residence permit.*" They are granted for a maximum of two years except for sub pr. (j) which is granted for a maximum of five years. The duration can be extended.

According to the Foreigners Act Art. 34 (1), a family residence permit for a maximum duration of three years at a time may be granted to: "*a) foreign spouse, b) foreign children or foreign minor children of their spouse, c) dependent foreign children or dependent foreign children of their spouse of; the Turkish citizens, persons within the scope of the 'Turkish Citizenship Act #5901 of 29.05.2009'*[100] *Art. 28 or foreigners holding one of the residence permits as well as refugees and subsidiary protection beneficiaries.*"

According to the Foreigners Act Art. 42 (1), "*A long-term residence permit shall be issued by the governorates, upon approval of the Ministry of Internal*

[100] RG 12.06.2009/27256.

Affairs, to foreigners that have continuously resided in Türkiye for at least eight years on a permit or, foreigners that meet the conditions set out by the Migration Policies Board."

C. WORK PERMIT AND WORK PERMIT EXEMPTION

As a rule, foreigners cannot work in Türkiye without a work permit or work permit exemption; administrative fines will be imposed on both the employee and the employer for work performed contrary to this, as stipulated in the ILF Act Art. 23.

According to the ILF Act Art. 7 (1), "*Work permit applications in Türkiye shall be made directly to the Ministry of Labor and Social Security and the applications abroad shall be made to the embassies or consulate generals of the Republic of Türkiye in the foreigner's country of citizenship or legal stay.*" It is important to note that, foreigners with a valid residence permit of minimum six months in total and employers who want to employ such foreigners can apply for a domestic work permit. According to pr. (3), "*A work permit can be extended on condition that the application is made within sixty days prior to the expiration of the work permit.*" According to pr. (8), "*Duly made application shall be assessed within thirty days on condition that information and documents are complete.*" According to the ILF Regulation Art. 15 (3), "*Some foreigners who are determined by the Directorate General of International Labor Force can apply for work permit without a valid residence permit.*"

According to the ILF Act Art. 8, "*(1) Obtaining preliminary permission is compulsory on the assessment of work permit applications of foreigners seeking to work in healthcare and educational services that require professional competence. (2) Preliminary permission for professionals of healthcare services shall be granted by Ministry of Health, and for professionals of educational services shall be granted by Ministry of National Education... (3) On the assessment of foreigners' work permit applications that are granted preliminary permission, the first paragraph, subparagraph (d) of Art. 9 of this Act is not applicable. (4) Work permits of foreign national faculty members who are to work within the scope of Art. 34 of the 'Higher Education Act #2547 of 04.11.1982'*[101] *shall be granted by the Ministry of Labor and Social Security relying on the preliminary permission of Higher Education Council. On the work permit assessment of above said faculty members, fourth, fifth and sixth paragraph of Art. 7, and the first paragraph of Art. 9 without prejudice to subparagraph (f), (g) and (ğ) are not applicable.*"

Among the applications that shall be rejected we put an emphasis on; ç) the applications made for occupations and professions confined exclusively to

[101] RG 06.11.1981/17506.

the Turkish citizens in other laws and g) the applications made by foreigners whose employment is objectionable on grounds of public order, public security or public health [ILF Act Art. 9 (1)].

According to the ILF Act Art. 10 (1), foreigners are granted with a work permit valid for a maximum of one year, provided that it does not exceed the duration of the employment contract. In a relevant decision[102], the Turkish Court of Cassation ruled that: "*...since the plaintiff worked with temporary permits, there is a substantial reason to make a fixed-term employment contract, and the renewed fixed-term employment contract will not become indefinite...*" In other words, in case of renewal of the temporary work permits, the employment contract will not turn into an indefinite-term employment contract. However, if the foreign worker has obtained a permanent work permit, the contract will be accepted as an indefinite-term employment contract. In a fixed-term employment contract, the foreign worker will be deprived of certain rights. For instance, severance and notice pay will not be possible when the fixed-term employment contract ends and the foreign worker is not covered by job security[103].

According to the ILF Act Art. 10 (2), "*a foreigner serving under same employer will be given upmost two years extension on the first application and maximum three years for the ensuing applications. However, applications lodged for employment under different employer shall be assessed as per first paragraph of this Article.*" According to pr. (3), "*foreigners holding long-term residence permit or minimum eight years of legal work permit may apply for permanent work permit.*"

According to Art. 6 (1) of the Decision #1/80, after one year of employment the Turkish workers can renew their permits on condition that they work for the same employer. After three years, they are entitled to change their employers on condition that they remain in the same occupation. After four years, they enjoy free access to any paid employment. There are no such restrictions foreen under the ILF Act but, the applications for renewal of work permits are considered as a new work permit application if the employer changes. A new work permit is granted for upmost a year whereas renewals are provided for up to two-three years.Therefore, if the foreign worker plans to change his/her employer or occupation within four years of his/her employment he/she shall rely on the ILF Act.

According to Art. 4 (1) of the Directive on Long-term Residents, the Member States shall grant long-term resident status to third-country nationals who have

---

[102] 9th Civil Chamber, 11.10.2005, Main # 2005/12936, Decision #2005/33070.

[103] Gül Setenay Horuztepe, *Türkiye'de Çalışan Yabancıların İş Kanunu'ndan Kaynaklanan Hak ve Görevleri,* Aile Çalışma ve Sosyal Hizmetler Bakanlığı Expert Thesis (2021), https://www.csgb.gov.tr/media/89560/gul-setenay-horuztepe_turkiye-de-calisan-yabancilarin-is-kanunundan-kaynaklanan-hak-ve-yukumlulukleri-1.pdf (date of access: 25.07.2024), 91-93.

resided legally and continuously within its territory for five years. Since this Directive is not an association law instrument, Art. 42 (1) of the Foreigners Law will be applied to the EU citizens in Türkiye. Accordingly, a long-term residence permit shall be issued to foreigners that have continuously resided in Türkiye for at least eight years on a permit or to foreigners that meet the conditions set out by the Migration Policies Board.

According to the ILF Act Art. 10 (4), "*foreigners holding permanent work permit shall benefit from the same rights long-term residence permit provide. Holders of permanent work permit, without prejudice to acquired rights with respect to social security and provided that they are subject to conditions set forth in applicable legislation in the enjoyment of these rights, shall benefit from the same rights as accorded to the Turkish citizens with the exception of the provisions in laws regulating specific areas. Those foreigners have no right to elect and be elected, to enter into public service, to import motor vehicles and house goods and they have no obligation of compulsory military service.*"

According to the ILF Act Art. 10 (5), "*managing partner of limited liability companies, partners of joint-stock companies who are also member to board of directors and acting (commandite) partners of commandite companies with a capital divided into shares which are established under the 'Turkish Commercial Act #6102 of 13.01.2011 (Commercial Act)'*[104] *may work by obtaining a work permit.*" On the other hand, according to the ILF Act Art. 13 (7), "*board members of joint-stock companies and non-executive partners of other companies shall be assessed in the scope of work permit exemption.*"

According to the ILF Act Art. 10 (6), "*foreign members of profession might be granted independent work permit provided that they satisfy the special terms set forth in other laws.*" According to pr. (7), "*in the assessment of independent work permit application with respect to international labor force policy, foreigners' educational level, professional experience, contribution to science and technology, effect in-country activities or investments on Türkiye's economy and employment, and in case of being foreign company partner the share of capital and other issues determined by Ministry Labor and Social Security in line with the suggestions of International Labor Force Policy Advisory Board shall be taken into consideration.*" According to pr. (8), "*independent working permit shall be arranged for a defined period of time without being subject to period restrictions in this Article.*" Apparently, the ILF Act does not only cover the dependent foreign workers but also the ones who wish to work independently on his/her own behalf and account in Türkiye in line with the freedom of establishment and to provide services as mentioned in the association law.

104 RG 14.02.2011/27846.

According to the ILF Act Art. 11, "*(1) in line with the international labor force policy, foreigners whose application accepted as appropriate with regard to their educational level, professional experience, contribution to science and technology, effect of their in-country activities or investments on Türkiye's economy and employment, and the suggestions of International Labor Force Policy Advisory Board and procedures and principles determined by the Ministry of Labor and Social Security shall be granted Turquoise Card. (2) Turquoise Card shall be given on condition that its first three years will be deemed as transition period. The Ministry of Labor and Social Security may request information and documents from employer or employed foreigner as regard to conducted activities. In case Turquoise Card is not canceled pursuant to Art. 16 within transition period, the transition period reservation that put on in shall be removed upon foreigner's application and he shall be granted permanent Turquoise Card... (3) Turquoise Card owner's spouse and children who are dependent in line with governing legislation shall be given a document that substitutes the residence permit and shows that they are relatives of Turquoise Card owner. (4) Turquoise Cards owners shall benefit from the same rights provided by permanent work permit arranged in this Act.*"

According to the ILF Act Art. 12 (1), "*work permit or work permit exemption granted under this Act shall be deemed as residence permit pursuant to the Foreigners Act Art. 27. However, foreigners are obliged to register to the 'Address Registration System' within the latest twenty days from the date they have entered the country.*" According to pr. (2), "*a foreigner who is granted work permit upon his/her application abroad must come to Türkiye within six months after the date of work permit's validity starts. Otherwise the residence permit shall be cancelled.*" According to pr. (3), "*without prejudice to the rights provided by the bilateral or multilateral agreements to which Türkiye is a party and within the framework of reciprocity principle, the work permits may be restricted for a certain time in agriculture, industry or service sectors and for a certain profession, job or territorial and geographical area, in cases where the conditions in business market and developments in the labor life, sectorial and economic conjuncture conditions regarding employment require.*" As it is expressly stated in this Article, the working rights of the EU citizens in Türkiye are guaranteed by the association law and not likely to be adversely affected from the said situations.

According to the ILF Act Art. 13 (1), foreigners who are in the scope of work permit exemption (ILF Regulation Art. 48)[105] may work, provided that they obtain

[105] "*(1) Save for the provisions in the special laws and liabilities of the foreigner and employer arising from the other laws,*
1) Foreigners who will work within the framework of scientific, cultural and artistic activities, for up to one month.

a work permit exemption. As per pr. (6), "*duration spend under work permit*

2) *Foreigners who will come to Türkiye for training with respect to the use of the goods and services exported from Türkiye or imported to Türkiye or to provide training eith respect to the assembly, maintenance and repair of the goods and services imported to Türkiye or to receive the equipment or for the repair of the vehicles broke down in Türkiye, for up to three months in total.*
3) *Cross-border service provider foreigners, for up to three months.*
4) *Members of the board of director of the joint stock companies established as per the Act #6102 not residing in Türkiye and non-management partners of the other companis and foreigners to work in Türkiye and non-management partners of the other companies and foreigners to work in Türkiye authorized to represent and bind at the highest level despite of not being a partner in these relevant companies, for up to three months.*
5) *Those who will work in Türkiye among the foreigners residing abroad and determined as Turkish origin by the Ministry of Interior or Foreign Affairs, for up to three months.*
6) *Foreigners who will work within the framework of sportive activities, for up to four months.*
7) *Foreigners who will do internship within the framework of the student exchange programs made between Turkish universities and universities in the foreign countries and approved by the Council of Higher Education, for up to four months.*
8) *Foreigners who will work in the seasonal agriculture and animal husbandry works determined by the Directorate General, for up to six months.*
9) *Foreigners who will work in the fairs and circuses active outside the licensed torism establishments, for up to six months.*
10) *Foreigners determined to provide significant service and contribution to Türkiye in the economic, socio cultural and technological areas and areas of education by the relevant public institutions and organizations, for up to six months.*
11) *Foreigners who will work as tour opearator representative, for up to eight months,*
12) *Foreigners who will do internship within the framework of the intern student exchange, newly graduated intern exchange or youth exchange programs approved by the Directorate General, for up to twelve months.*
13) *Foreigners who will come to Türkiye to carry out researches in the universities and public institutions and organizations or increase their knowledge and experiences, as to be limited with the period of study and in any case, up to two years.*
14) *On condition of the assent of the Ministry of Youth and Sports of Turkish Football Federation, foreign professional sportspersons and trainers coming to Türkiye with the visa annotated for sports and sports phsician, sport physiotherapist, sports mechanician, sports masseuse or masseur and similar sports staff foreigners, during the term of the agreements with the sports federations and sports clubs.*
15) *As per the bilateral protocols made with the states according to 1/10 Principle of the on Standards of Training, Certification and Watchkeeping for Seafarers, foreign seafarers appointed in the ships which have received Certificate of Conformity, are registered to Turkish International Ship Registry and are working outside the cabotage line, during the term of the employment or service agreement.*
16) *Foreigners appointed in the programs or projects carried out within the framework of Türkiye-European Union Financial Co-operation programs, during the term of office.*
17) *Those required to do compulsory internship within the framework of the vocational training as per the relevant legislation among the foreign students enrolled to a formal eduction program in Türkiye, during the term of compulsory internship.*
18) *Foreigners appointed in schools and instituttions of culture and institutions of religion not regarded as an organizational unit of the diplomatic and consular representations of the foreign countries in Türkiye, during the term of office.*

exemption shall not be taken into account on calculation of legal work permit or residence permit periods." As per pr. (7), "*cross-border service provider whose in-country activities not exceeding ninety days within the period of hundred and eighty days shall be assessed in the scope of work permit exemption.*" According to the ILF Regulation Art. 50 (2), "*the work permit exemption applications made for three months and longer are evaluated by the Ministry of Labor and Social Security.*"

Art. 14 of the ILF Act regulates the work permit applications which will be made to the Ministry of Foreign Affairs. According to pr. (1), "*foreigners may work in schools, cultural institutions, institutions of religion belong to foreign diplomatic missions and consulates in Türkiye by; a) obtaining a work permit exemption for working in those that operate as associated unite of said foreign missions, b) obtaining a work permit for working in those that are not deemed as associated unite of said foreign missions according to the 'Vienna Convention on Diplomatic Relations' of 18.04.1961 and the 'Vienna Convention on Consular Relations' of 24.04.1963."* According to pr. (2), "*some relatives and the employees who are at special service of; diplomatic staff, consulate officer, administrative and technical staff and consulate attendant in foreign diplomatic missions and consulates in Türkiye and of international officials and administrative and technical staff in international organizations in Türkiye may work.*" Requirements for those are as follows: "*a) Spouses and children, and relatives determined according to reciprocity principle or bilateral agreements with the relevant country, should obtain a work permit, without prejudice to provisions as regard to work permit exemption mentioned in this Act and in relevant bilateral agreements and legislation. b) Foreigners employed for private services should obtain work permit exemptions.*"

---

19) *Diplomatic staff member, consular officer, administrative and technical staff member and consular assistant in the diplomatic and consular representations of the foreign countries in Türkiye and foreigners appointed as international official, administrative and technical staff and service staff in the international institutions in Türkiye, during the term of the employment and service agreement.*
20) *Foreigners who will work in the military factory and shipyards operating within the body of the Ministry of National Defense and Makine ve Kimya Endüstrisi Joint Stock Company, during the term of the employment or service agreement.*
21) *Foreign national staff, researchers and administrators who will work within the body f Turkish Japanese Science and Technology University established with the Act on the Establishment of Turkish Japanese Science and Technology University #7034 of 18.06.2017, during the term of the employment agreement.*
22) *Foreigner receiving specialty training as per the Regulation on Specialty Training in Medicine and Dentistry published in the Official Journal 26.04.2014/28983, during the term of the training, are evaluated within the framework of the work permit exemption.*"

A family residence permit for a maximum duration of three years at a time is granted to the spouses and children of the EU citizens who are working in Türkiye. A short-term residence permit for a maximum five years is granted to the spouses and children of the foreigners who will make an investment in Türkiye. A residence permit exemption is provided to the family members of diplomatic and consular officers. However, no work permit exemption is foreseen and therefore, the spouses and children of the working EU citizens are required to obtain a work permit individually if they wish to work. We believe the restrictions foreseen in Art. 7 of Decision #1/80 should not be applied. Otherwise, they should wait for three to five years to be employed in Türkiye.

According to the ILF Act Art. 16 (1) (e), "*citizens of the countries that are member of the EU are granted work permit exceptionally. They are exempt from some requirements and conditions stated in Arts. 7, 9 and 10."* Furthermore, qualified labor force (pr. a), qualified investors (pr. b), persons who are married to a Turkish citizen and living in Türkiye together (pr. g), cross-border service providers (pr. ı) are also listed as beneficiaries of exceptional work permits among others in the list. It is obvious that the Turkish foreigners law provides convenience to the EU citizens beyond the association law.

According to the ILF Act Art. 18 (1), "*work permit applications of foreigners planning to work in free trade zones in the scope of 'Free Trade Zone Act #3218 of 06.06.1985'*[106]*, shall be made to Ministry of Economy.*"

According to the ILF Act Art. 20 (1), "*foreigners who have assumed the title of engineer and architect by graduating from engineering or architecture faculty of a Turkish university or from the said faculties of foreign universities which are recognized by relevant country authorities abroad and the Higher Education Council in Türkiye may practice their professions by obtaining project-based and temporary work permit.*"

According to the Key Staff Regulation[107], "*the work permits of the key staff to be occupied by the qualified foreign direct investments are subject to a simplified regime. The credentials of such investments and their key staff are listed under Art. 4 of the Regulation.*"

Accordingly, a company or branch must meet at least one of the following criteria to be considered as a qualified foreign direct investment for the year 2024[108]:

---

106 RG 15.06.1985/18785.

107 RG 29.08.2003/25214.

108 https://www.csgb.gov.tr/uigm/genel-bilgi/dogrudan-yabanci-yatirimlar/ (date of access: 02.01.2024).

"*a) The turnover of the company or branch must be at least 913 million TL in the past year provided that the total capital share of the foreign shareholders is at least 12.150.526 TL.*

b) Exports of the company or branch must be at least 1 million USD in the past year provided that the total capital share of the foreign shareholders is no less than 12.150.526 TL.

c) The company or branch must employ at least 250 employees registered with the Social Security Institution in the past year provided that the total capital share of the foreign shareholders is at least 12.150.526 TL.

d) If the company or branch will make an investment, the minimum fixed investment amount must be at least 303 million TL.

e) The company must have foreign direct investment in at least one other country other than the one where its headquarters is located."

Employees of a company incorporated in Türkiye having a legal personality are referred to as key staff on condition that they meet at least one of the following criteria:

"*a) Those serving as a company shareholder, chairman of the board of directors, member of the board of directors, general manager, deputy general manager, executive, assistant executive or similar positions, with the authority or role in at least one of the following:*

1) A senior management or executive position in the company.

2) Managing the whole or a part of the company.

3) Supervising or controlling the work of the company auditors or administrative or technical staff.

4) Hiring new employees or terminating the employment of existing employees, or making proposals concerning these issues

b) A person with critical knowledge of the services, research devices, techniques, or management of the company.

c) A maximum of one person at liaison offices who is issued an authorization certificate by the overseas parent company."

According to Art. 6 of the Key Staff Regulation, "*the Ministry of Labor and Social Security grants work permit to a maximum of one person at liaison offices which activate within the Foreign Direct Investment Act, on condition that they brought at least 200.000 USD or equal amount of exchange from abroad in the last year. Furthermore, it is provided that they have obtained an operating license from the General Directorate of Incentives Implementation and the Foreign Capital of the Ministry of Industry and Technology, limited to the duration of their activities.*"

D. THE SECTORS AND PROFESSIONS PROHIBITED TO FOREIGNERS

In Turkish law, some sectors and professions are prohibited to the foreigners. Therefore, the applicants should hold Turkish citizenship for these jobs. According to the "Act #2527 of 25.09.1981", only the foreigners (therefore EU citizens) of Turkish descent are exempt from prohibitions but, they cannot work for the Turkish Military Forces and Security Organization.

The restrictions brought by the EU countries are mostly related to the entrance to the country. On the other side, the EU citizens do not face visa problems but, face restrictions on employment in Türkiye[109].

When Türkiye becomes a full member to the EU, this citizenship criteria would be brodened in a way to include the EU citizens for harmonization with EU law. In other words, the EU citizens will be able to work in all sectors and professions in Türkiye except for the public services as foreseeen in Art. 48 of the EEC Agreement (now Art. 45 of the TFEU)[110].

The sectors and professions where foreign employees cannot work are regulated by different laws as follows[111]:

- *Civil Servant (*Act #657 of 14.07.1965 Art. 48).

- *Notary* (Act #1512 of 18.01.1972 Art. 7).

- *Judge and Prosecut*or (Act #2802 of 24.02.1983 Art. 8).

- *Advocate.* However; foreigners and foreign advocacy partnerships (including the Turkish lawyers employed) seeking to operate in Türkiye within the framework of Art. 44 can provide consultancy services on foreign legal legislation and international law issues. In such a partnership of lawyers, partners are not required to be registered with the bar (*Act* #1136 of 19.03.1969 Art. 3).

- Mediator (Act #6325 of 07.06.2012 Art. 20).

- Expert Witness (Act #6754 of 03.11.2016 Art. 12).

- Condordat Commissioner (By-law published in the RG 30.01.2019/30671 Art. 4).

- Chief Assistant Manager of International Private Schools (*Act* #5580 of 08.02.2007 Art. 8).

- Turkish and Turkish Cultural Teacher at Minority Schools (Act #6581 of 20.05.1955 Art. 1).

- *Private Hospital M*anager (Act #2219 of 24.05.1933 Art. 9).

---

109 Kinsmann and Ekşi (n 28) 34.

110 Ibid 32-34.

111 https://www.csgb.gov.tr/uigm/calisma-izni/turk-vatandaslarina-hasredilen-meslekler/ (date of access: 02.01.2024).

- *Veterinarian* (Act #6343 of 09.03.1954 Art. 2).

- *Pharmacist* (Act #6197 of 18.12.1953 Art. 2), *Dentist (*Act #1219 of 11.04.1928 Art. 30), *Nursing Caregiver (*Act #1219 of 11.04.1928 Art. 63), Foreign Assistant Medical Doctor, ones under specialized training are excluded (By-law published in 03.09.2022/31922 Art. 14). According to the By-law published in 22.02.2012/28212 Art. 5 (1), the health professionals other than the ones listed above can work in the private health institutions on condition that; (a) Their equivalency of the diplomas and/or expert certificates are recognized and registered by the Ministry of Health, (b) They bear no legal obstacles to fulfill the profession, (c) They can speak Turkish, (ç) They obtained work and residence permits according to the related legislation, (d) Regarding the medical doctors, they have compulsory financial responsibility insurance.

- Financial Consultant (Act #3568 of 01.06.1989 Art. 4).

- *Customs Assistant Consultant* (Act #4458 of 27.10.1999 Art. 27).

- *Tourist Guide (*Act #6326 of 07.06.2012 Art. 3).

- Board Member of Cooperative Partnerships (Act #1163 of 24.04.1969 Art. 56).

- *Private Security Offi*cer (Act #5188 of 10.06.2004 Art. 10).

- Founder, Executive, Trainer and Representative appointed by the Legal Person Shareholder of the Private Security Companies (Act #5188 of 10.06.2004 Art. 5).

- Market and Neighborhood Guard (Act #7245 of 11.06.2020 Art. 3)

- Aviation Information Management Trainee Officer (By-law published in the RG 14.06.2017/30096 Art. 16).

- Honorary Traffic Inspector (Act #2918 of 13.10.1983 Additional Art. 6).

- Transportation Work Organizer (By-law published in the RG 27.08.2022/31936 Art. 7).

- Person in Charge of Agency and Travel Agency (Act #1618 of 14.09.1972 Art. 3).

- Exporter of Fish, Oyster, Mussel, Sponge, Pearl and Coral; Diver, Searcher, Pilot, Captain, Mechanic, Clerk, Crew, etc. within the Internal Waters (Act #815 of 19.04.1926 Art. 3).

- Sports Consultant (By-law published in the RG 03.10.2023/32328 Art. 5).

- Agricultural Job Searcher (By-law published in the RG 27.05.2010/27593 Art. 6).

- Ship Agency Officer and Staff (By-law published in the RG 05.03.2012/28224 Art. 7&8).

- Permanent Supervisor, Technical Staff (By-law published in the RG 11.12.2022/32040 Art. 125&130).

- *Mining rights can only be granted to the Turkish real persons and legal persons (*Act #3213 of 04.06.1985 Art. 6).

- Founders of Turkish private schools should be Turkish (*Act* #5580 of 08.02.2007 Art. 3).

- *Foreign travel agencies* can not organize tours abroad but, they can operate in Türkiye (Act #1618 of 14.09.1972 Art. 3).

- If the ship is owned solely by a Turkish citizen, 51% of the ship and yacht staff (other than captain who is required to be Turkish) should be Turkish (Act #4490 of 16.12.1999 Art. 9).

- Transportation of passengers and goods from one point of the Turkish coast to another and port works and guidance within the ports at the beaches can only be done by the Turkish-flagged vessels. Foreign-flagged vessels can only carry passengers and cargo from the Turkish ports to foreign ports or from foreign ports to the Turkish ports (Act #815 of 19.04.1926 Art. 1).

- Vehicles like ferry, tug steamboat, motorboat, barge, etc. can be transported and trade can be done exclusively by the Turkish citizens within the rivers, lakes, Marmara basins and straits including the gulf, port, bay and other places in the internal waters (Act #815 of 19.04.1926 Art. 2).

- The Turkish President may allow; foreign ships pursue activities temporarily and without aiming to gain profit, sea vehicles to be used for petrol search and manufacturing and employment of foreign experts, captains and crew members on the Turkish ships[112] (Act #815 of 19.04.1926 Art. 4).

---

[112] "*(1) Every Turkish ship hoists the Turkish Flag.*
(2) The ship owned only by a Turkish citizen is a Turkish ship.
(3) Ships owned by more than one person;
a) In case of joint ownership, the majority of the shares,
b) In case of joint ownership, majority of the owners,
They are considered as Turkish ships provided that they are Turkish citizens.
(4) Established in accordance with Turkish laws;
a) Ships belonging to organizations, institutions, associations and foundations with legal personality, majority of the persons constituting the management body are Turkish citizens,
b) Ships belonging to Turkish commercial companies, the majority of those authorized to manage the company are Turkish citizens and the majority of the votes are in Turkish shareholders according to the company agreement, in joint stock companies and limited partnerships whose capital is divided into shares, the majority of the shares are registered and the transfer of the shares to a foreigner is subject to the permission of the company's board of directors,
provided that they are considered as Turkish ships.
(5) Ships owned by armament subsidiaries registered in the Turkish trade registry are considered Turkish ships, provided that more than half of their shares are owned by Turkish citizens and majority of stakeholder shipowners authorized to manage the subsidiary are Turkish citizens." (Act #6102 of 13.01.2011Art. 940).

- Transportation of passengers, mail and freight by air for commercial purposes between two points within the boundaries of the Republic of Türkiye can be effected with the Turkish aircrafts[113] (Act #2920 of 14.10.1983 Art. 31).

- The majority of the pilots, technicians, flight operation experts and cabin attendants should be Turkish in aircrafts of the commercial air transportation entities with twenty or more seats. All the cabin crew should be Turkish. However, the credentials of the staff appointed for international flights are determined by the General Directorate of Civil Aviation (By-law #SHY-6A of 16.11.2013 Art. 22).

CONCLUSION

A right which remains on the paper does not have any value. The employment right, which is regulated under the EU-Türkiye association law, does only apply to the Turkish citizens who have already obtained residence and work permits in an EU Member State according to its national laws. Alike, the EU citizens in Türkiye can not benefit from full freedom of movement for workers and should possess a work permit according to the Turkish foreigners law.

The conditions are worse with regard to the freedom of establishment and to provide services in the EU-Türkiye association law. While the goods are able to move freely under the EU-Türkiye customs union rules, their producers do not enjoy the same right.

Since Türkiye's membership seems unforeseeable soon, we believe the EU-Türkiye association law still matters. During Türkiye's accession process to the EU, Turkish citizens can at least claim the rights arisen from the association law.

Upon realization of Türkiye's full-membership, the restrictions on nationality shall be abolished and the EU citizens shall obtain the right to work in Türkiye freely in all sectors except for the public services. Even though, like the other Member States, Türkiye, will keep the right to put restrictions on employment of foreigners on grounds of public order, public security and public health.

When compared with the EU Member States' regulations, Turkish foreigners law already provides convenience to the EU citizens to work, establish and provide services in Türkiye beyond the EU-Türkiye association law. They are exempt from some requirements and conditions on exceptional work permits.

---

[113] "*A civil aircraft is considered to be a Turkish civil aircraft under the following conditions:*
a) Aircraft owned by public agencies such as occupational organizations, associations, political parties, trade unions and foundations, all established pursuant to Turkish laws, whose executive positions are held by a majority of Turkish nationals.
b) Aircraft owned by trade companies, cooperative societies and their unions registered in the Turkish Trade Register, with a majority of Turkish nationals holding executive and representational powers and the voting majority of which according to the articles of association consists of Turkish stockholders or partners." (Act #2920 of 14.10.1983 Art. 49).

May the migration problems be solved and secured, the Member States shall perhaps consider similar means to support the association law.

BIBLIOGRAPHY

Anonymous, *Avrupa Birliği'nin Hizmetlerin Serbest Dolaşımı ve Bankacılık Müktesebatı ve Türkiye'nin Uyumu* (İktisadi Kalkınma Vakfı 2004)

Apaydın DT, "Monizm ve Düalizm İkileminde Türk Hukuk Sistemi: Uluslararası Hukuka Bakış Üzerine Doktrinel Uzlaşmazlığın Nedenleri ve AB Hukuku Işığında Bir Değerlendirme" (2018) 9 (1) İnÜHFD 529

Baykal S, "Turkey-EC Association Law and Recent Developments Regarding the Freedom of Establishment and Free Movement of Services" in *Turkey-EC Association Law: Developments Since Ankara Agreement 1963 (The Rights of EU Citizens in Turkey and of Turkish Citizens in the EU Countries)* (Legal Yayınevi 2010) 11

Bozbel S, "Türk Vatandaşlarının Avrupa Birliği Ortaklık Konseyi Kararlarından Doğan Çalışma ve Serbest Dolaşım Hakları" (2004) VIII (1-2) AÜEHFD 351

Bozkurt E and Köktaş A, *Avrupa Birliği Hukuku* (9th edn, Legem Yayınları 2024)

Çelikel A and Öztekin Gelgel G, *Yabancılar Hukuku* (28th edn, Beta Basım 2024)

Çiçekli B, *Yabancılar ve Mülteci Hukuku* (6th edn, Seçkin Yayıncılık 2016)

Çiçekli B, "Rights of EU Citizens in Turkey" in *Turkey-EC Association Law: Developments Since Ankara Agreement 1963 (The Rights of EU Citizens in Turkey and of Turkish Citizens in the EU Countries)* (Legal Yayınevi 2010) 77

Çiçekli B, *Yabancıların Çalışma İzinleri* (Türkiye İşveren Sendikaları Konfederasyonu Yayınları 2004).

Çiçekli B, "Türk-AB Ortaklık Hukuku Çerçevesinde Türkiye'deki AB Vatandaşlarının Çalışma ve İkamet Hakları Üzerine Bir Değerlendirme" (1999) 19 (1-2) Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni 213

Çiçekli B, "The Rights of Turkish Migrants in Europe under International Law and EU Law" (1999) 33 (2) International Migration Review 300

Erdenir B, "Vize" in B Akçay and S Akgül Açıkmeşe (eds.), *Yarım Asrın Ardından Türkiye-Avrupa Birliği İlişkileri* (Turhan Kitabevi 2013) 471

Ergin H, *Türk Hukukunda Yabancıların Çalışma İzinleri* (Beta Basım 2017)

Göçmen İ, *Türkiye - Avrupa Birliği İlişkileri: Hukuki Boyut* (Ankara Üniversitesi Yayınları 2022)

Göçmen İ, "Türkiye-Avrupa Birliği (AB) Ortaklık Hukukunun Hukuki Çerçevesi" in Bayraktaroğlu G Özçelik and Aktan E (eds.), *Avrupa ve Uluslararası Göç Hukuku* (Yetkin Yayınları 2022) 269

Göçmen İ, *Avrupa Birliği Hukukunun Temelleri* (2nd edn, Seçkin Yayıncılık 2023)

Göçmen İ, "The Freedom of Establishment and to Provide Services: A Comparison of the Freedoms in European Union Law and Turkey-EU Association Law" (2011) 8 (1) Ankara Law Review 67

Göçmen İ and OE Civan, "The Principle of Non-Discrimination on Grounds of Nationality with regard to Turkish Workers in the European Union and Union Workers in Turkey" in Akçay B and Akipek Ş (eds.), *Turkey's Integration into the European Union* (Lexington Books 2013) 95

Güneş A, *Avrupa Birliği Hukukuna Giriş* (5th edn, Ekin Yayınları 2022)

Kaplan AB, *Avrupa Birliği'nde Türk Vatandaşlarının Serbest Dolaşımı* (Beta Basım 2008)

Karluk R, *Avrupa Birliği Türkiye İlişkileri: Bir Çıkmaz Sokak* (Beta Basım 2013)

Kaya G, "Free Movement of Turkish Citizens after the Soysal Judgment" in Fırat C and Hoffmann L (eds.), *Turkey and the European Union: Facing New Challenges and Opportunities* (Routledge 2014) 121

Kinsmann F and Ekşi N, *Avrupa Birliği'nin Kişilerin Serbest Dolaşımı Müktesebatı ve Türkiye'nin Uyumu* (İktisadi Kalkınma Vakfı 2002)

Kutucu S, *Avrupa Birliği'nde Üçüncü Devlet Vatandaşlarının Serbest Dolaşımı* (Seçkin Yayıncılık 2014)

Köktaş A, *Avrupa Birliği'nde İşçilerin Serbest Dolaşım Hakkı ve Türk Vatandaşlarının Durumu* (Nobel Yayın 1999)

Ott A, "The Savas Case - Analogies between Turkish Self-Employed and Workers?" (2000) 2 European Journal of Migration and Law 445

Özen Ç and Can H, *Türkiye-Avrupa Topluluğu Ortaklık Hukuku* (Gazi Kitabevi 2005)

Özkan I, *Yabancıların Çalışma Hürriyeti ve Avrupa Topluluğunda Kişilerin Serbest Dolaşımı* (Kazancı Hukuk Yayınları 1997)

Schütze R, "Direct Effects and Indirect Effects of Union Law" in Schütze R and Tridimas T (eds.), *Oxford Principles of European Law: European Legal Order V. I* (Oxford University Press 2018) 265

Tezcan İdriz N, "Free Movement of Persons between Turkey and the EU: To Move or not to Move? The Response of the Judiciary" (2009) 46 (5) Common Market Law Review 1621

Tiryaki H, *Yabancıların Türkiye'de Çalışma İzinleri* (2nd edn, Bilge Yayınevi 2016)

Ümit C, *Avrupa Birliği Hukukunda Üçüncü Ülke Vatandaşları* (Seçkin Yayıncılık 2013)

Online Sources

Eur-Lex Access to European Union Law, https://eur-lex.europa.eu/homepage.html

Ministry of Foreign Affairs, https://www.mfa.gov.tr/

Ministry of Foreign Affairs Directorate for EU Affairs of the Turkish Republic, https://www.ab.gov.tr/turkey-eu-relations_4_en.html

Ministry of Labor and Social Security General Directorate of International Labor Force of the Turkish Republic, https://www.csgb.gov.tr/uigm/

Official Journal of the EU (OJ), https://eur-lex.europa.eu/oj/direct-access.html

Official Journal of the Turkish Republic (RG), https://www.resmigazete.gov.tr/

Horuztepe GS, *Türkiye'de Çalışan Yabancıların İş Kanunu'ndan Kaynaklanan Hak ve Görevleri,* Aile Çalışma ve Sosyal Hizmetler Bakanlığı Expert Thesis (2021), https://www.csgb.gov.tr/media/89560/gul-setenay-horuztepe_turkiye-de-calisan-yabancilarin-is-kanunundan-kaynaklanan-hak-ve-yukumlulukleri-1.pdf date of access: 25.07.2024

IS LEGAL PLURALISM REQUIRED IN HUMAN RIGHTS LAW?*

Hukuki Çoğulculuk İnsan Hakları Hukuku için Gerekli midir?

Mehmet Sercan ERCAN**

L&JR
Year: 16, Issue: 30
July 2025
pp.39-54

Article Information

Submitted	*: 15.11.2024*
Revision Requested	*: 20.01.2025*
Last Version Received	*: 02.02.2025*
Accepted	*: 22.04.2025*

Article Type

Research Article

Abstract

This paper critically examines the nature and extent of legal pluralism, its role in fostering inclusiveness, and perceptions of justice administration within international human rights law. Arguing that legal pluralism is not merely a descriptive concept but a normative requirement, the study explores its complex and nuanced relationship with international human rights standards. Through a detailed analysis of various forms of legal pluralism, the paper evaluates their alignment with international human rights legislation. Case law from the European Court of Human Rights (ECtHR) illustrates how pluralism is fundamental to democratic society, affecting the scope and definition of freedoms such as speech and association. The study ultimately questions how pluralism is interpreted within ECtHR jurisprudence, revealing it as both a marker of societal diversity and an essential element of political and legal frameworks.

Key words: Legal pluralism, human rights, case-law, European legal pluralism.

Özet

Bu makale, hukuki çoğulculuğun doğasını ve kapsamını, kapsayıcılığı teşvik etmedeki rolünü ve uluslararası insan hakları hukuku çerçevesinde adaletin sağlanmasına dair algıları eleştirel bir şekilde incelemektedir. Hukuki çoğulculuğun yalnızca tanımlayıcı bir kavram değil, aynı zamanda normatif bir gereklilik olduğunu ileri süren çalışma, bu kavramın uluslararası insan hakları standartlarıyla olan karmaşık ve çok yönlü ilişkisini araştırmaktadır. Çeşitli

* There is no requirement of Ethics Committee Approval for this study.

** Dr., Lawyer, mehmetsercanercan@gmail.com, ORCID ID: 0000-0002-5098-2271.

hukuki çoğulculuk biçimlerinin ayrıntılı bir analizini sunan makale, bunların uluslararası insan hakları mevzuatıyla uyumunu değerlendirmektedir. Avrupa İnsan Hakları Mahkemesi'nin (AİHM) içtihatları, çoğulculuğun demokratik toplum için temel bir unsur olduğunu, ifade ve örgütlenme özgürlüğü gibi hakların kapsam ve tanımlarını etkilediğini göstermektedir. Çalışma, çoğulculuğun AİHM içtihatlarında nasıl yorumlandığını sorgulamakta ve bunu hem toplumsal çeşitliliğin bir göstergesi hem de siyasi ve hukuki çerçevelerin vazgeçilmez bir unsuru olarak ortaya koymaktadır.

Anahtar Kelimeler: Hukuki çoğulculuk, insan hakları, içtihat, Avrupa hukuki çoğulculuğu.

INTRODUCTION

This paper critically examines legal pluralism's role in supporting human rights frameworks. In particular, it questions how pluralist approaches can reconcile state sovereignty with the unique legal needs of culturally diverse communities, thus positioning legal pluralism as a pivotal concept in human rights law. Today's biggest challenge is participation in global trade while honouring our local traditions and multicultural identity. The time has come to create a different social change model that redefines how states and their people interact and respect both universal values and local traditions1. A renewed lifestyle focuses on cultural elements through new ways of learning, connecting with others, and arranging new and existing practices, prioritising society's community network to build strong democratic principles through acceptance of different people and cultures. Community strength builds the systems needed for national structure, cultural development, political diversity, and fair legal access. Social actors use their power to create rights standards based on human dignity and accept human differences.

Today's global financial system, governed by neoliberal rules, creates social inequalities, so we must study how communities remain effective within this landscape. We need to support both new rights and protect minority groups while developing legal methods that consider different interpretation sources[2]. Legal systems move away from personal protective measures to support community power, which naturally enhances social acceptance and cultural connections. Social groups need recognition of their fundamental needs, autonomy claims, diversity, and distinct identities to build an effective rights protection system. This method shows why building an independent rights system is essential to make rights valid. The democratisation of Latin American political structures

1 *Brannigan and Mcbride v the United Kingdom* [1993] ECtHR 14553/89, 14554/89.

2 Karl Loewenstein, 'Militant Democracy and Fundamental Rights, I' (1937) 31 American Political Science Review 417.

and laws requires different democratic approaches to developing knowledge. These practices should defend diversity and safeguard group identity rights while providing equal access to rights for everyone. Given today's needs, we must ensure pluralism becomes an organic part of our political and cultural foundation rather than just an open option. This analysis shows how financial capital drives liberal neo-colonialism while promoting ethnic-cultural genocide yet proposes democratic pluralism as a solution to address globalisation's harmful effects. This method shows how pluralism works against current power structures and supports upcoming human rights.

The conversation focuses on developing solutions supporting human diversity to build a more respectful community with substantial personal rights. The changes taking place in local multicultural communities create better connections between citizens and the state government while setting the stage for new community development. These communities act as hybrid bodies that mix state functions and community power within an open space where people shape decisions beyond state limits[3]. Pluralism that allows different cultural backgrounds helps us fight against dominant systems. It connects new community leaders with emerging forces to develop stronger participation methods in society. Our strategy offers various ways to participate in democracy plus helps ensure people's rights get recognised and supported[4].

I. HUMAN RIGHTS AND LEGAL PLURALISM

Legal pluralism refers to the coexistence of multiple legal systems within a single state or jurisdiction. Under legal pluralism, the state is not the sole authority for laws, as many norms and rules come from customary law, religious rules, and community-based traditions. Human rights benefit from this method because it unites global rights standards with local legal traditions. Indigenous rights movements in Latin America have asserted alternative legal frameworks that challenge state-centric views on property and cultural rights, demonstrating pluralism's practical applications. Likewise, European cases emphasise the complex interactions between national and supranational legal norms that address individual and collective rights. The law stems from what makes human beings social creatures who live with others. A law system follows personal rights that allow someone to seek their legal property. These rights reflect the need to deliver what someone rightfully deserves. All basic legal foundations begin with human rights efforts to achieve justice through laws, institutions, and standards[5].

---

3 ibid.

4 *Brannigan and Mcbride v. the United Kingdom* (n 2).

5 Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals : Text and Materials* (Oxford University Press 2008).

Member states create human rights protection by writing them into their constitutions and by joining international treaty agreements. States define these rules to make human rights legally valid. Under present legal systems, human rights receive official protection through official legal hearings that judges oversee. The legal system protects rights that are admitted under state-created laws. Without formal state law acceptance, human rights remain theoretical and cannot be applied by authorities[6]. Actual human rights practice does not always match legal requirements because the formal rules do not always produce effective results. Formal human rights laws set down in paperwork often remain unfulfilled when put into practice across real-world situations[7].

The modern conception of law is often described as univocal, meaning it is understood to have one clear definition: A state-controlled set of rules forms the system by which society is managed. The state creates laws from scratch and positions them within a defined structure to manage social relationships. Under this new system, the modern state gained total control over all forms of law, shifting from historical pluralistic systems. Through state governance, law absorbed many different legal traditions, which produced the modern world's "drama." Traditional state law becomes the dominant authority because these new frameworks suppress other types of justice practices from recognition. People understand law as a system of rules, but its meaning extends far beyond that. In addition to formal rules, the law gives specific rights to people and social groups, including ownership of their property and enhanced protections.

The power to define legal standards exists outside of state authority. Law develops out of fundamental principles and takes form from social customs alongside community practices and relationships. It forms from everyday interactions, nature, and society, including customs, history, and legal standards. Different groups use their expectations and activism to create new laws when their demands exceed conventional norms[8]. Legal pluralism moves beyond modernity's simple understanding of law through a new way of knowing. The system accepts systems side by side without ranking them according to worth or accuracy. The model uses comparison and analogy to balance law variations while protecting its fundamental core. In reality, justice defines the law's purpose and enhances its authority[9]. Under this view, legal pluralism is an essential part of justice. When a conservative approach to legal pluralism controls unjust behaviour, the theory loses its genuine role.

---

6 McDougal MS, Lasswell HD, Chen LC. Human rights and world public order: the basic policies of an international law of human dignity. Oxford University Press; 2018 Nov 16.

7 John Rawls, 'THE DOMAIN OF THE POLITICAL AND OVERLAPPING CONSENSUS', *Debates in Contemporary Political Philosophy* (Routledge 2002) 474.

8 *Gunduz v Turkey* [2003] ECtHR 35071/97 para 72.

9 Steiner, Alston and Goodman (n 6).

Legal pluralism implies an emancipatory project, a praxis of liberation. That is, "a legal project resulting from the process of insurgent social practices motivated to satisfy essential needs." But before characterising this legal pluralism and how legalities are produced, human beings are the root of all laws and the primordial source of all legalities; somehow, human rights are legalised needs. One of the prominent examples of legal pluralism is in the Canadian province of Quebec, which operates under a civil law system influenced by French culture, in contrast to the standard law system predominant in the other provinces. Cultural rights laws show that mixed legal systems protect minority customs while letting everyone access fundamental human rights[10]. Lebanon has legal pluralism structures because different religious groups run their family laws[11]. Our legal framework gives every community proper representation yet threatens human rights by limiting fairness in family matters like marriage rules, inheritance distribution, and child guardianship. When we look at these examples, legal pluralism faces both positive and negative impacts on human rights.

A. European Legal Pluralism

Contemporary cases, such as refugee rights and freedom of religion, reveal how the European Court of Human Rights applies pluralism to navigate diverse legal expectations within the EU. These cases underscore the persistent relevance of pluralist jurisprudence in mediating between diverse value systems. Legal pluralism has been widely accepted in European law systems in recent decades. Lawyers developed this view to match the rising connection between different European legal systems. The approach fills significant gaps in monist and dualist frameworks because these systems struggle with multiple overlapping values across European Union laws and rule sources in complex legal settings. The region continues to experience changes in its legal framework. For example, the ECtHR shows how different cultural and legal systems work together by looking at Quebec cases where French and Anglo-Saxon laws exist as examples of internal and external pluralism[12]. Legal pluralism keeps a vague or 'fuzzy' perception[13]. To study pluralism, we must split the elements that make up meaning into two

---

10 Fyson D. Legal pluralism, hybridization and the uses of everyday criminal law in Quebec, 1760–1867. InThe Uses of Justice in Global Perspective, 1600–1900 2019 Jan 15 (pp. 210-230). Routledge.

11 Gharios G. Legal pluralism and unofficial law in Lebanon: evolution and sustainable development of water. Water Policy. 2020 Jun 1;22(3):348-64.

12 Pirola F. *Between Deference and Activism: The ECtHR as a Court on States or a Court on Rights? Exploring the ECtHR interpretative tools* (Doctoral dissertation, Université Côte d›Azur; Università degli studi di Milano-Bicocca).

13 *Refah Partisi (the Welfare Party) and Others v Turkey* [2003] ECtHR [GC] 60936/12 para 123.

parts. In a legal context, internal pluralism means multiple legal systems operate as part of a single system. This theory accepts many legal systems operate under one law system as separate norms. People often connect this type of pluralism with international law theories[14]. A second interpretation of legal pluralism shows that multiple legal systems work apart yet influence domestic law. The legal values nations follow today come from outside sources, such as international law, even though they must follow a domestic framework to implement them. When external laws enter domestic systems, they blend with multiple existing legal systems, creating different forms of internal legal plurality[15].

In 1976, the European Court of Human Rights launched two ground-breaking decisions using pluralism to translate the core Human Rights stipulated in the European Convention of Human Rights (ECHR) and its extensions. These first rulings set human rights precedents by allowing multiple standards to function across different societies. Handyside generated a new framework for protecting human rights in Europe during its leading role in shaping European law[16]. The European Court of Human Rights (ECtHR) bases its defence of freedom of expression on its ideals for democratic governance. Our democratic way of life depends on free speech as its basic foundation and source of social diversity. The ECtHR established another key case decision for democratic values on the same day, as it confirmed its dedication to protecting fundamental rights in Kjeldsen, Busk Madsen & Pedersen, which manages freedom of education[17]. These two cases show that the view of pluralism has a relatively broad scope. Through the margin of appreciation doctrine, the ECtHR in the Welfare Party v. Turkey case allowed states to take some liberties under human rights conditions. The ECtHR uses a margin of appreciation to let states apply pluralism freely while maintaining their ECHR commitments[18]. In democratic settings, pluralism functions as a community feature and a requirement, with "democratic society" broadly defined. This expanded interpretation allows us to connect many rights to pluralism values that honour all perspectives[19].

---

14 Vasiliki Kosta, Nikos Skoutaris and Vassilis P Tzevelekos (eds), *The EU Accession to the ECHR* (Hart Publishing 2014) <https://libproxy.berkeley.edu/login?qurl=http%3A%2F%2Fdx.doi.org%2F10.5040%2F9781474202046%3Flocatt%3Dlabel%3Asecondary_bloomsburyCollections> accessed 27 October 2024.

15 Sciolino (n 11).

16 *Handyside v the United Kingdom* [1976] ECtHR 57499/17, 74536/17, 80215/17, 9323/18, 16128/18, 25920/18.

17 Mireille Delmas-Marty, (2002), Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism, Publisher Cambridge University Press

18 Alves AI. *The margin of appreciation doctrine and the right to life: the article 2 of the ECHR* (Doctoral dissertation).

19 Mireille Delmas-Marty, *Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism* (Paperback re-issue, digitally print version, Cambridge Univ Press 2007).

B. Legal Pluralism and Realisation of Human Rights

Recent scholarship critiques pluralism's potential to reinforce local power dynamics that may conflict with universal human rights. This paper addresses these critiques by highlighting mechanisms within pluralist legal systems that safeguard against the exclusion or oppression of marginalised groups, thereby promoting a balanced view of pluralism's role in advancing justice. Quebec has established provincial legal frameworks to defend French-speaking traditions and culture under federal human rights guidelines[20]. Lebanon's laws support multiple religious traditions by letting each faith follow its family rules yet struggle to ensure equal rights between men and women[21]. These examples illustrate how cultures defend their traditions against global human rights requirements.

National laws created by the state do not adequately meet the basic requirements of people, which leads to unfair treatment across the country. Human societies need legal frameworks to operate between people, even though anyone needs law to thrive. If the official state laws are ineffective or unfair, certain social groups develop their legal systems, leading to multiple legal systems existing at once. Sworn laws emerge when government law falls short of meeting human rights needs needed for quality living. Alternative law comprehends three fundamental uses of the law. National law faces its battle to give legal rights to all citizens, including poor workers and lower-income individuals. Groups advocating for their human rights push the state to make more equitable laws that benefit everyone. People consider this first meaning of Alternative Law as one of the spaces of the alternative use of law[22]. The second approach lets legal interpreters use legal provisions to safeguard vulnerable populations by selecting specific interpretive methods. Indigenous peoples in Canada, the USA, and Australia blend their traditional legal traditions with national law but experience disagreements about their traditional rights to resources and cultural freedom[23].

The alternative use of law is the second kind of "alternative law" according to this classification and is directly related to legal hermeneutics. Thus, it is argued that the alternative use of the law "is the hermeneutic process by which the interpreter gives the legal norm a meaning different from that intended by the right-wing legislator or the ruling social class[24]." Law systems mainly

---

20 Bosset P. Cultural human rights as new foundations for interculturalist policies: a rights-based approach from Québec. The International Journal of Human Rights. 2024 Dec 3:1-25.

21 Kachar S. The Challenges of Pluralism in Lebanon and the Culture of Change in the Lebanese Political Thought. J Poli Sci Publi Opin. 2023;1(1):105.

22 Steiner, Alston and Goodman (n 6).

23 Ahmed, B. I. What are the Underlying Factors for the Poor Implementation of the Free, Prior, and Informed Consent Principle in Australia, Canada, and the United States? A Qualitative Comparative Study.

24 Kosta, Skoutaris and Tzevelekos (n 13).

support familiar people with limitations placed on rules that benefit powerful social groups. Within their specific social groups, individuals develop their legal standards and frameworks under the law, known as "legal pluralism" and "alternative law." When communities take charge, they create new forms of justice representing their visions and demands for a better society. Society obtains economic, social and cultural rights mainly through government programs and official departments. Even though states give rights material support, sometimes traditional legal principles do not effectively explain how these rights should be achieved. Social movements press for legislation to defend human rights when government rules lack effectiveness or oppose basic human needs. Alternative laws serve both to shield and fight for equal treatment for minority and emerging societal groups in building a fairer community[25].Throughout Mexico's recent history, several indigenous groups have fought legal battles to protect their cultures and land ownership[26].

The community's development project needs the Community Police force and all elements of security and justice to function correctly. Our system protects fundamental human rights, including safety from harm, alongside access to all economic, social, and cultural opportunities for our entire society[27]. Regarding the political importance of this project, it is "one of the most important experiences in the whole country of Indigenous creativity in the construction of its democratic forms of community regulation." It emphasises the process of producing this project, the liberation of indigenism to build an independent Indigenous movement and the "reception among priests of Indigenous or popular origin of the desacralising and liberating influence of Liberation Theology[28]. It is essential to say that the community assemblies mentioned did not begin to be created to create a security system but rather that they had been carried out for economic and social reasons before.

II. LEGAL PLURALISM IN THE PERSPECTIVE OF OTHERNESS AND PARTICIPATION

The recognition of pluralism in the perspective of otherness and emancipation reveals the locus of coexistence for a growing understanding of creative, differentiated, and participatory multicultural elements. In a society composed

[25] Schmid, S. P. (2023). Individual or collective rights? Consequences for the satisfaction with democracy among Indigenous peoples in Latin America. *Democratization*, *30*(6), 1113-1134.

[26] Rachel Sieder, *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (Palgrave Macmillan 2002) 1–19.

[27] Linden-Retek, P. (2024). A Postnational Bearing: On the Legal Form of European Constitutionalism.

[28] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2011).

of diverse communities and cultures, pluralism based on a democracy expresses the recognition of collective values materialised in the cultural dimension of each group and community. Such an attempt to conceive the plurality of cultures in society, to stimulate the participation of minority cultural groups and ethnic communities approach the theme of "multiculturalism." Multiculturalism, which takes on different meanings (conservative, progressive, critical, etc.), expresses the coexistence of cultural forms or groups characterised by other cultures within a 'modern' society[29]. This is a Eurocentric concept designed to describe cultural diversity within the framework of the nation-states of the northern hemisphere and to deal with the situation resulting from the influx of immigrants from the South to a European space without internal borders, ethnic diversity, and identity affirmation of minorities in the United States, and the specific problems of countries such as Canada with territorially differentiated linguistic or ethnic communities. A concept that the North tries to impose on the nations of the South a way of defining their historical condition and identity. There are different notions of multiculturalism; in the case of the emancipatory version, it centres on recognising the right to difference and the coexistence or construction of a life in common besides differences of various kinds. It may become imperative as a requirement and affirmation of dialogue.

Certainly, legal pluralism has the merit of revealing the rich informal legal production engendered by material conditions, social struggles, and pluriclassist contradictions. This explains why legal pluralism in Latin American peripheral capitalism goes "through the redefinition of relations between the centralising power of state regulation and the challenging effort of self-regulation of social movements and multiple excluded voluntary entities." Recognition of another juridical culture, marked by communitarian-participatory pluralism and legitimacy built through the internalised practices of social subjects, allows us to advance in the redefinition and affirmation of human rights from an intercultural perspective. Interculturality is understood as a critical cultural philosophy, a horizon of equitable dialogue, and a recognition of cultural pluralism in which no culture is an absolute but a possibility constitutively open to the possible fertilisation by other cultures. Although it is sometimes associated with multiculturalism (or a form or variant thereof), interculturality has its specificity since given cultural pluralism and new philosophical hermeneutics. Interculturality refers to an emerging society in which ethnic communities, social groups, and classes recognise themselves in their differences and seek their mutual understanding and appreciation, "which is effected through" dialogical instances[30]. In the hermeneutic perspective of philosophy, interculturality" has its central theme,

29 ibid.

30 ibid.

the problem of identity, the way of being, and the peculiar way of thinking. "It is a discourse on cultures as a "synthesis of innovative, transported elements assimilated into a historical process." Consequently, interculturality has a dialogic, hermeneutic, and interdisciplinary character in its pluralistic dimension. As part of intercultural dialogue, the new approach works to build better human rights systems through cultural change. The basic methods used by diverse community groups encourage active participation to serve these groups' essential requirements. People primarily seek meaningful lives and want others to accept and respect their differences[31].

The concept of a "subject" in historical-cultural settings traces back to experiences of revolutionary movements fighting for resistance. When public systems deny rights and persistently fail to work effectively, emerging groups start new, legitimate ways for people to participate in politics. These enterprises lead and develop standards in multiple ways throughout society. Traditional, modern law struggles under its capitalist liberal and formalist rules, which push society toward non-state normative practices and alternative justice methods. Social groups engaged in these unofficial normative practices are generally seen as outsiders by main system authorities yet build alternative legitimate forms of governance. The classic authorities who create law now extend beyond official institutions and national government organisations. Today, the law is developing across multiple centres of social practice where it started. Our society now needs to acknowledge how social change movements from unequal regions develop legal solutions that bring freedom to everybody. These movements lead the human rights conversation while creating opposition against current community rights threats.

In legal pluralism, which focuses on freedom, the core legitimacy depends on what people require to live. Our human needs expand in all directions from life-shared backgrounds, including personal yearnings and life approaches that remain unmet or impossible to reach. Humans never stop developing critical needs, adapting them to different times and locations. People need advanced social training from one cultural group to another to understand and fulfil their particular needs. Identifying which needs to qualify as a justice challenge remains the primary obstacle to achieving fair treatment. According to Agnes Heller's approach, a need becomes proper when meeting its requirements and won't harm other individuals. When goals are met, people should not reduce others to aid them. Each citizen should fight self-imposed oppression by noticing everyone's needs to ensure outcomes that benefit all communities without harming others.

A better-enlightened approach to the law requires collaboration across subjects and cultures during transformation. Through new historical subjects' practices,

31 ibid.

this perspective strengthens legal pluralism for social change and creates a powerful resistance against current norms. The perspective fights the system that shuts people out of daily life and slowly weakens essential fundamental rights protection. This perspective first recognises human needs that belong to all people and works to establish legal systems that serve every community effectively. These movements reframe law while showing why state-centred law structures need change to end repeated distributions of injustice"[32].

III. HUMAN RIGHTS: ITS INTERCULTURAL AND EMANCIPATORY DIMENSION

The current political system tied to capitalism produces individuals who want new ways beyond capitalist globalisation. The strategy of emphasising human rights in political talks includes its visionary nature for freedom and cultural equality. As human rights doctrine adjusted to cultural changes throughout history, it evolved from different societal needs each time. These early human rights principles' unique features and practical implementation need clear distinction from contemporary rights standards shaped by 20th-century neoliberal global trade dynamics. During past debates, human rights served as a belief system to fight against unfair rulers and protect fundamental personal freedoms. People generally regarded human rights as official state-backed rules without practical connection to real life and society. Under this single system, Every legal system today submits to official power and market rules within the state framework. Although human rights remain influential today, their practical application remains restricted.

Limitations that linked human rights with state laws made it hard for them to promote democracy because they did not directly protect non-government rights. The formal approach to legal procedures for rights creation failed to examine their practical implementation. By focusing only on legal standards, the system could not make rights work for people, which limited their benefits. The present financial capital dominance and neoliberal globalisation require us to establish new historical periods and analytical concepts for human rights. The moment calls for a complete departure from state-centred and market-focused human rights systems to develop action-based rights that meet today's global needs.

Legal pluralism plays a significant role in addressing these limitations. Through legal pluralism, we accept that several legal systems operate together in one territory. Quebec shows how legal pluralism works by using French civil law as an alternative to standard law practices in other Canadian provinces. Quebec shows how French culture roots in their legal system combine different legal systems to preserve human rights. In contrast, Anglo-Saxon cultural practices

32 ibid.

spread throughout provinces and guide those regions to adopt similar laws, which can be compared to highlight the benefits and challenges of legal pluralism[33]. In addition to Canada, Lebanon demonstrates legal pluralism by letting religious groups set rules for marriage, divorce, and inheritance[34]. Different religious communities in Lebanon can run their legal matters cheers to these laws. This method leads to questions about how equally and fairly human rights protections apply to everyone.

IV. LEGAL PLURALISM AND THE EUROPEAN COURT OF HUMAN RIGHTS (ECHR'S) MARGIN OF APPRECIATION

ECHR exists to create shared human rights principles for states, but legal pluralism limits how member nations can use their rulings. Legal pluralism blocks a state's ability to fulfil the responsibilities stated in the Convention agreement. States can exercise judgment in following Convention rights because the ECHR accepts a flexible application of these rules despite different legal frameworks. In the Welfare Party case, the ECtHR found that states have limited freedom to fulfil their Convention responsibilities when they allow legal pluralism based on religious grounds. The European Court of Human Rights expects nations to adopt the same legal rules, while Europe has many distinct legal systems[35]. The ECtHR usually follows a pluralistic approach to policy implementation. The ECtHR uses this approach to evaluate free speech matters, educational freedom cases, personal relationships, and religious freedoms. Pluralism defends the freedom of groups and individuals while keeping central cultural values open to public debate. Public institutions cannot prevent emerging religious groups and cultural minorities from constructing organisational centres. The rights of groups and individuals connect naturally with the concept of pluralism. Our freedoms to express ourselves and practice our faith heavily rely on and help build pluralistic social environments.

CONCLUSION

This study reaffirms that legal pluralism is essential for a holistic and inclusive approach to human rights. The interplay between state and non-state legal systems enriches human rights law by acknowledging and addressing the legal needs of diverse cultural groups, offering a path toward more equitable and just societies. A multicultural understanding of today's world helps us learn new ways to think about human rights as changing standards of being a citizen. Our

---

33 Salih AL. The Anglo-Saxon the Basis for a Universal Language. Journal of Al-Ma'moon College. 2023;2(40).

34 Ibid

35 Mégret F. International Criminal Justice, Legal Pluralism, and the Margin of Appreciation Lessons from the European Convention on Human Rights. Harv. Hum. Rts. J.. 2020;33:57.

larger approach shows that social policies should fix unfairness while spreading resources evenly and making social groups feel more part of society. The roots of human rights emerged from bourgeois-liberal traditions, yet their expansion now includes social, economic, and cultural rights beyond basic personal freedom protection. Modern society has produced new knowledge that helps us meet minority rights goals beyond traditional individual petitioner countries. Nations worldwide make their democracies more welcoming to diverse populations by combining multiculturalism as a foundation and growth process. To protect individual cultural rights and freedoms, governments must support the cultural group rights of their citizens. Thus, it must be maintained that "the struggle for human rights is a collective task that requires the state to recognise the group identities of traditionally marginalised and excluded minority populations." In any case, it is urgent "to overcome the individualistic, mono-cultural and positivist concept of human rights, based on the equal dignity of cultures, to open the way for an intercultural definition and interpretation of human rights."

The European Court of Human Rights stands firmly for pluralism by defending free speech and religious and group rights. The principle upholds personal speech rights for all individuals while stopping the majority influence from erasing minority values. The state has to let new faith groups and cultural minority institutions establish themselves and run their activities. The pluralistic system allows freedom of religious and association rights while providing the environment for these activities to function together.

BIBLIOGRAPHY

Ahmed, B. I. What are the Underlying Factors for the Poor Implementation of the Free, Prior, and Informed Consent Principle in Australia, Canada, and the United States? A Qualitative Comparative Study.

Alves AI. *The margin of appreciation doctrine and the Right to life: the article 2 of the ECHR* (Doctoral dissertation).

Bosset P. Cultural human rights as new foundations for interculturalist policies: a rights-based approach from Québec. The International Journal of Human Rights. 2024 Dec 3:1-25.

Delmas-Marty M, *Towards a Truly Common Law: Europe as a Laboratory for Legal Pluralism* (Paperback re-issue, digitally print version, Cambridge Univ Press 2007)

Fyson D. Legal pluralism, hybridisation and the uses of everyday criminal Law in Quebec, 1760–1867. InThe Uses of Justice in Global Perspective, 1600–1900 2019 Jan 15 (pp. 210-230). Routledge.

Gharios G. Legal pluralism and unofficial law in Lebanon: evolution and sustainable development of water. Water Policy. 2020 Jun 1;22(3):348-64.

Kachar S. The Challenges of Pluralism in Lebanon and the Culture of Change in the Lebanese Political Thought. J Poli Sci Publi Opin. 2023;1(1):105.

Kosta V, Skoutaris N and Tzevelekos VP (eds), *The EU Accession to the ECHR* (Hart Publishing 2014)<https://libproxy.berkeley.edu/login?qurl=http%3A%2F%2Fdx.doi.org%2F10.5040%2F9781474202046%3Flocatt%3Dlabel%3Asecondary_bloomsburyCollections> accessed 27 October 2024

Krisch N, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2011)

Linden-Retek, P. (2024). A Postnational Bearing: On the Legal Form of European Constitutionalism.

Loewenstein K, 'Militant Democracy and Fundamental Rights, I' (1937) 31 American Political Science Review 417

McDougal MS, Lasswell HD, Chen LC. Human rights and world public order: the basic policies of an international law of human dignity. Oxford University Press; 2018 Nov 16.

Mégret F. International Criminal Justice, Legal Pluralism, and the Margin of Appreciation Lessons from the European Convention on Human Rights. Harv. Hum. Rts. J.. 2020;33:57.

Pirola F. *Between Deference and Activism: The ECtHR as a Court on States or a Court on Rights? Exploring the ECtHR interpretative tools* (Doctoral dissertation, Université Côte d›Azur; Università degli studi di Milano-Bicocca).

Rawls J, 'THE DOMAIN OF THE POLITICAL AND OVERLAPPING CONSENSUS,' *Debates in Contemporary Political Philosophy* (Routledge 2002)

Salih AL. The Anglo-Saxon the Basis for a Universal Language. Journal of Al-Ma'moon College. 2023;2(40).

Schmid, S. P. (2023). Individual or collective rights? Consequences for the satisfaction with democracy among Indigenous peoples in Latin America. *Democratisation*, *30*(6), 1113-1134.

Sciolino E, 'Lawyers Protest Across France at Sweeping Anticrime Law' *The New York Times* (12 February 2004) <https://www.nytimes.com/2004/02/12/world/lawyers-protest-across-france-at-sweeping-anticrime-law.html> accessed 27 October 2024

Sieder R, *Multiculturalism in Latin America: Indigenous Rights, Diversity and Democracy* (Palgrave Macmillan 2002)

Steiner HJ, Alston P and Goodman R, *International Human Rights in Context: Law, Politics, Morals : Text and Materials* (Oxford University Press 2008)

Brannigan and Mcbride v the United Kingdom [1993] ECtHR 14553/89, 14554/89

Gunduz v Turkey [2003] ECtHR 35071/97

Handyside v the United Kingdom [1976] ECtHR 57499/17, 74536/17, 80215/17, 9323/18, 16128/18, 25920/18

Kjeldsen, Busk Madsen and Pedersen v Denmark [1976] ECtHR 57509/11

Refah Partisi (the Welfare Party) and Others v Turkey [2003] ECtHR [GC] 60936/12

Thlimmenos v Greece [2000] ECtHR [GC] 58561/00

TAXATION OF EQUITY BASED CROWDFUNDING PLATFORMS*

Paya Dayalı Kitlesel Fonlama Platformlarının Vergilendirilmesi

Pınar Nur TAŞDEMİR**

L&JR
Year: 16, Issue: 30
July 2025
pp.55-74

Article Information

Submitted : *03.01.2025*
Revision Requested : *07.02.2025*
Last Version Received : *28.02.2025*
Accepted : *22.04.2025*

Article Type

Research Article

ABSTRACT

Crowdfunding platforms appear as platforms that bring together the needs of investment and closing the financing gap and have been created to meet both needs. As a matter of fact, on the one hand, individuals or companies are looking for investors to meet their financing needs, and on the other hand, investors want to meet their investment needs by accessing projects they can trust. Crowdfunding platforms are internet-based applications that meet these needs by bringing together projects and investors. These platforms can be reward-based, debt-based, equity-based or donations based as will be discussed in detail within the scope of the study. Although these platforms make significant contributions in terms of fundraising, the operation of the funds also brings with it various legal problems. One of the most important problems is conducting fraudulent activities. In order to prevent such activities, various regulations are adopted by country legislation and the platforms themselves. At this point, it is very important to ensure transparency in the operation of the platforms. Taxing these platforms and the profits derived from them through a properly functioning system will also make significant contributions to ensuring transparency and control. Within the scope of the study, the taxation of equity based crowdfunding platforms will be discussed in detail.

Keywords: Equity based crowdfunding platforms, taxation, transparency.

* There is no requirement of Ethics Committee Approval for this study.

** Asst. Prof., Ankara Medipol University, Faculty of Law, Financial Law Department, Ankara, Türkiye, E-mail: nur.pnr@gmail.com, ORCID ID: 0000-0003-2659-4436.

ÖZ

Kitle fonlaması platformları, yatırım yapılması ve finansman açığının kapatılması ihtiyaçlarını bir araya getiren ve her iki ihtiyacı da karşılamak için oluşturulmuş platformlar olarak karşımıza çıkmaktadır. Nitekim bir yandan bireyler veya şirketler finansman ihtiyaçlarını karşılamak için yatırımcı ararken, diğer yandan da yatırımcılar güvenebilecekleri projelere erişerek yatırım ihtiyaçlarını karşılamak istemektedir. İşte kitle fonlaması platformları da proje ve yatırımcıları bir araya getirerek bu ihtiyaçları karşılayan internet tabanlı uygulamalardır. Bu platformlar, çalışma kapsamında ayrıntılı olarak ele alınacağı üzere, ödüle dayalı, borca dayalı, paya ya da bağışa dayalı olabilmektedir. Kitle fonlaması platformları, fon toplama açısından önemli katkılar sağlasa da çeşitli hukuki sorunları da beraberinde getirmektedir. Bu kapsamdaki en önemli sorunlardan birisi de dolandırıcılık faaliyetleri olarak karşımıza çıkmaktadır. Bu tür faaliyetlerin önlenmesi amacıyla mevzuat kapsamında ya da platformların kendileri tarafından çeşitli düzenlemeler kabul edilmektedir. Bu noktada platformların işleyişinde şeffaflığın sağlanması oldukça önemlidir. Bu platformların ve bunlardan elde edilen kazancın düzgün işleyen bir sistemle vergilendirilmesi de şeffaflığın ve kontrolün sağlanmasına önemli katkılar sağlayacaktır. Çalışma kapsamında, paya dayalı kitle fonlama platformlarının vergilendirilmesi konusu detaylı olarak ele alınacaktır.

Anahtar Sözcükler: Paya dayalı kitlesel fonlama platformları, vergilendirme, şeffaflık.

INTRODUCTION

Crowdfunding platforms have emerged primarily to meet the need for funds. An aspect of meeting the need for funds is making investments. In fact, in addition to the difficulty of creating or finding resources to meet the need for funds, it is equally difficult for investors to meet an idea or person that suits them or that they can trust. Crowdfunding platforms have been created as an intermediary to meet these needs.

Significant amounts of funds have been raised through crowdfunding platforms such as Kickstarter, Indiegogo and GoFundMe. In addition to the important aspects of crowdfunding platforms such as fundraising and employment, innovation, and supporting new and innovative ideas, there are also aspects that need to be addressed legally. Indeed, one of the most struggled issues regarding these platforms is fraudulent behavior. In order to prevent such fraudulent behaviors, the platforms themselves accept certain rules and Terms of Use. So platforms have some private incentives to ensure that investors do not commit abusive behaviour. However these incentives remain limited and regulations have a role to play[1].

[1] Garry A. Gabison, 'The Incentive Problems with the All-Or-Nothing Crowdfunding Model' (2016) 12 Hastings Business Law Journal 489, 518.

The subject of this study, the taxation of these platforms and the regulations adopted for this purpose, is also one of the issues that need to be addressed from a legal perspective. Taxation of platforms will provide a protection mechanism to prevent fraudulent activities, as it will ensure transparency and control of the activities of these platforms within the scope of fulfilling documentation and registration obligations. Within the scope of the study, crowdfunding platforms, the functioning and types of these platforms will be explained, and the taxation of equity-based platforms will be discussed.

I. CROWDFUNDING PLATFORMS AS A CONCEPT

Crowdfunding platforms are essentially platforms created via a website. Entrepreneurs/venture companies and investors/backers are brought together through internet-based platforms. In other words, creators or initiators of a fundraising campaign seek contributors or backers to finance their projects[2]. Creators and backers can be an individual or a company. The project creator posts the project ideas on the host website and asks backers for funding. The host receives funds from backers and passes them along to the project creator after retaining a hosting fee[3]. With this feature, the platforms can be considered as intermediaries between the project creator and backers. Many small and large contributions are obtained through these platforms.

These platforms have many advantages both for investors and entrepreneurs or project owners. Since crowdfunding is so effective at connecting project owners and investors, the project owner can raise money at a reduced cost of capital. New funding models could be used to confirm whether a new product is appropriate for the market. Investors can readily participate in the development and backing of new big ideas without having to deal with exorbitant expenses and get early access to the project's early phases. Furthermore, crowdfunding gives everyone involved the chance to have their investment safeguarded by exact legal provisions in the form of a crowdfunding agreement[4].

The particular form of crowdfunding undertaken can have a significant impact on the tax results. Businesses undertaking crowdfunding may, in exchange for a contribution, offer a product or service, a token thank you item, an equity

---

2 Cherly T. Metrejan and Britton A. Mckay, 'Crowdfunding and Income Taxes' (2015) Journal of Accountancy <https://www.journalofaccountancy.com/issues/2015/oct/crowdfunding-and-income-taxes.html> accessed 4 December 2024.

3 Washington State Department of Revenue, 'Crowdfunding' <https://dor.wa.gov/forms-publications/publications-subject/tax-topics/crowdfunding> accessed 4 December 2024.

4 Federica Casano, 'Income Tax Treatment of Crowdfunding at National Level: Exploring the Suitability of the Conventional System and Scope for a New Approach' (2020) 4 World Tax Journal 863, 869.

interest, a debt interest or nothing[5]. So before examining the taxation of the equity based crowdfunding platforms which is the main topic of this article, it is useful to explain the types of the crowdfunding platforms. Because as a result of the success of platforms in raising funds, many types of platforms have emerged. The most popular of these are equity crowdfunding, rewards-based crowdfunding, donations-based crowdfunding, and debt crowdfunding[6].

Firstly, to start with rewards based crowdfunding, normally, the return on investments is expected to be financial, but in rewards based crowdfunding, the return appears as a reward that the entrepreneurs specify in advance. A donor gives to a project in exchange for some existing or future tangible reward. Future products or another kind of membership may be offered as a reward[7]. Reward can also be determined as a service or benefit and there is no restriction on what the reward will be. The features of the benefit to be offered are announced through the platform[8]. Fraud and misuse are not significant issues because the award has a negligible monetary value[9].

An alternative to rewards-based funding is equity based crowdfunding. What is meant by equity is important. Equity is essentially an ownership interest[10]. Equity based crowdfunding gives fund providers ownership shares in the company[11]. This also means that funders share profits, losses or risks. Detailed information on this type of funding will be provided under the next heading.

In donation-based crowdfunding, as the name suggests, there is no financial or other compensation. Here, funds are granted without expecting anything in return. After the projects are announced through the platforms, donations are collected through crowdfunding organizations and the collected donations are delivered to the project owner[12]. The absence of a compensation also makes it

---

5 Mark A. Luscombe, 'Crowdfunding and Taxes' (2017) 95 Taxes: The Tax Magazine 3, 3.

6 Andrew M. Wasilick, 'The Tax Implications of Crowdfunding: From Income to Deductions' 97 North Carolina Law Review 710, 712.

7 Joseph J. Dehner and Jin Kong, 'Equity-Based Crowdfunding outside the USA' (2014) 83 University of Cincinnati Law Review 413, 417.

8 Soner Yakar ve Serkan Yılmaz Kandır, 'Türkiye'de Paya Dayalı Kitlet Fonlaması İçin Bir Vergi Teşvik Önerisi' (2020) 19. Uluslararası İşletmecilik Kongresi Özel Sayısı Erciyes Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi 189, 193.

9 Dehner and Kong (n 7) 417.

10 James Drennen, 'An Analysis and Prediction of Federal Taxation as It Pertains to Crowdfunding' (2017) 19 Duquesne Business Law Journal 144, 159.

11 Fiona Martin and Ann O'Connell, 'Crowdfunding: what are the tax issues' (2018) 20 Journal of Australian Taxation 16, 31.

12 Selda Aydın ve Murat Zorkun, 'Doğal Afetlerin Finansal Maliyetlerinin Azaltılmasında Bağışa Dayalı Kitle Fonlamasının Etkisi ve Vergisel Boyutu' (2023) 422 Vergi Sorunları Dergisi 13, 16.

important to provide government incentives, such as tax advantages, to fund providers.

Finally, debt based crowdfunding centers on a debt instrument that pays a fixed or variable rate of interest and returns principal on a schedule[13]. So this type of crowdfunding refers to lending based on interest at a predetermined rate. In this type of crowdfunding, a contributor lends money to a promoter. In exchange for the loan, the promoter promises to reimburse the contributor for interest and to repay the principal amount after a predetermined amount of time[14]. This method is a suitable financing option especially for entrepreneurs who do not want to issue their shares. While one side receives attractive interest income, the other side can borrow at a reasonable cost[15].

The type of crowdfunding platforms to be created is also important in terms of determining the regulations to be applied to these platforms. Therefore, it should be determined which types of platforms are accepted in terms of legislation and specific regulations should be introduced. In this sense, for example, if there is no compensation for the investment made, regulations can be envisaged to encourage this investment.

The regulations introduced are also very important in terms of preventing fraudulent actions. Crowdfunding platforms themselves can also make regulations to prevent such actions. It is seen that such regulations are mostly accepted in the form of Terms of Use documents and annexes. With the regulations in the Terms of Use, such as don't spam, don't break the law, and reserving the right to withhold funds in case of fraud, a policy regarding fraudulent activities is adopted[16].

Regulations regarding the taxation of these platforms are also important in terms of preventing fraudulent activities. Indeed, compliance with the documentation system and control through tax audits will also provide protection in this sense. In addition, how taxation regulations are implemented will have important consequences for the operation of platforms. The absence of clear standards and stable regulation can dissuade creators and backers from participating, and it can lead to distortions in the marketplace as some platforms are favored through taxation[17].

---

13 Dehner and Kong (n 7) 417.

14 Martin and O'Connell (n 11) 32.

15 Yakar ve Kandır (n 8) 193.

16 Kickstarter, 'Terms of Use' (Kickstarter, 2024) <https://legal.kickstarter.com/policies/en/?name=terms-of-use> accessed 4 December 2024.

17 Elisabetta Lazzaro and Douglas Noonan, 'A comparative analysis of US and EU regulatory frameworks of crowdfunding for the cultural and creative industries' (2021) 27 International Journal of Cultural Policy 590, 597.

Since the taxation of these platforms is a very important issue, the platforms themselves include issues related to this in their regulations. One of these platforms originating from the United States is Kickstarter, one of the largest crowdfunding platforms in the world. There are some statements related to taxation in the Kickstarter and Taxes Guideline[18]. According to this Guideline, in the US, funds raised on the platform are considered income and a creator can offset the income from their project with deductible expenses that are related to the project and accounted for in the same tax year. In the Guideline, it is also stated that Sales tax may be applicable in certain cases depending on the local rules. Indiegogo, another US-based crowdfunding platform, also includes some tax-related issues in its Terms of Use. According to this Terms of Use, taxing authorities may classify contributions as taxable income to the Campaign Owner and any beneficiary who will receive funds directly from the applicable Campaign[19].

A. Equity Based Crowdfunding Platforms

Equity crowdfunding is a model that allows different types of investors to finance new and small businesses in exchange for shares in the company. This way, investors contribute to a company in exchange for a small share/partnership[20]. These platforms offer significant opportunities to companies who want to invest and also ensure that the financing needed by entrepreneurs is met by finding shareholders.

Investors and entrepreneurs also have the opportunity to interact through these platforms. This allows equity investors to take part in an information exchange process with entrepreneurs via these platforms[21]. These platforms enable multiple small-volume investors or companies to conduct without the need for intermediary institutions, and enable companies that are not publicly traded to easily access financing. Their mass nature also contributes to this[22].

It should be noted that investing in equity-based crowdfunding carries with it certain risks. In fact, investors acquiring shares of venture companies through this method means assuming the possible losses and risks. The equity model confronts the most serious challenge, because it holds an obvious and

---

18 Kickstarter, 'Kickstarter and Taxes' (Kickstarter and Taxes) <https://www.kickstarter.com/help/taxes> accessed 4 December 2024.

19 Indiegogo, 'Terms of Use' (Indiegogo, 2021) <https://www.indiegogo.com/about/terms> accessed 4 December 2024.

20 Aydın ve Zorkun (n 12) 18.

21 Edoardo Crocco, Elisa Giacosa, Dorra Yahiaoui and Francesca Culasso, 'Crowd inputs in reward-based and equity-based crowdfunding: a latent Dirichlet allocation approach on their potential for innovation' (2022) 27 European Journal of Innovation Management 2250, 2254.

22 Aydın ve Zorkun (n 12) 18.

significant opportunity for loss of the entire amount contributed, including from fraud and abuse[23].

II. CROWDFUNDING PLATFORMS ACCORDING TO TURKISH LEGISLATION

In our legislation, the first regulation on crowdfunding platforms was introduced with the amendment made to the Capital Markets Law No. 6362[24] in 2017. Crowdfunding is defined here as the collection of money from the public through crowdfunding platforms within the principles determined by the Capital Markets Board in order to provide the funds needed by a project or venture company[25]. According to Article 35/A of the Capital Markets Law, crowdfunding platforms are organizations that mediate crowdfunding and provide services in an electronic environment. According to the same article, it is mandatory to obtain permission from the Capital Markets Board in order to establish and start operating crowdfunding platforms.

The Capital Markets Board may determine whether crowdfunding activities through crowdfunding platforms will be carried out by collecting money from the public based on partnership or debt[26]. From this statement, it is understood that crowdfunding platforms accepted according to the Capital Markets Law are equity based crowdfunding and debt crowdfunding.

The Notification on Equity-Based Crowdfunding was published in the Official Gazette dated October 3, 2019 and numbered 30907. As its name suggests, this Notification only introduced regulations regarding equity-based crowdfunding. However, the relevant Notification was abolished and the Notification on Crowdfunding[27] was published in the Official Gazette. In this Notification, equity-based crowdfunding is defined as raising money from the public via platforms in exchange for a share. And debt crowdfunding is defined as raising money from the public via platforms in exchange for a crowdfunding debt instrument.

A. Establishment of Platforms

In order for the establishment of platforms to be permitted by the Capital Markets Board, the conditions are as follows; being a joint stock company, limits regarding capital and equity being met, shares being registered, the trade name containing the phrase "Crowdfunding Platform", the subject of the business being stated as mediation in crowdfunding activities based on equity

23 Dehner and Kong (n 7) 418.

24 Official Gazette Date: 30.12.2012 Official Gazette Number: 28513.

25 See art. 3 of Law no: 6362.

26 Article 35 of Law no: 6362.

27 Official Gazette Date: 27.10.2021 Official Gazette Number: 31641.

and/or debt in the Convention of association and the Board of Directors being composed of at least 3 persons. In addition, the founders, partners and board members must not be bankrupt, must not have declared composition or have been subject to a postponement of bankruptcy decision, must not have a final conviction for crimes listed in the law and must have the honesty and reputation required by the business[28].

According to the Notification on Crowdfunding, all funds collected from the investors should be paid in cash and the campaign process begins when a venture company or entrepreneur applies to any platform with a request to collect funds in exchange for a debt instrument or shares (equity).

B. Functioning of the Platforms in General

Investors who want to invest through equity-based crowdfunding must become members of a platform that operates in this field. This membership process must be carried out electronically. A membership agreement must be concluded between the relevant equity-based crowdfunding platform and the members. The minimum content of this agreement is regulated in the annex of the Notification on Crowdfunding[29]. Similarly, a Crowdfunding Agreement is concluded between the entrepreneurs and the platform[30].

Venture companies submit campaign applications. According to the Notification on Crowdfunding, the platforms have the right to reject the campaign applications of venture companies or entrepreneurs before submitting them to the investment committee. The platforms must create a campaign page for each project and announcements regarding the funded company are made periodically on this page for the five years following the calendar year in which the campaign takes place.

According to the Notification on Crowdfunding, the campaign process begins when an entrepreneur or venture company applies to any platform with a request to raise funds in exchange for a share. On the other hand, the campaign period begins on the date the information form approved by the investment committee is published on the campaign page. This period cannot exceed sixty days. After this process, it is important to collect the targeted fund amount. If the fund amount is collected before the end date of the campaign period, the campaign period may be terminated early. If funds are collected in excess of the fund amount, the return of the excess amount to investors must be carried out considering equality between investors.

---

28 Article 5 and 6 of the Notification on Crowdfunding.

29 See Annex 5 of the Notification on Crowdfunding

30 Article 11 of the Notification on Crowdfunding. Minimum content of the Crowdfunding agreement can be found in the Annex 4 of the Notification on Crowdfunding

C. Capital Markets Board's List

In order for equity-based crowdfunding platforms to carry out their activities, they need to be listed by the Capital Markets Board. The listing process creates the Board's list of permits to operate.

One of the most important conditions for being listed is to have formed at least one investment committee[31]. This investment committee must consist of at least 3 members, one of whom is a board member of the platform, and the majority of the members must have at least 5 years of experience in areas such as finance, entrepreneurship, business, legal consultancy, technology, industry and trade. At least one member must have a Capital Market Activities Level 3 License[32].

In order to be included in the list, it is also required to establish an internal control and risk management system and an accounting and operations unit. A sufficient number of personnel must be employed in the responsible unit that will carry out the document, record and accounting transactions. In order to ensure that the operational transactions of the crowdfunding activity are carried out, a contract must be signed with the Central Registry Agency and the escrow authority. The Central Registry Agency must establish the infrastructure that will provide mutual data flow with the Investor Risk Monitoring System. In addition, members must establish the infrastructure on the platform where they can communicate electronically with the venture company officials[33]. Providing this interaction is one of the most important features of the platforms.

Another important condition for being included in the list is the establishment of a written conflict of interest policy. This policy must be linked to the decision of the board of directors[34].

Apart from these, it is also mandatory to comply with the issues stipulated in Article 6 of the Notification on Crowdfunding and under the title "A. Establishment of Platforms", such as the partners and members not being bankrupt, not having declared composition or not having a postponement of bankruptcy decision, in order to be included in the list.

D. Fundraising and Investment Restrictions

It is very important to clarify the process of transferring funds obtained from investors to entrepreneurs. The transfer of funds collected through equity-based crowdfunding is subject to detailed rules.

---

31 Article 5 of the Notification on Crowdfunding.

32 Article 9 of the Notification on Crowdfunding.

33 Article 5/5 of the Notification on Crowdfunding.

34 Article 5/5 of the Notification on Crowdfunding.

First of all, a new joint stock company must be established by the entrepreneurs. The company establishment must be completed before the funds collected are transferred. Funds can only be transferred to the venture company in exchange for shares to be issued through capital increase. Funds cannot be collected by selling existing shares of the venture company. All funds obtained from investors in exchange for the shares of the venture company must be paid in cash[35].

As investors acquire shares of the venture company, certain partnership rights will also arise. According to the Article 16/3 of the Notification on Crowdfunding, partnership rights arising from the shares to be given to investors and the privileges related to these shares must be clearly stated in the information form. However, no privilege difference can be created between the shares to be given to investors. Qualified investors are an exception to this.

The Notification on Crowdfunding also provides for certain limitations regarding investment. Whether the investment limits are exceeded is checked by the Central Registry Agency. According to this, individuals who are not qualified investors can invest a maximum of 50,000 Turkish Liras in a calendar year. This limit can be applied as 10% of the annual net income declared by the investor. In any case, this limit should not exceed 200,000 Turkish Liras.

The Capital Markets Board must approve the prospectus for capital market instruments to be offered to the public or traded on the stock exchange, and the issuance document for capital market instruments to be issued without being offered to the public[36]. According to the Notification on Crowdfunding, entrepreneurs can raise funds through platforms through a maximum of two campaigns in any twelve-month period. The amount of funds that can be collected during this period cannot exceed the issuance limit, which is exempted from the obligation to prepare a prospectus by the Board and announced each year through the Board Bulletin. Additional funds can be collected up to a maximum of 20% of the requested fund amount. However, for fund requests exceeding 1,000,000 Turkish Liras, in order for the targeted fund amount to be considered collected, an amount corresponding to at least 5% of the targeted fund must be provided by qualified investors. This amount must be provided within the campaign period.

III. TAXATION OF EQUITY BASED CROWDFUNDING PLATFORMS

Since crowdfunding platforms have three parties: the platforms themselves, the investors and the venture companies, the taxation of these platforms should be evaluated separately from the perspective of these three parties.

---

35 Article 16/1,2 of the Notification on Crowdfunding.

36 Sermaye Piyasası Kurulu, 'İzahname ve İhraç Bilgisi Onayı', <https://spk.gov.tr/hakkimizda/gorev-yetki-ve-sorumluluklar/izahname-ve-ihrac-bilgisi-onayi /> accessed 4 December 2024.

A. Taxation of Equity Based Crowdfunding Platforms As a Joint Stock Company

The regulations in the Notification on Crowdfunding are very important in terms of addressing the issue of taxation of equity based crowdfunding platforms. Indeed, as a result of correctly determining the legal characteristics of these platforms, how these platforms will be taxed will also be correctly determined. At this point, it is useful to re-emphasize the issues mentioned in the previous headings.

Crowdfunding platforms must be established as a joint stock company with the Board of Directors being composed of at least 3 persons, they must meet the limits regarding capital and equity shares being registered. According to the Corporate Tax Law[37], joint stock companies are subject to corporate tax. Accordingly, corporate tax is collected on the corporate profits of these companies. Therefore, corporate tax shall be collected on the corporate income of equity based crowdfunding platforms such as fees, commissions and deductions[38].

According to the Value Added Tax Law[39], deliveries and services made within the scope of commercial, industrial, agricultural activities and self-employment activities in Türkiye are subject to Value Added Tax[40]. According to the Article 6 of aforementioned law, in determining net corporate income, the provisions of the Income Tax Law[41] on commercial income are applied. In this regard, the activities of platforms which act as intermediaries between entrepreneurs and investors and provide consultancy to entrepreneurs should be examined in terms of Value Added Tax.

At this point, the structuring of crowdfunding platforms gains importance again. Indeed, as explained before, these platforms are established as joint stock companies. Since it is stipulated that the provisions regarding commercial income are applied in determining net corporate income, Value Added Tax should be collected on the consultancy service earnings of the platforms[42].

Another tax that should be considered in terms of the activities of the platforms is the stamp duty. According to the Notification on Crowdfunding, in order to be able to carry out crowdfunding transactions, investors must become members of the relevant platform electronically. As stated in the heading titled "B. Functioning of the Platforms in General", a membership agreement is

---

37 Official Gazette Date: 21.06.2006 Official Gazette Number: 26205.

38 Article 11 of the Notification on Crowdfunding.

39 Official Gazette Date: 02.11.1984 Official Gazette Number: 18563.

40 Article 1 of Value Added Tax Law

41 Official Gazette Date: 06.01.1961 Official Gazette Number: 10700.

42 See article 11 of the Notification on Crowdfunding.

concluded between the platform and the members in an electronic environment. Similarly, a crowdfunding agreement is signed between the venture company or entrepreneur and the platform. And according to the Stamp Duty Law[43], the papers listed in Table (1) annexed to this Law are subject to Stamp Duty. This table includes papers related to contracts.

Annex 4 of the Notification on Crowdfunding regulates the minimum elements of the crowdfunding agreement to be conducted between the venture company or entrepreneur and the platform, and Annex 5 regulates the minimum elements of the membership agreement to be conducted between the platform and the members. These minimum elements include fees, commissions or other benefits to be received.

Considering these agreements and the minimum content of the agreements, it can be stated that the contracts concluded are subject to stamp duty. The question that comes to mind here is that the Notification on Crowdfunding stipulates that the membership contract will be concluded "electronically". However, this situation does not create a problem in terms of collecting stamp duty. In fact, according to Article 1 of the Stamp Duty Law, the term "papers" in this Law includes documents created in magnetic media and in the form of electronic data by using electronic signatures.

Another tax that should be considered for equity based crowdfunding platforms is the digital service tax. In fact, in the Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services published by the European Commission on 21.03.2018, it is envisaged that a digital services tax may be applied to crowdfunding platforms[44]. According to the Law No. 7194 on the Digital Service Tax and Amendment of Certain Laws and Legislative Decree No. 375[45], the revenue obtained from the provision and operation of digital environments where users can interact with each other and the intermediary services provided by digital service providers in the digital environment for the services listed in the Law are subject to the digital service tax. The taxpayer of the digital service tax is the digital service providers. In this case, crowdfunding platforms which as stated before are structured as a digital platform and provide interaction and intermediary services between entrepreneurs and investors should be considered as liable for digital service tax.

---

43 Official Gazette Date: 11.07.1964 Official Gazette Number: 11751.

44 European Commission, 'Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services' (Taxation Customs, 2018) <https://taxation-customs.ec.europa.eu/system/files/2018-03/proposal_common_system_digital_services_tax_21032018_en.pdf> accessed 4 December 2024.

45 Official Gazette Date: 07.12.2019 Official Gazette Number: 30971.

A final assessment of the taxes that equity based crowdfunding platforms must pay can be made in terms of the banking and insurance transaction tax. According to Article 28 of the Expenditure Tax Law[46], all money received in cash or on account by banks and insurance companies in their favor, regardless of the name, due to all transactions they have made are subject to the banking and insurance transaction tax[47]. The money received by bankers in cash or on account, regardless of the name given, for their own benefit due to the banking transactions and services they perform, is also subject to banking transaction tax. Therefore, the taxpayers of the banking and insurance transaction tax are banks, bankers and insurance companies. Since the Joint stock companies that are considered as crowdfunding platforms according to the Notification on Crowdfunding, cannot be considered as a bank or banker within the meaning of this Law, they are not subject to banking and insurance transaction tax.

B. Taxation of Investors

The issues regarding the taxation of the platforms themselves can be summarized as above. Looking at the issue from the perspective of investors, taxation of investors will be subject to different regulations depending on whether the investor is an income tax payer or a corporate tax payer. Therefore, taxation of investors who are income tax and corporate tax payers will be discussed under separate headings.

1. Taxation of Income Tax Payer Investors

1.1. Taxation of Dividends

Investors earn dividends from the venture company by investing in it through an equity based crowdfunding platform. Therefore, the first thing to consider is how these dividends will be taxed.

The dividends obtained by investing in the venture company will be subject to income tax as earning on movable assets. Indeed, according to the first subparagraph of the second paragraph of Article 75 of the Income Tax Law, dividends from all types of stocks are considered as earning on movable assets. Therefore, the shares obtained by investors /backers subject to income tax will be considered as dividends and will be subject to income tax as earning on movable assets.

In case of dividend distribution, the venture company is obliged to make withholding tax on the distributed dividends. According to the article 94/1-6-b-i of the Income Tax Law, tax will be withheld from dividends distributed by fully taxpayer corporations to fully taxpayer individuals, those who are not subject to

46 Official Gazette Date: 23.07.1956 Official Gazette Number: 9362.

47 Transactions made in accordance with the Financial Leasing Law are excluded.

income or corporate tax, and those who are exempt from these taxes.

According to Article 22/3 of the Income Tax Law, half of the dividends obtained from fully taxpayer institutions is exempt from income tax. Withholding is made on the exempted amount and the entire withheld tax is offset against the tax calculated on the annual return if the dividend is declared with an annual return. For taxpayer real persons, if the dividend, together with other income items subject to declaration, does not exceed 330,000 Turkish Liras for 2025, no annual declaration will be submitted. If this amount in the second line of the income tax tariff is exceeded, no annual return will be submitted. In this case, the withheld tax will be offset against the tax calculated on the annual return[48].

Moreover, individual participation investors who are full taxpayer real persons can deduct 75% of the shares from their annual income and profits in the period in which the shares are acquired, provided that they hold the shares of the full taxpayer joint stock companies they have acquired for at least two full years[49]. This rate is applied as 100% for some individual participation investors specified in the Law. Accordingly, if fully liable individual participation investors hold the shares of the fully liable venture company for at least two years through equity-based crowdfunding platforms, 75% of the share amounts can be deducted.

1.2. Taxation In Case of Disposal of Shares

Investors can dispose of their venture company shares. In this case, it should be clarified how taxation will be made in the event of share disposal.

Since the shares of the venture company that provides resources for its project through equity-based crowdfunding are not traded on Borsa Istanbul and there is no sale transaction in the secondary market, the sale of these shares may take a certain period of time[50]. When the provisions of the Notification on Crowdfunding regarding this issue are examined, according to the 7th paragraph of Article 12, which regulates the activities that platforms cannot perform, platforms cannot mediate secondary market transactions regarding equity or debt instruments. However, it is also stipulated that allowing members to communicate among themselves through the websites of platforms does not constitute a violation of this provision[51]. As mentioned in the heading titled "C. Capital Markets Board's List", according to the Notification on Crowdfunding, The Central Registry Agency must establish the infrastructure that will provide mutual data flow with the Investor Risk Monitoring System. Moreover, members must establish

48 Article 22/3 and 121 of the Income Tax Law

49 Provisional Article 82 of the Income Tax Law.

50 Hakan Boztaş ve Ayşe Sümer, 'Girişimciliğin Finansmanında Yeni Bir Model: Paya Dayalı Kitle Fonlaması ve Vergisel Boyutu' (2023) 499 Vergi Dünyası Dergisi 21, 31.

51 Boztaş ve Sümer (n 50) 31.

the infrastructure on the platform where they can communicate electronically with the venture company officials[52]. In this way, platforms will be able to help investors who invest in the campaigns they mediate sell their dividends through their own websites, which will make it easier for investors who want to sell their dividends[53].

Returning to the issue of taxation, in accordance with the duplicate article 80 of the Income Tax Law, gains from disposal of securities or other capital market instruments, except for those acquired without consideration and shares belonging to fully taxpayer institutions and held for more than two years, are subject to income tax as capital appreciation. Accordingly, income tax will be charged on disposal of dividends held for less than two years. Since the same article stipulates that the capital appreciation obtained in a calendar year, excluding those obtained from the disposal of securities and other capital market instruments, are exempt from income tax up to 120,000 TL, this exemption cannot be used in the event of the sale of shares. Therefore, if shares held by the investors for less than two years are sold, there is no exemption and tax will be charged.

Net profit in capital appreciation is found by deducting the cost of the goods and rights disposed of and the expenses incurred due to the disposal and the taxes and duties paid, from the amount of all kinds of benefits provided by the money and in kind received in return for the disposal and that can be represented by money. In case of disposal of goods and rights, the acquisition price is determined by increasing the wholesale price index determined by the State Institute of Statistics, excluding the month in which the goods and rights are disposed of. In order for this indexation to be made, the increase rate must be 10% or more[54]. In this case, the amount found by deducting the purchase price subject to indexation from the sales price of shares held for less than two years should be declared as capital appreciation by investors[55].

It is possible for tax payers with more than one income and revenue element to offset losses arising from certain sources of income in the annual declaration against gains arising from other sources[56]. However, losses arising from disposal of shares in the venture company cannot be offset by investors[57].

---

52 Article 5/5-g,ğ of Notification on Crowdfunding.

53 Boztaş ve Sümer (n 50) 31.

54 Duplicate article 81 of the Income Tax Law.

55 Murat Mutlu ve Halit İslam Ekmen, 'Paya Dayalı Kitle Fonlaması ve Vergisel Boyutu' (2021) 399 Vergi Sorunları Dergisi 91, 98.

56 Mualla Öncel, Ahmet Kumrulu, Nami Çağan ve Cenker Göker, Vergi Hukuku (30th edn, Turhan Kitabevi 2021) 338.

57 Article 88 of Income Tax Law.

2. Taxation of Corporate Tax Payer Investors

The situation is slightly different for investors or backers who are subject to corporate tax in equity-based crowdfunding platforms. In case the investor institutions obtain the dividends of the fully liable enterprise companies and participate in their capital, the profits obtained are exempted from corporate tax. In fact, according to subparagraph a of paragraph 1 of article 5 of the Corporate Tax Law, the profits obtained from the participation in the capital of another institution subject to full liability are exempted from corporate tax.

Moreover, 75% of the profits arising from the sale of investment fund shares that corporations have held in their assets for at least two full years are exempt from corporate tax. Therefore, if companies sell the shares of the venture company after keeping them in their assets for two years, 75 percent of the profit is exempted. This exemption is applied in the period in which the sale is made, and the part of the sales profit that benefits from the exemption is kept in a special fund account until the end of the fifth year following the year in which the sale is made. The sales price must be collected by the end of the second calendar year following the year the sale was made. Otherwise, tax loss is considered to have occurred for taxes not accrued on time[58]. Moreover, the earnings that should be kept in a special fund account by companies should not be transferred from the fund account to another account should not be withdrawn from the business, and should not be transferred abroad by limited taxpayer institutions within five years. Otherwise, taxes that are not accrued on time due to the applied exception will be collected together with tax loss penalty and late payment interest. This also applies if the company enters the liquidation process. In fact, if the company enters liquidation by the end of the fifth year following the year of sale, the profit that should be kept in the fund account will be considered to have been withdrawn from the business[59].

C. Taxation of Venture Companies

When looking at the operation of crowdfunding platforms, the primary focus should be on the issuance of shares by venture companies and how this will be taxed. In this regard, the expenses of issuance of securities can be deducted from the revenue. In fact, according to subparagraph a of the first paragraph of Article 8 of the Corporate Tax Law, taxpayers are allowed to deduct the expenses of issuing securities from the revenue in determining the corporate income.

It should be noted at this point that it is also possible to capitalize these expenses and amortize them in equal amounts within 5 years[60].

---

58 Article 5/1-e of Corporate Tax Law.

59 Corporate Tax General Notification (Serial No: 1), Official Gazette Date.: 03.04.2007 Official Gazette Number: 26482

60 Article 282 and 326 of Tax Procedure Law, Official Gazette Date: 10.01.1961 Official Gazette Number: 10705, Boztaş ve Sümer (n 50) 30.

According to the Income Tax Law and Corporate Tax Law, a tax withholding should be made in case of dividend distribution by the venture company. Since this issue has also been addressed under the heading "1.1. Taxation of Dividends", it will not be discussed again.

As explained, before the funds collected are transferred, these funds must be transferred to the funded company only in return for the shares to be issued through capital increase. Funds cannot be collected by selling the existing shares of venture companies. In addition, all funds provided from investors in return for the shares of the funded company must be paid in cash. And according to the subparagraph (ı) of the first paragraph of Article 10 of the Corporate Tax Law, taking into account the weighted annual average interest rate applied to commercial loans in TL issued by banks announced by the Central Bank of the Republic of Türkiye, on the cash capital increases of capital companies or the part of the paid-in capital covered by cash in newly established capital companies, 50% of the calculated amount can be deducted from the corporate income until the end of the relevant accounting period. The cash capital increase here is the cash increases in the paid or issued capital amounts registered in the trade registry within the relevant accounting period by venture companies that raise funds through crowdfunding platforms, and the part of the paid capital in newly established companies that is covered in cash[61].

Thus, venture companies can benefit from the discount provided in the Article 10/1-I of Corporate Tax Law in case of a capital increase. This discount is used separately for the accounting period in which the decision regarding the capital increase is registered in the trade registry and for the four accounting periods following this period. In case of a capital decrease during these periods, the reduced capital amount is not taken into account in the discount calculation[62].

CONCLUSION

Crowdfunding platforms have become increasingly popular. Therefore, the legal status of these platforms needs to be determined. When considered in terms of the Turkish legislation, there are important provisions in the Capital Markets Law and Notification on Crowdfunding on this issue.

Taxation of equity based crowdfunding platforms requires the correct determination of the legal status of the platforms. In this context, first of all, the provisions in the Capital Markets Law and Notification on Crowdfunding are examined and it is determined that the platforms shall have the status of a joint-stock company. In this context, it has been stated that crowdfunding platforms themselves are liable for corporate tax, value added tax, stamp duty and digital service tax.

---

61 Corporate Tax General Notification (Serial No: 1).

62 Article 10/1-I of Corporate Tax Law.

If the issue is addressed in terms of taxation of investors or backers who are liable for income tax, it should be stated that the shares obtained by investors / backers subject to income tax will be considered as dividends and will be subject to income tax. Half of the dividends obtained from fully taxpayer institutions are exempt from income tax. Withholding is made on the exempted amount and the entire withheld tax is offset against the tax calculated on the annual return if the dividend is declared with an annual return.

Since the gains from disposal of securities or other capital market instruments, except for those held for more than two years, are subject to income tax, income tax will be charged on disposal of shares held for less than two years. And in case that fully liable individual participation investors hold the shares of the fully liable venture companies for at least two years through equity-based crowdfunding platforms, 75%[63] of the share amounts can be deducted.

When it comes to investors or backers who are subject to corporate tax, in case the investor institutions obtain the dividends of the fully liable enterprise companies and participate in their capital, the profits obtained are exempted from corporate tax. Also, 75% of the profits arising from the sale of investment fund shares that corporations have held in their assets for at least two full years are exempt from corporate tax.

And considering the venture companies, the third party in equity-based crowdfunding, the expenses of issuing securities can be deducted from the revenue. And a tax withholding should be made in case of dividend distribution by the venture company. In addition, it is possible to benefit from deductions if the cash capital increase conditions in accordance with Article 16 of the Crowdfunding Notification and Article 10/1-ı of the Corporate Tax Law are complied with.

The basic regulations regarding the taxation of crowdfunding platforms can be summarized as above. As can be seen from the aforementioned regulations, there is no direct provision in our legislation regarding how crowdfunding platforms will be taxed or what kind of tax incentives will be offered to these platforms. Therefore, the issue of how these platforms will be taxed has been evaluated within the framework of general provisions. Similarly, the tax incentives that platforms can benefit from have been determined based on general regulations.

In this context, it should be noted that it is beneficial to specifically regulate the incentives to be provided to crowdfunding platforms in order to encourage these platforms. In this sense, it can be suggested to define tax incentives such as the regulations regarding the tax advantages granted to angel investors. Similarly, it is suggested that the advantages and incentives provided to venture capital funds should also be envisaged for crowdfunding platforms.

[63] 100% for some individual participation investors specified in the Law.

REFERENCES

Aydın S ve Zorkun M, 'Doğal Afetlerin Finansal Maliyetlerinin Azaltılmasında Bağışa Dayalı Kitle Fonlamasının Etkisi ve Vergisel Boyutu' (2023) 422 Vergi Sorunları Dergisi 13

Boztaş H ve Sümer A, 'Girişimciliğin Finansmanında Yeni Bir Model: Paya Dayalı Kitle Fonlaması ve Vergisel Boyutu' (2023) 499 Vergi Dünyası Dergisi 21

Casano F, 'Income Tax Treatment of Crowdfunding at National Level: Exploring the Suitability of the Conventional System and Scope for a New Approach' (2020) 4 World Tax Journal 863

Capital Markets Law, Official Gazette Date: 30.12.2012 Official Gazette Number: 28513

Corporate Tax General Notification (Serial No: 1), Official Gazette Date: 03.04.2007 Official Gazette Number: 26482

Corporate Tax Law, Official Gazette Date: 21.06.2006 Official Gazette Number: 26205

Crocco E, Giacosa E, Yahiaoui D and Culasso F, 'Crowd inputs in reward-based and equity-based crowdfunding: a latent Dirichlet allocation approach on their potential for innovation' (2022) 27 European Journal of Innovation Management 2250

Dehner J J and Kong J, 'Equity-Based Crowdfunding outside the USA' (2014) 83 University of Cincinnati Law Review 413

Drennen J, 'An Analysis and Prediction of Federal Taxation as It Pertains to Crowdfunding' (2017) 19 Duquesne Business Law Journal 144

European Commission, 'Proposal for a Council Directive on the common system of a digital services tax on revenues resulting from the provision of certain digital services' (*Taxation Customs,* 2018) <https://taxation-customs.ec.europa.eu/system/files/2018-03/proposal_common_system_digital_services_tax_21032018_en.pdf> accessed 4 December 2024

Expenditure Tax Law, Official Gazette Date: 23.07.1956 Official Gazette Number: 9362

Gabison G A, 'The Incentive Problems with the All-Or-Nothing Crowdfunding Model' (2016) 12 Hastings Business Law Journal 489

Income Tax Law, Official Gazette Date: 06.01.1961 Official Gazette Number: 10700

Indiegogo, 'Terms of Use' (*Indiegogo*, 2021) <https://www.indiegogo.com/about/terms> accessed 4 December 2024

Kickstarter, 'Terms of Use' (*Kickstarter,* 2024) <https://legal.kickstarter.com/policies/en/?name=terms-of-use> accessed 4 December 2024

Kickstarter, 'Kickstarter and Taxes' (*Kickstarter and Taxes)* <https://www.kickstarter.com/help/taxes> accessed 4 December 2024

Law on the Digital Service Tax and Amendment of Certain Laws and Legislative Decree No. 375, Official Gazette Date: 07.12.2019 Official Gazette Number: 30971

Lazzaro E and Dougles N, 'A comparative analysis of US and EU regulatory frameworks of crowdfunding for the cultural and creative industries' (2021) 27 International Journal of Cultural Policy 590

Luscombe M A, 'Crowdfunding and Taxes' (2017) 95 Taxes: The Tax Magazine 3

Martin F and Ann O, 'Crowdfunding: what are the tax issues' (2018) 20 Journal of Australian Taxation 16

Metrejean C T and Britton A M, 'Crowdfunding and Income Taxes' (2015) Journal of Accountancy <https://www.journalofaccountancy.com/issues/2015/oct/crowdfunding-and-income-taxes.html> accessed 4 December 2024

Mutlu M ve Ekmen H İ, 'Paya Dayalı Kitle Fonlaması ve Vergisel Boyutu' (2021) 399 Vergi Sorunları Dergisi 91

Notification on Crowdfunding, Official Gazette Date: 27.10.2021 Official Gazette Number: 31641

Sermaye Piyasası Kurulu, 'İzahname ve İhraç Bilgisi Onayı', <https://spk.gov.tr/hakkimizda/gorev-yetki-ve-sorumluluklar/izahname-ve-ihrac-bilgisi-onayi/> accessed 4 December 2024.

Öncel M, Kumrulu A, Çağan N ve Göker C, *Vergi Hukuku* (30th edn, Turhan Kitabevi 2021)

Stamp Duty Law, Official Gazette Date: 11.07.1964 Official Gazette Number: 11751

Tax Procedure Law, Official Gazette Date: 10.01.1961 Official Gazette Number: 10705

Value Added Tax Law, Official Gazette Date: 02.11.1984 Official Gazette Number: 18563

Washington State Department of Revenue, 'Crowdfunding' <https://dor.wa.gov/forms-publications/publications-subject/tax-topics/crowdfunding> accessed 4 December 2024

Wasilick A M, 'The Tax Implications of Crowdfunding: From Income to Deductions' 97 North Carolina Law Review 710

Yakar S ve Kandır S Y, 'Türkiye'de Paya Dayalı Kitlet Fonlaması İçin Bir Vergi Teşvik Önerisi' (2020) 19. Uluslararası İşletmecilik Kongresi Özel Sayısı Erciyes Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi 189

FROM DATA TO DESTRUCTION: THE LEGAL CHALLENGES OF BIG DATA ATTACKS[*]

Veriden Yıkıma: Büyük Veri Saldırılarının Hukuki Zorlukları

Berkant AKKUŞ[**]

L&JR
Year: 16, Issue: 30
July 2025
pp.75-108

Article Information

Submitted : *19.01.2025*
Revision Requested : *07.03.2025*
Last Version Received : *27.03.2025*
Accepted : *22.04.2025*

Article Type

Research Article

ABSTRACT

The rapid development of technology has produced hugely positive outcomes, yet such benefits are placed in the shadow of the threat of the inappropriate use of technology. Incidents involving cyber-attacks have posed challenges to traditional international law on armed force and the right to self-defence. This study critically evaluates this issue, with focus on how the existing legal framework applies to cyber operations, and the challenges and issues that this gives rise to. The study explores the conditions under which cyber operations amount to a use of force giving rise to the right to use force in self-defence. With reference to big data attacks, the study argues that while the notion of implementing a new international legal instrument may appear to be a promising solution, it promises to create more problems than it remedies. Accordingly, big data attacks that exist beyond the armed force context cannot be reasonably deemed to reach the threshold of armed force. Furthermore, the extension of the existing legal framework to cyber operations, although it is not without challenges, has thus far proven more beneficial than problematic. It is predicted that existing issues will be gradually resolved as practical situations arise.

Keywords: Cyber operations, big data attacks, use of force, international law.

[*] There is no requirement of Ethics Committee Approval for this study.

[**] Asst. Prof., Inonu University, Faculty of Law, Department of Public International Law, Malatya/Türkiye, E-mail: berkantakkus91@gmail.com, ORCID ID: 0000-0001-6652-2512.

ÖZET

Teknolojinin hızlı gelişimi büyük olumlu sonuçlar doğurmuş olsa da, bu tür faydalar teknolojinin uygunsuz kullanım tehdidiyle gölgelenmektedir. Siber saldırılarla ilgili olaylar, silahlı kuvvet ve meşru müdafaa hakkı konusundaki geleneksel uluslararası hukuka meydan okumaktadır. Bu çalışma, mevcut yasal çerçevenin siber operasyonlara nasıl uygulandığını ve bu durumun ortaya çıkardığı zorluklar ile sorunları ele alarak bu konuyu eleştirel bir şekilde değerlendirmektedir. Çalışma, siber operasyonların hangi koşullar altında kuvvet kullanımı olarak değerlendirilebileceğini ve meşru müdafaa hakkını doğurduğunu araştırmaktadır. Büyük veri saldırılarına atıfta bulunarak, yeni bir uluslararası hukuk aracı uygulama fikrinin çekici bir çözüm gibi görünse de, aslında düzelttiğinden daha fazla sorun yaratacağını savunmaktadır. Buna göre, silahlı kuvvet bağlamının ötesinde var olan büyük veri saldırıları, makul bir şekilde silahlı kuvvet eşiğine ulaştığı düşünülemez. Ayrıca, mevcut yasal çerçevenin siber operasyonlara genişletilmesi, zorluklar barındırsa da, şu ana kadar sorunlardan çok fayda sağlamıştır. Mevcut sorunların, pratik durumlar ortaya çıktıkça kademeli olarak çözüleceği öngörülmektedir.

Anahtar Kelimeler: Siber operasyonlar, büyük veri saldırıları, kuvvet kullanımı, uluslararası hukuk.

INTRODUCTION

Cyber-attacks are cyber operations that are aimed at the alteration, deletion, corruption or denial of access to computer software or data, with the purposes of deception or propaganda, the partial or total disruption of the functioning of the target computer, or computer network or system, and related infrastructure, and physical damage which is extrinsic to the targeted computer, computer network or system.[1] A key characteristic of cyber operations is that they spread with great speed. For example, a computer worm attacked the database software of Microsoft in 2003, which spread throughout the entire internet over just 48 hours.[2] The worm caused significant harm by cancelling airline flights, causing failures in ATMs, interfering with elections, and network outages.[3] A further example is the distribution of a denial-of-service attack in Estonia in 2007, which brought governmental services and the banking system to a halt.[4] In 2010, a power plant in Iran was the target of a cyber-attack, which caused the

1 Marco Roscini, *Cyber Operations and the Use of Force in International Law* (OUP 2014) 17.

2 Heather Dinniss, *Cyber Warfare and the Laws of War* (CUP 2012) 296.

3 Eric Jensen, 'Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-defence' (2002) 38 *Stan. J. Int'l L.* 207, 209.

4 Dinniss (n 3) 38.

rotor speed of its centrifuges to change, resulting in severe damage.[5] These are some of many examples of the speed and extent of the damage and disruption that cyber operations can cause.

As technology continues to develop at a rapid pace, the threat of cyber operations has become all the more apparent. This serves to demonstrate the significance of the study; in that it addresses a contemporary and pressing issue. Accordingly, the study examines the implications of cyber operations for international law. The key research question is: what implications do cyber operations have for the existing legal framework on the use of force? This gives rise to a range of research objectives. The first is to identify the key elements of international law on the use of force, and how they apply to cyber operations. The second is to examine whether cyber operations qualify as a use of force, and the implications of this for big data attacks. The third is to assess the various legal criteria on the use of force, and whether they apply effectively to cyber operations, or whether problems and gaps exist. The fourth is to explore the criteria for self-defence against cyber operations, with particular focus on whether, and under which circumstances, cyber operations and big data attacks amount to an armed attack under international law. The final objective is to critically explore whether existing problems and gaps would be best remedied by clarifying the scope and content of the existing legal framework, or developing a new, distinct, international legal instrument on cyber operations.

The research features doctrinal legal analysis. It is recognised that analysis of a legal issue cannot be effectively or accurately undertaken without first identifying the relevant and applicable legal framework.[6] Doctrinal legal analysis is the logical starting-point for the topic, given its legal character, and that it seeks to "describe a body of law and how it applies" to the specific context.[7] Doctrinal legal analysis therefore involves examination of key treaties, such as the Charter of the United Nations 1945 (UN Charter), case law, and legal commentary on cyber operations and the use of force. Some case studies are also used, to provide a practical dimension to the study. This involves analysis of recent data-centric cyber incidents, to assess their impact on state security, and to demonstrate the important limits that are placed on the scope of the use of force under international law. Finally, policy analysis is applied to evaluate international policies that address whether cyber operations amount to armed attacks giving rise to the right to use self-defence.

---

5 Roscini (n 2) 53.

6 MD Pradeep, 'Legal Research-Descriptive Analysis on Doctrinal Methodology' (2019) 4 *International Journal of Management, Technology and Social Sciences* 95, 97.

7 Ian Dobinson & Francis Johns, 'Legal Research as Qualitative Research' in *Research Methods for Law* (Mike McConville & Wing Hong Chui eds, 2nd edn, Edinburgh University Press 2017) 21.

The definition of big data varies depending on the context, and international law has yet to establish a universally accepted definition. One way to understand big data is through its sheer volume. As the term big implies, its defining characteristic is the vast amount of information it encompasses. One definition describes big data as "the exponentially increasing amount of digital information being generated by emerging technologies such as mobile internet, cloud storage, social networking, and the Internet of Things, along with the advanced analytics used to process it."[8] In essence, the technological ecosystem developed over the past decade has become the most extensive data mining operation in human history.

However, volume alone does not fully define big data. Another approach emphasizes its networked nature. The significance of big data lies not only in its size but in its ability to reveal patterns, establish connections between individuals, and generate insights. Its analytical capacity transforms it from a mere collection of vast datasets into both an opportunity and a challenge.

When combined with machine learning and algorithmic tools, big data enhances our ability to analyze and interpret complex information. Scholars note that "algorithms are used to analyze these large and unconventional data streams to uncover increasingly granular correlations between data points."[9] However, this analytical power has also been criticized for its potential to produce inaccurate, biased, and discriminatory outcomes.

What are the implications of big data for *jus ad bellum*? First, this legal framework can no longer treat data as a singular entity. Some data is discrete and individualized, while other data exists on a much larger scale. Big data stands apart due to both its volume and its analytical nature. Over time, states will likely establish clearer distinctions between cyber operations targeting big data—where the scale and effects may meet the threshold for the use of force—and those that do not. Second, legal scholarship on cyber operations must account for the differences in volume, impact, nature, and sensitivity between small data and big data. These distinctions will play a crucial role in shaping future legal interpretations.

The study commences with an outline of the key elements of the use of force under international law, namely, Article 2(4) of the UN Charter. This section proceeds to examine whether cyber operations qualify as a use of force. With reference to the Tallinn Manual, the various elements of the use of force are examined, such as state attribution, the use of force, and the threat of force. Section 3 examines the applicable law on self-defence and responses to cyber

---

8 Paul Symon & Arzan Tarapore, 'Defense Intelligence Analysis in the Age of Big Data' (2015) 79 *Joint Force Quarterly* 5.

9 Caryn Devins, Teppo Felin, Stuart Kauffman, Roger Koppl, 'The Law and Big Data' (2017) 27 *Cornell Journal of Law and Public Policy* 357, 363.

operations, with reference to big data attacks, with identification of strengths and weaknesses in the framework's application to cyber operations. Focus is placed on the principles of state attribution in the context of self-defence, whether cyber operations may amount to armed attacks, and how the principles of necessity and proportionality apply. Section 4 offers and explores recommendations for improvement, with focus on the implementation of a new legal framework that specifically addresses cyber operations, and the alternative of clarifying the extended application of the existing framework. The study ultimately draws a number of conclusions. The first is that there are challenges in the application of the existing international framework to cyber operations, but these can be resolved through practice, and as situations arise. The second is that classifying big data attacks as a use of force is not appropriate, and risks distorting the very spirit of the law on the use of force. Finally, the study argues that the most appropriate solution is to continue evolving the existing legal framework so that it more effectively encompasses cyber operations. The enactment of a new legal instrument would prove more problematic than beneficial.

I. CYBER OPERATIONS AND THE USE OF FORCE

A. The Scope of the Use of Force

Article 2(4) of the UN Charter provides that Member States:

> *"shall refrain in their international relations from the threat of use of force against the territorial sovereignty or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".*

There is no official or formal definition of 'threat or use of force'.[10] This is in recognition of the need for flexibility, and the various contexts to which the term may be applied. However, it is possible to observe that 'force', when considered in light of the purpose and spirit of the UN Charter, is limited to 'armed force'.[11]

The use of the term 'armed' implies that the force must involve the use of some form of a weapon, which is intended to kill or injure. It has been argued that almost any object can be utilised as a weapon, provided the intention is hostile.[12] The flexibility of Article 2(4) of the UN Charter is demonstrated in the *Nuclear Weapons Case,*[13] in which the International Court of Justice (ICJ) ruled

---

10 Marco Roscini, 'Threats of Armed Force and Contemporary International Law' (2007) 54 *Netherlands International Law Review* 229, 231.

11 Katharina Ziolkowski, *Stuxnet: Legal Considerations* (NATO Cooperative Cyber Defence Centre of Excellence 2012) 8.

12 John Yoo, 'Using force' (2004) 71 *University of Chicago Law Review* 729, 739.

13 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, para.

that Articles 2(4) and 51 (on the use of force in self-defence) of the UN Charter "do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed".[14] For example, the use of chemical and biological weapons does qualify as a use of force, implying that cyber operations should also qualify as such.[15] This is supported by the *Nicaragua Case,*[16] in which the ICJ categorised the training and arming of contras as a threat or use of force, implicitly recognising that the use of non-kinetic force may amount to a violation of Article 2(4) of the UN Charter.[17]

B. Do Cyber Operations Qualify as a Use of Force?

According to Rule 68 of the Tallinn Manual (Manual):[18]

> *"a cyber operation that constitutes a threat or use of force against the territorial integrity or political independence of any state, or that is in any other manner inconsistent with the purposes of the United Nations, is unlawful".*

This rule reflects both Article 2(4) of the UN Charter and customary international law. In order for Article 2(4) of the UN Charter to apply to cyber operations, three conditions must be fulfilled. Firstly, the cyber operation must be attributed to a state, which excludes the conduct of armed groups or private individuals, irrespective of the damage caused.[19] Secondly, the cyber operation must amount to a threat or use of force.[20] Finally, the threat or use of force must be exercised in the context of international relations.[21]

Big data attacks refer to cyber operations that manipulate, steal, or destroy massive datasets, often targeting sensitive information, including financial data, military intelligence, and humanitarian records. On the one hand Tallinn Manual

39. (hereafter *Nuclear weapons Case*).

14 Ibid., para. 39.

15 Andrew Bell, 'Using Force against the Weapons of the Weak: Examining a Chemical-Biological Weapons Usage Criterion for Unilateral Humanitarian Intervention under the Responsibility to Protect' (2013) 22 *Cardozo J. Int'l & Comp. L.* 261, 266.

16 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (1986) ICJ Rep 14, para. 228 (hereafter *Nicaragua Case*).

17 Ibid., para. 228.

18 Michael Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017) (hereafter, *Manual*).

19 Garrett Derian-Toth and others, 'Opportunities for Public and Private Attribution of Cyber Operations' (2021) 12 *Tallinn Paper Series* 8, 9.

20 Herbert Lin, 'Offensive Cyber Operations and the Use of Force' (2010) 4 *J. Nat'l Sec. L. & Pol'y* 63, 66.

21 Roscini (n 2) 44-45.

1.0: limited discussion on data. First, Tallinn Manual 1.0 primarily focused on cyberattacks causing physical or infrastructure damage. Second, Tallinn Manual 1.0 did not consider data as an independent target under IHL. Third, Tallinn Manual 1.0 did not address cyber threats to humanitarian or biometric data. On the other hand Tallinn Manual 2.0: recognizing data as a legal concern. For instance, data as a civilian object (Rule 100): Debate emerged over whether data, like physical infrastructure, should be protected under IHL. While Tallinn Manual 2.0 does not explicitly classify data as a protected civilian object, some experts argue that targeting vital data could violate the principle of distinction. Further, misinformation & fake news (Rule 113): The use of cyber operations to manipulate public perception or influence political stability through data-driven disinformation campaigns was addressed. In addition, humanitarian data protection: Cyberattacks targeting refugee databases or medical records pose ethical and legal dilemmas under IHL.

The Tallinn Manual 2.0 represents a significant expansion beyond the original 2013 edition, moving from a narrow focus on cyber warfare to a broader framework encompassing peacetime cyber activities and data-driven threats. While Tallinn Manual 1.0 only addressed cyber warfare, Tallinn Manual 2.0 incorporates state sovereignty, due diligence, and economic cyberattacks, making it more applicable to modern threats. The growing recognition of data as a strategic target introduces new challenges for international law, especially in humanitarian contexts but still there are unresolved questions for future legal developments. For instance, should data be classified as a civilian object under IHL? Can cyberattacks causing purely economic damage justify self-defense under Article 51 of the UN Charter? How should international law regulate misinformation campaigns in armed conflicts?

C. State Attribution

According to Rule 10 of the Manual, the prohibition of the threat or use of force is binding on all UN Member States, and is not binding on non-state actors, unless their acts can be attributed to a state, under the law of state responsibility. In the context of state attribution, the problems surrounding the identification of the attribution and origin of cyber operations to states are problematic, and pose a prominent hindrance to the application of Article 2(4) of the UN Charter to cyber operations. It is recognised that non-state actors are both willing and able to use force against states, and therefore, the prohibition of the threat or use of force should encompass non-state actors that are not attributable to a state.[22] The ICJ has demonstrated its willingness to include indirect uses of force

[22] Ankit Lavania, 'The Need to Fill Legal Vacuum in International Law to Deal with Non-State Actors in Cyber Operations' (2022) 5 *Int'l JL Mgmt. & Human.* 462, 465.

within the scope of Article 2(4) of the UN Charter.[23] There is an opportunity for the attribution criteria to be interpreted in a more extensive manner to include the activities of non-state actors, although there remain some circumstances in which non-state actors act independently to states.

Non-state actors – at the very least those who demonstrate some degree of organisation – should be perceived as bound by the international customary law that prohibits the threat or use of force. The customary international rule should therefore be applicable to non-state actors, because their acts that amount to a threat or use of force impact the fundamental right that underlies Article 2(4) of the UN Charter and customary international law.[24] This is the right to remain free from the threat or use of force.[25] To permit non-state actors to violate this right would undermine the very purpose and spirit of the prohibition of the threat or use of force.

In the context of international organisations, the Manual clarifies that:

> *"International organisations bear international legal responsibility for their cyber activities and cyber-related omissions that constitute internationally wrongful acts".*[26]

Due to their status as subjects of international law, international organisations are bound by customary international law.[27] However, the Manual itself recognises that "the binding nature of many customary norms *vis-à-vis* international organisations is unsettled".[28] The result is that international organisations are subject to customary primary norms in non-cyber contexts and "fully in the cyber context".[29]

D. The Use of Force

Rule 69 of the Tallinn Manual states that "a cyber operation constitutes a use of force when its scale and effects are comparable to non-cyber operations rising to the level of a use of force".[30] The definition of 'force' is crucial in this respect,

---

23 *Nicaragua Case,* para. 228.

24 Michael Schmitt and Sean Watts, 'Beyond State-Centrism: International Law and Non-State Actors in Cyberspace' (2016) 21 *Journal of Conflict and Security Law* 595, 606.

25 Nicholas Tsagourias, 'Non-State Actors and the Use of Force' in *Participants in the International Legal System: Theoretical Perspectives* (Jean D'Aspremont ed, Routledge 2011) 327-328.

26 Manual, Rule 4.1.

27 Manual, Rule 4.5.

28 Ibid.

29 Ibid.

30 See: *Nicaragua Case,* para. 195.

in that it implies that big data attacks do not lie within its scope.[31] The Manual adopts an effects-based rather than an instrument-based approach, reflecting the widely held view that the use of force should be separate from the instrument used.[32] Therefore, Rule 69 of the Manual confirms that any force that has harmful effects in the form of human injury/death and/or physical damage equivalent to those resulting from military force are in violation of the prohibition, which includes cyber force (and excludes big data attacks). However, there remains the question concerning whether cyber operations that are committed against the critical infrastructure of a state, which do not cause physical harm, but which have the effect of severely disrupting state functioning amount to a use of force under Article 2(4) of the UN Charter. This would potentially include big data attacks. Rule 69.2 implies that political or economic coercion is to be excluded from the definition of force, based on the *travaux preparatoires* of the UN Charter, and the UN General Assembly's Declaration on Friendly Relations 1970. However, this does not mean that cyber operations that have a serious impact on critical infrastructure do not qualify as a use of force. This is apparent in Rule 69.10, in which it is recognised that: "some may categorise massive cyber operations that cripple an economy as a use of force, even though economic coercion is presumptively lawful". This further demonstrates the effects-based approach adopted by the Manual, and suggests that big data attacks will rarely meet the necessary threshold. Therefore, data breaches that primarily cause economic damage will be highly unlikely to fall within the scope of Article 2(4) of the UN Charter.[33] It is argued that this is an appropriate approach, given the implications of the qualification of a cyber operation as a use of force. When such attacks result in the injury or death of persons, and/or the destruction of property, only then is it acceptable to define them as a use of force, lest the scope and meaning of the use of force become distorted.

Upon closer analysis, the Manual does not explicitly exclude cyber operations that damage critical infrastructures from the definition of force. The Manual clarifies that "generating mere inconvenience or irritation will never" amount to a use of force.[34] However, it proceeds to discuss the factors that may be taken into account when determining whether cyber operations are an unlawful use of force. In outlining the concept of severity (the central factor), the Manual states that "the more consequences impinge on critical national interests, the more

---

31 Terence Check, 'The Tallinn Manual 2.0 on Nation-State Cyber Operations Affecting Critical Infrastructure' (2022) 13 *Nat'l Sec. L. Brief* 1, 4.

32 Consistent with *Nuclear Weapons Case*, para. 39.

33 Lianne Boer, 'Restating the Law as It Is: On the Tallinn Manual and the Use of Force in Cyberspace' (2013) 5 *Amsterdam LR* 4, 6.

34 Manual, Rule 69.9a.

they will contribute to the depiction of a cyber operation as a use of force".[35] At this point, "the scope, duration, and intensity of the consequences" are of vital significance in determining severity.[36] Thus the severity criterion measures the range of consequences of an attack, including but not limited to physical consequences. Therefore, cyber operations that have severe consequences for critical infrastructure may qualify as a use of force, regardless of whether physical damage was caused.[37] However, it is unlikely that this will include the effects of big data attacks, because they do not meet the necessary threshold. Big data attacks—such as the manipulation, destruction, or exploitation of vast datasets—could, in some cases, meet the necessary severity threshold. However, the applicability depends on the effects-based approach widely used in cyber law assessments. Some considerations include: If a big data attack directly results in kinetic effects—such as manipulating health data in a way that causes physical harm or misdirecting military operations—it could cross the use of force threshold. For example, altering medical records in a conflict zone to prevent necessary treatments could have life-threatening consequences. While economic coercion alone typically does not qualify as a use of force (as seen in ICJ jurisprudence), a big data attack that causes widespread systemic failures—such as in financial systems, food distribution, or critical infrastructure—could push the threshold if the disruption leads to significant harm. If an adversary manipulates or degrades military AI decision-making systems using big data attacks, causing battlefield miscalculations or increased casualties, the severity threshold may be met. For a cumulative approach where a series of cyber operations, including big data manipulations, collectively result in harm comparable to traditional kinetic attacks. If a pattern of such attacks leads to widespread suffering or military disadvantage, it may be considered a use of force.

The Manual imposes further limits of the scope of the use of force, by imposing a *de minimis* scale and effects threshold, which establishes a distinction between acts that do and do not qualify as a use of force under Article 2(4) of the UN Charter.[38] Rule 69.6 of the Manual refers to the ICJ's distinction drawn between the grave and less grave forms of the use of force in the *Nicaragua Case*.[39] In applying this judgement, the Manual confirms that the most grave uses of force will constitute an armed attack, giving rise to the right of self-defence, whereas less grave uses of force will constitute a violation of Article 2(4) of the

35 Manual, Rule 69.9a.

36 Ibid.

37 Terence Check, 'The Tallinn Manual 2.0 on Nation-State Cyber Operations Affecting Critical Infrastructure' (2022) 13 *Nat'l Sec. L. Brief* 1, 4.

38 Divij Kumar, 'Interpretation of International Law under the Tallinn Manual(s)' (2021) 3 *Indian JL & Legal Rsch.* 1, 3.

39 *Nicaragua Case,* para. 191.

UN Charter.[40] However, the Manual does not clarify the criteria applicable for measuring the gravity of a use of force, implying the aim to achieve flexibility, and to provide a broad margin of appreciation in this respect.[41] The Manual does identify this issue, and stipulates that states may take a range of factors into account when determining whether or not a cyber-attack amounts to a use of force: Severity, immediacy, directness, invasiveness, measurability of effects, military character, state involvement, and presumptive illegality.[42] These factors do not have legal status and are not exhaustive,[43] and whether they offer meaningful guidance is subject to debate.

Arguably, more precise thresholds are required in order to effectively guide states in determining whether cyber operations amount to a use of force. For example, cyber operations may feature a considerable length of time between the insertion of a particular vulnerability into a target system, its execution, and the damage caused.[44] Furthermore, cyber operations (as well as big data attacks) involve a range of stages, each of which directly and indirectly contribute to the outcome, and which introduces uncertainty in the context of the principle of directness. The directness and immediacy principles are particularly problematic, because a cyber operation's most severe consequences may be non-immediate and indirect.[45] This fails to recognise that cyber operations and big data attacks have both immediate and long-term, and direct and indirect effects. The measurability of effects principle is also potentially problematic, because it is often difficult to measure overall harm inflicted on a state, particularly when the majority of the consequences are indirect, or involve big data.[46] The problem with the principle of state involvement is that there are often major difficulties involved in attributing cyber operations to states, due to their anonymity and multi-staged nature.[47] Finally, distinguishing between lawful and unlawful cyber operations is by no means straightforward. For instance, inserting a vulnerability may be

---

40 Manual, Rule 69.6.

41 Nicholas Tsagourias, 'The Tallinn Manual on the International Law Applicable to Cyber Warfare: A Commentary on Chapter II—The Use of Force' (2012) 15 *Yearbook of International Humanitarian Law* 19, 32.

42 Manual, Rule 69.9a-d.

43 Manual, Rule 69.7.

44 Andrew Foltz, 'Stuxnet, Schmitt Analysis, and the Cyber "Use-of-Force" Debate' (2012) 67 *Joint Force Quarterly* 40, 44.

45 Tsagourias (n 42) 28.

46 Shannel Gunatileka, '"Big Data Breaches", Sovereignty of States and the Challenges in Attribution' (2024) 5 *University of Colombo Review* 104, 119.

47 David Clark & Susan Landau, 'Untangling Attribution' in *Proceedings of a Workshop on Deterring Cyberattacks: Informing Strategies and Developing Options for US Policy* (National Research Council 2010) 25.

unlawful, yet it may also amount to some other act that is not prohibited under international law.[48]

The introduction of a *de minimis* threshold achieves little in terms of promoting certainty and clarity. This may lead to assessments as to whether cyber operations and big data attacks amount to a use of force being challenged. However, cyber operations that do not fall within the scope of Article 2(4) of the UN Charter will not automatically be deemed legal. As the Manual states, they may qualify as an unlawful intervention;[49] a concept which is considerably broad.[50] The element of coercion is the key element that distinguishes between interference and intervention.[51] Intervention is coercive in that it causes a state to do something that it would not do otherwise. The principle of intervention therefore provides a secondary net, enabling acts that do not qualify as a use of force to amount to unlawful intervention.

E. A Threat of Force

Rule 70 of the Manual provides that an actual or threatened cyber operation amounts to an unlawful threat of force "when the threatened action, if carried out, would be an unlawful use of force". This mirrors the definition of unlawful threat of force set out by the ICJ in the *Nuclear Weapons Case.*[52] Therefore, all threats of force except the threat of the use of force by self-defence or under Chapter VII of the UN Charter are not lawful.[53] In order for an unlawful threat of force to be found, it is not necessary that the threat be accompanied by a specific or particular demand. However, coercion lies at the very epithet of a prohibited threat of force.[54] A threat of force does pressure the target state irrespective of whether it includes a specific demand and a threat can be communicated in implicit or explicit form, though conduct or words.[55] Whether such communication amounts to a threat of force is highly context-specific, and depends on a range of factors. What is clear is that "actions that simply endanger the security of the target state, but that are not communicative in nature, do not qualify" as a threat of force, suggesting that big data attacks do not meet the threshold.[56]

---

48 Dan Efrony & Yuval Shany, 'A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice' (2018) 112 *American Journal of International Law* 583, 611.

49 Manual, Rule 69.6-10.

50 *Nicaragua Case*, para. 246.

51 Ibid, para. 205.

52 *Nuclear Weapons Case*, para. 47.

53 Manual, Rule 70.3.

54 Manual, Rule 70.4.

55 Ibid.

56 Manual, Rule 70.4.

This clarifies that there must be a communicative element. While this appears logical, such an approach is rather restrictive, because it fails to take context into account, such as political, historical and military factors. Taking such factors into account may lead to the inference that a threat of force has been made by the mere development or acquisition of cyber capabilities. The approach adopted by the Manual fails to recognise the subjectivity of assessments as to whether a threat of force exists.[57]

II. DEFENCES OR RESPONSES TO CYBER ATTACKS

Big data attacks, when they only result in economic damage, do not, and should not reach the threshold of the use of force. Accordingly, states should not be permitted to exercise force in self-defence against such attacks. However, if economic damage is accompanied by injury or death, or destruction of property, the right of self-defence may be exercised, provided the requirements are met. These requirements are examined in this section.

It is important to point out that some have argued in favour of equating big data attacks to the use of force under international law.[58] Such arguments are based on the interpretation of big data as a resource, which is a potential target during armed conflict. However, the law is clear, that economic damage, at least that inflicted by big data attacks, does not meet the requisite threshold. This is not without reason; the use of force must be kept within certain boundaries, given the implications of equating a cyber operation with a use of force. Furthermore, the Manual clarifies that data is an intangible asset, and therefore not an object, meaning that it does not fall within the scope of the 'destruction of property' element.[59]

A. The Use of Force in Self-Defence

As has been clarified, international law generally prohibits the use of force. However, a vital exception to this general prohibition is the use of force in self-defence.[60] Article 51 of the UN Charter provides for the right to use force in self-defence, presenting it as the "inherent right of individual or collective self-defence if an armed attack occurs". Rule 71 of the Manual provides for the right to self-defence against armed attack, stating that "a state that is the target of a cyber operation that rises to the level of an armed attack may exercise its

---

57 Duncan Hollis and Tsvetelina Van Benthem, *Threatening Force in Cyberspace* (Temple University Legal Studies Research Paper 2021) 13.

58 Jason Barkham, 'Information Warfare and International Law on the Use of Force' (2001) 34 *NYUJ Int'l L. & Pol.* 57, 60.

59 Tallinn Manual, Rule 100.6.

60 Gleider Hernandez, *International Law* (OUP 2019) 352.

inherent right of self-defence". This reflects the ICJ's approach towards self-defence, which is subject to the requirement that self-defence only be in response to a cyber operation equivalent to an armed attack.[61]

A cyber use of force amounts to an armed attack in the event that it has grave scale and effects.[62] However, the ICJ has not clarified how the gravity of an attack may be measured, which the Manual recognises but does not elucidate on.[63] This is problematic, because it gives rise to the potential for differing interpretations of any given cyber operation. This creates uncertainty surrounding whether a cyber operation may be deemed an armed attack for the purpose of self-defence.[64] This is apparent in the context of the SolarWinds hack, whereby hackers deployed a malicious code – a supply chain attack – into the monitoring and management software of SolarWinds Orion system 2020.[65] The hackers gained access to the systems, networks and data of thousands of customers and partners, which included state, local and federal agencies. It was believed that Russia's Foreign Intelligence Services was responsible for the hack, although the Russian government denied any involvement.[66] The incident highlights disagreement surrounding the appropriate standard for the qualification of cyber operations as a use of force, although it is widely accepted that it did not cross the threshold of the use of force,[67] because it did not result in any physical damage, death, injury, or destruction of property. This places a clear boundary, requiring that physical damage, death, injury, or destruction of property result from a big data attack in order for it to amount to a use of force. While there were significant economic costs, they were not at a level that might have justified the characterisation of the incident as a use of force. Arguably, this is appropriate, because it imposes significant boundaries on the scope of the concept of the use of force in the context of cyber operations.

A further question is whether attacks committed by non-state actors that are not attributable to a state qualify as an armed attack giving rise to the right

---

61 *Nicaragua Case*, para. 191; *Oil Platforms Case (Islamic Republic of Iran v United States of America)* (2003) ICJ Rep 4, para. 51 (Hereafter, *Oil Platforms Case*).

62 Manual, Rule 71.3-6.

63 *Nicaragua Case*, para. 195; Manual, Rule 71.7.

64 Kosmas Pipyros, Christos Thraskias, Lilian Mitrou, Dimitris Gritzalis & Theodoros Apostolopoulos, 'A New Strategy for Improving Cyber-Attacks Evaluation in the Context of Tallinn Manual' (2018) 74 *Computers & Security* 371, 377.

65 Massimo Marelli, 'The SolarWinds Hack: Lessons for International Humanitarian Organizations' (2022) 104 *International Review of the Red Cross* 1267, 1271.

66 Antonio Coco, Talita Dias & Tsvetelina Van Benthem, 'Illegal: The SolarWinds Hack under International Law' (2022) 33 *European Journal of International Law* 1275, 1278.

67 Kristen Eichensehr, 'Not Illegal: The SolarWinds Incident and International Law' (2022) 33 *European Journal of International Law* 1263, 1266.

of self-defence.[68] While the general view is that this does give rise to the right to self-defence,[69] there is disagreement surrounding this view. The ICJ has in several judgements determined that only a state can commit an armed attack.[70] However, dissenting judges have criticised this stance.[71] It is argued that the correct view is that non-state actors can commit an armed attack, according to international customary law on self-defence, and Article 52 of the UN Charter.[72] This view is further supported by the Security Council, which in Resolutions 1368 and 1373 (2001) determined that the Al Qaeda attacks amounted to an armed attack, giving rise to the right of self-defence.[73] However, there is evidence to the contrary. It has been argued that it is implicit in Article 51 of the UN Charter that a state rather than a non-state actor must commit an armed attack in order for the right to self-defence to be exercised.[74] This was confirmed in the *Palestinian Wall Case,*[75] in which the ICJ ruled that self-defence cannot be exercised against non-state actors. The International Criminal Court (ICC) has also confirmed that Article 51 of the UN Charter only offers the right of self-defence "in the case of an armed attack *by one state against another state*".[76] Armed attacks against non-state actors are considered a violation of the target state's territorial integrity and are permissible only when the non-state actor's actions can be attributed to the target state..[77] This is problematic, given the

---

68 Manual, Rule 71.

69 Carlo Focarelli, 'Self-Defence in Cyberspace' in *Research Handbook on International Law and Cyberspace* (Nicholas Tsagourias & Russell Buchan eds, Edward Elgar Publishing 2021) 324; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 25-42.

70 Manual, Rule 71.15-17; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Rep 28, para. 139

71 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) ICJ Rep 28, para. 139, Contra: Judge Higgins Separate Opinion, paras. 33-34; Judge Kooijmans Separate Opinion, paras. 35-36 (Hereafter *Palestinian Wall Case*); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v Rwanda*) (2006) ICJ 6, para. 146, Contra: Judge Kateka Dissenting Opinion, para. 34 (Hereafter, *Armed Activities Case*).

72 Also: *Caroline v United States,* 11 U.S. 496 (1813).

73 United Nations Security Council (UNSC) Res 1373 (28 September 2001) UN Doc S/RES/1373; United Nations Security Council (UNSC) Res 1368 (12 September 2001) UN Doc S/RES/1368.

74 Jutta Brunnee, 'The Security Council and Self-Defence: Which Way to Global Security?' in *The Security Council and the Use of Force* (Niels Blokker & Nico Schrijver eds, OUP 2005) 122.

75 *Palestinian Wall Case,* para. 35.

76 International Criminal Court, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/7/ SWGCA/2 (2009).

77 Paola Reyes, 'Self-Defence against Non-State Actors: Possibility or Reality?' (2021) 9 *Revista Facultad de Jurisprudencia* 151, 154.

difficulties and challenges involved in attributing cyber-attacks to a state, which are explored in detail in the next section.

B. State Attribution and Self-Defence

The Manual explicitly confirms that the international customary law of state responsibility applies to cyber operations;[78] Rule 14 stipulates that states bear international responsibility for cyber-attacks that are attributable to them, and that constitute a breach of an international legal obligation. Rule 15 of the Manual outlines the principles of state attribution, which stipulates that all acts of force committed by state organs in an "official capacity",[79] under state authority,[80] organs "empowered by domestic law … to exercise elements of government authority",[81] and organs acting "under the exclusive direction and control" of the state.[82] In relation to the final category, disagreement surrounds whether the applicable threshold is effective control as was opined by the ICJ in the *Nicaragua Case* and the *Bosnia Genocide Case*,[83] or effective control in the context of organised groups, as the International Criminal Tribunal for the Former Yugoslavia opined in the *Tadic Case.*[84] The Manual rejects adopting a specific position on this issue, and simply defines 'effective control' as state control over the "execution and course of the specific operation and cyber-activity" which is integral to the operation.[85]

There are different criteria of attribution applicable to different situations and contexts, as the ICJ itself has stated.[86] Following the September 11 attacks, and prominently in the context of terrorist attacks, the criteria of unwillingness and toleration have also been identified,[87] which the ICJ was receptive to in the *Armed Activities* case.[88] Therefore, if a state tolerates and is unwilling to suppress groups that commit a cyberattack on another state, it will be attributable to that

78 Manual, Rule 4.4.

79 Manual, Rule 15.6.

80 Manual, Rule 15.7.

81 Manual, Rule 15.8.

82 Manual, Rule 16.2.

83 *Nicaragua Case*, paras. 116-117; *Bosnia and Herzegovina v Serbia and Montenegro* (2007) ICJ 2, paras. 402-406 (Hereafter, *Bosnian Genocide Case*).

84 *Prosecutor v Dusko Tadic* (1999) ICTY Appeals Chamber, IT-94-1-A, para. 131.

85 Manual, Rule 17.6.

86 *Bosnian Genocide Case*, paras. 404-405.

87 Bruno Simma, Daniel-Erasmus Khan, Georg Nolte & Andreas Paulus, *The Charter of the United Nations: A Commentary* (4th edn, OUP 2024) 1418.

88 *Armed Activities Case*, para. 147.

state, and be the target of self-defence operations.[89] The Manual does not address whether there are further criteria for attribution, or the extent to which a state that is unwilling to control non-state actors may amount to state complicity. This should depend on the extent to which the state involvement or complicity contributed to the possibility of the attack.[90] However, Rule 7 on due diligence clarifies that states are under the obligation to take all feasible measures to "put an end to cyber operations that affect a right of, and produce serious adverse consequences for, other states". This implies that there are situations in which an attack may be attributed to a state when the state tolerates the launching of such attacks.

C. Are Cyber Operations Armed Attacks?

All armed attacks amount to a use of force, but not all uses of force amount to an armed attack that trigger the right to self-defence. As Article 51 of the UN Charter and customary international law provide, the act must be a grave use of force that causes severe injury and death and/or severe destruction and damage of property. This effects-based approach avoids the problems surrounding the definition of 'armed attack' that arise under the acts-based approach.[91] It focuses on the consequences of the action, rather than the weapons or means used, yet still has the effect of excluding most big data attacks from the scope of 'armed attack'.[92] Measured via the scale and effects approach, if such consequences are sufficiently severe to reach the threshold of an armed attack, the action will qualify as an armed attack, irrespective of the tools used to execute it. Thus, a conventional weapon need not be used to carry out an armed attack; attacks carried out by cyber means, provided they have sufficiently grave consequences to amount to an armed attack, also fall within this category. Cyber-attacks (and big data attacks) that cause substantial material destruction or harm may therefore qualify as armed attacks, triggering the right to self-defence.[93]

---

89 Yuki Motoyoshi, 'The Legal Framework of the 'Unwilling or Unable' Theory and the Right of Self-Defence against Non-State Actors' (2021) 37 *Nihon University Comparative Law* 25, 32.

90 Simma (n 88) 1416.

91 Paul Withers, 'Do We Need an Effects-Based Approach for Cyber Operations?' in *Research Handbook on Cyberwarfare* (Tim Stevens & Joe Devanny eds, Edward Elgar Publishing 2024) 214.

92 Michael Schmitt, 'Big Data: International Law Issues Below the Armed Conflict Threshold' in *Big Data and Armed Conflict: Legal Issues Above and Below the Armed Conflict Threshold* (Laura Dickinson & Edward Berg eds, Vol. 9, OUP 2024) 35.

93 Ido Kilovaty, 'Attacking Big Data as a Use of Force' *Big Data and Armed Conflict: Legal Issues Above and Below the Armed Conflict Threshold* (L Dickinson & E Berg eds, Vol. 9, OUP 2024) 144.

There are three distinct categories of the effects of cyber-attacks. First-order effects affect the specifically targeted system, while second-order effects are visible outside of the targeted system, although they are strictly linked to it, and third-order effects are long-term effects that result from the first- and second-order effects, and can be identified in political, strategic, and social changes within the target state.[94] However, this gives rise to the question concerning whether cyber-attacks and big data attacks that are directed against and severely disrupt national critical infrastructures, but do not cause damage to property or loss of human life, qualify as armed attacks which trigger the right to self-defence.[95] It has been argued that the severe disruption of national critical infrastructures caused by cyber-attacks, absent destruction of physical property or harm to persons, should amount to armed attacks.[96] This includes the severe disruption of industrial and economic infrastructures, which extends to big data attacks. However, this significantly extends the meaning of the term 'armed attack', enabling the right to self-defence to be exercised for a wider range of actions for which the term was not initially envisaged. Arguably, this is why the Manual does not include economic coercion within the scope of 'armed attack',[97] which excludes big data attacks that only cause economic damage. This once again appears to depend on the scale and effect principles, in that the Manual recognises that: "some may categorise massive cyber operations that cripple an economy as a use of force, even though economic coercion is presumptively lawful".[98] In the cyber context, the effects of a cyber operation that targets a state's economy would typically arise long after the completion of the operation. If this was to be deemed an armed attack, it would give rise to issues surrounding the immediacy and necessity of the target state's response. Therefore, it is generally the case that economic coercion falls outside of the scope of 'armed attack'.[99]

There are arguments in favour of including the severe disruption of national critical infrastructures within the scope of 'armed attack', which could also extend to big data attacks. Several states appear to defend this assertion; the US includes attacks that severely disrupt national critical infrastructures within

94 Venkata Palleti, Sridhar Adepu, Vishrut Mishra & Aditya Mathur, 'Cascading Effects of Cyber-Attacks on Interconnected Critical Infrastructure' (2021) 4 *Cybersecurity* 1, 8.

95 Nicholas Tsagourias, 'Cyber Attacks, Self-Defence and the Problem of Attribution' (2012) 17 *Journal of Conflict and Security Law* 229, 238.

96 Avra Constantinou, *The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter* (Sakkoulas 2000) 63-64.

97 Manual, Rule 69.2-3.

98 Manual, Rule 69.10.

99 Jacob Batinga, 'Reconciling the Global North-South Divide on the Use of Force: Economic Coercion and the Evolving Interpretation of Article 2(4)' (2024) 41 *Wis. Int'l LJ* 103, 106.

the scope of 'cyber attacks', giving rise to the right of self-defence.[100] If such a position was to be accepted, a cyber-attack directed against a state's financial system that causes severe economic instability should theoretically amount to an armed attack. However, to accept such a view would be to significantly extend the scope of the meaning of 'armed attack'. On the other hand, technological developments have enabled cyber-attacks to inflict serious harm on target states without specifically causing loss of human life or physical destruction – this is particularly the case with big data attacks. Even in the event that such circumstances were included within the scope of 'armed attack', this would not automatically give rise to the right to use force in self-defence against the perpetrator, given the need for necessity and proportionality. For example, measures that do not involve the use of force may be deemed viable alternatives, such as passive cyber defence, or cyber operations that do not reach the level of force.

The Manual recognises the lack of consensus on the issue of cyber-attacks that "do not result in injury, death, damage, or destruction, but that otherwise have extensive negative effects".[101] The Manual points out that such attacks are considered by some to amount to an armed attack, while others adopt the alternative view that they do not.[102] The former view places focus on the "extent of the ensuing effects" rather than the nature of the consequences.[103] Agreement has yet to be reached on this matter, rendering the question unanswered. This study argues that the effects-based approach adopted could potentially permit cyber-attacks (and big data attacks) that severely disrupt national critical infrastructures could amount to an armed attack, depending on the consequences. This would prove consistent with the overall approach adopted in the Manual, and allow for a context-specific approach to be adopted.

There is also debate surrounding whether a target state can use force in self-defence against a series of cyber-attacks that would not qualify as armed attacks alone, but may reach the necessary severity to qualify as an armed attack if considered collectively. Aggregated attacks that do not individually meet the threshold of an armed attack are not fully addressed in the Manual. It simply provides that such attacks will qualify as an armed attack if they are carried out by the same perpetrator, are related, and "taken together meet the requisite scales and effects".[104] The ICJ in the *Oil Platforms Case*[105] and the

100 Roscini (n 2) 74.

101 Manual, Rule 71.12.

102 Ibid.

103 Ibid.

104 Ibid., Rule 71.11.

105 *Oil Platforms Case*, para. 64.

Armed Activities Case[106] took into account the fact that there had been a series of attacks when determining whether an armed attack had taken place. However, it had not clarified this point of law, because it did not determine that there was an armed attack on alternative grounds. It has been opined by some scholars that attacks that are low in intensity could combine to amount to an armed attack for the purposes of self-defence.[107] However, this approach has been rejected by other scholars, and even Judge Simma in the *Oil Platforms Case.*[108] This issue therefore remains unclear, both for cyber operations and big data attacks. This study argues that considering a series of low intensity cyber-attacks collectively would enable them to reach the threshold to qualify as an armed attack. This is consistent with the effects-based approach, in that it would look to the cumulative effects of the cyber-attacks.[109] This would in fact resolve debate surrounding the inclusion of cyber operations that result in the severe disruption of national critical infrastructures, but which do not cause loss of life or material damage, within the scope of 'armed attack', giving rise to the right to self-defence. The scale and effects requirement would ensure that the cyber-attacks would need to have a sufficiently disruptive effect on national critical infrastructures to amount to an armed attack.[110]

D. Necessity, Immediacy and Proportionality

In the event that a state lawfully uses armed force under Article 51 of the UN charter, it is required to fulfil the requirements of necessity and proportionality. In order to satisfy the necessity requirement, the target state must use armed force in self-defence as a last resort to bring an end to the armed attack; non-forcible measures must not be available to end the armed attack.[111] The target state judges the principle of necessity - it is largely subjective in nature. In order to satisfy the proportionality requirement, the use of armed force in self-defence must be proportionate to the need to end the armed attack.[112]

A use of armed force in self-defence must also fulfil the imminence and immediacy requirements. This means that the armed attack must be imminent,

---

106 *Armed Activities Case*, paras. 146-147.

107 Yoram Dinstein, *War, Aggression and Self-Defence* (CUP 2010) para. 548; Carsten Stahn, 'Terrorist Acts as Armed Attack: The Right to Self-Defense, Article 51 (½) of the UN Charter, and International Terrorism' (2003) 27 *The Fletcher Forum of World Affairs* 35, 54.

108 *Oil Platforms Case,* Judge Simma, para. 14.

109 Tsagourias (n 96) 233.

110 Roscini (n 2) 75.

111 Suzanne Uniacke, 'The Condition of Last Resort' in *The Cambridge Handbook of the Just War* (L May ed, CUP 2018) 103.

112 David Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus Ad Bellum' (2013) 24 *European Journal of International Law* 235, 266.

and the response of the target state must immediately follow the occurrence of the armed attack.[113] These requirements are applied under Rule 72 of the Manual, which stipulates that "a use of force involving cyber operations undertaken by a state in the exercise of its right to self-defence must be necessary and proportionate". A target state can use active or passive cyber defence, and where passive defence measures are sufficient to prevent a cyber-attack, forceful active cyber defence measures are unlawful. Active cyber defence measures are attacks that respond to cyber-attacks that have already been carried out, and may be below or beyond the threshold of force. As the principle of necessity provides, if cyber defence operations are not sufficient to prevent a current or future armed attack, cyber armed force is permissible under the right of self-defence.[114] The principle of proportionality requires that the amount of force used in self-defence must be at the level required to prevent or cease an armed attack. A cyber use of force in response to a cyber-attack may not be sufficient, rendering a kinetic use of force permissible.[115]

The immediacy requirement stipulates that the self-defence must be aimed at preventing or stopping an armed attack, which excludes punishment for the armed attack. Thus, the self-defence response need not be instant in terms of the period of time following the armed attack.[116] Rather, it must be within a reasonable time following the armed attack. This principle is rather flexible, which is particularly appropriate in the context of cyber-attacks. This is because a considerable amount of time may be needed for a target state to identify a perpetrator. Furthermore, a cyber-attack may have debilitated the target state's ability to exercise self-defence. Thus, the immediacy requirement is able to take into account the particular aspects of cyber-attacks.

E. Anticipatory Self-Defence and Cyber Operations

The Manual permits a state to "act in participatory self-defence … when the attacker is clearly committed to launching an armed attack and the victim state will lose its opportunity to effectively defend itself unless it acts".[117] Although customary international law does contemplate the use of anticipatory countermeasures to deter an imminent armed attack, which includes cyber operations, international law does not provide for such countermeasures.[118]

---

113 Terry Gill, 'The Temporal Dimension of Self-Defence: Anticipation, Pre-Emption, Prevention and Immediacy' (2006) 11 *Journal of Conflict and Security Law* 361, 365.

114 Chris O'Meara, *Necessity and Proportionality and the Right of Self-defence in International Law* (OUP 2021) 58.

115 Roscini (n 2) 90.

116 James Green, 'The Ratione Temporis Elements of Self-Defence' (2015) 2 *Journal on the Use of Force and International Law* 97, 103.

117 Manual, Rule 73.4.

118 See: *Gabcikovo-Nagymaros Project* (*Hungary v Slovakia*) (1997) ICJ 692, para. 83.

The speed of cyber operations argues in favour of a permissive response to anticipatory countermeasures in such contexts.[119] Cyber operations feature a speed that is not present in many other systems of attack. However, they also require considerable time to develop, and become apparent in the systems of the target state. A target state may know of such actions, and have the ability to adopt countermeasures prior to the illegal attack, in order to decrease or eliminate its effectiveness. However, the target cannot lawfully do so, due to the fact that the countermeasures doctrine requires that an illegal act occur before action may be permitted.[120] A more effective approach would be to permit anticipatory countermeasures that are proportionate to the impending illegal act, and specifically focused on preventing it.

III. RECOMMENDATIONS FOR AN INTERNATIONAL LEGAL FRAMEWORK

While the Manual provides a useful basis for the regulation of cyber-attacks, it contains several gaps and weaknesses (as outlined in the previous sections), and lacks legally binding force. This gives rise to the question as to whether a binding international law framework should be established to regulate the specific context of cyber-attacks. Alternatively, the existing international law framework could be amended to explicitly provide for and clarify the legal position on cyber-attacks. This may prove problematic in the context of new situations, as Shaw recognises:

> *"one of the major problems of international law is to determine when and how to incorporate new standards of behaviour and new realities of life into the already existing framework, so that, on the one hand, the law remains relevant and, on the other hand, the system itself is not too vigorously disrupted".*[121]

In the context of big data attacks, the Manual is clear that such attacks do not amount to armed force, because data is not recognised as an object.[122] However, an increasing number of scholars and states have expressed that intangible data should be regarded as an object, subject to international law on the use of force.[123] For example, it has been suggested that damage caused to big data should relate

---

119 Gary Corn & Eric Jensen, 'The Use of Force and Cyber Countermeasures' (2018) 32 *Temp. Int'l & Comp. LJ* 127, 133.

120 Ryan Hayward, 'Evaluating the Imminence of a Cyber Attack for Purposes of Anticipatory Self-Defence' (2017) 117 *Colum. L. Rev.* 399, 402.

121 Malcolm Shaw, *International Law* (7th edn, CUP 2014) 31.

122 Manual, Rule 102.

123 Michael Schmitt, 'The Notion of 'Objects' During Cyber Operations: A Riposte in Defence of Interpretive and Applicative Precision' (2015) 48 *Israel Law Review* 81, 85.

to the integrity, availability, and confidentiality of such data.[124] Some believe that cyber operations that cause economic injury *during an armed conflict* must comply with the principles of proportionality and necessity.[125] However, this relates to cyber operations *during* armed conflict, meaning that a big data attack does not automatically trigger the right to use force in self-defence outside of the armed conflict context. This demonstrates that international law primarily regulates big data attacks as part of armed conflict, and economic damage is not actionable outside of this context, which is a necessary limitation on the scope of the use of force in self-defence. To allow a big data attack that does not have immediate physical consequences to trigger an armed conflict cannot be reconciled with the foundations of the law on armed conflict. Alternatively, and firstly, it is necessary to determine whether cyber operations in general should be contained in a separate international legal instrument.

While treaties are legally binding, they are only binding on the states that are parties to them,[126] and third states that give consent to assumption of the obligations or rights provided therein.[127] This emphasises the need for consensus, in order for a treaty to have sufficiently broad effect, and to minimise state reservations.[128] Thus, a separate treaty on cyber-attacks would need to ensure sufficient scope of ratification in order to have useful force. Alternatively, the UN Charter could be interpreted to include cyber-attacks. This is consistent with the ICJ's ruling that international instruments must be "interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation".[129] This ascribes to the principle of dynamic interpretation, as provided for under Article 31(3)(b) of the Vienna Convention on the Law of Treaties 1969. Accordingly, the terms 'armed attack' and 'use of force' should be understood in light of technological developments. As has been identified in previous sections, it is possible to interpret the principles of armed attack and the use of force within the cyber context.[130] However, as has also been previously identified, there are several difficulties surrounding such an approach, ranging

---

124 Anna Osula, Agnes Kasper and Aleksi Kajander, 'EU Common Position on International Law and Cyberspace' (2022) 16 *Masaryk University Journal of Law and Technology* 89, 99.

125 Heather Dinniss, 'The Nature of Objects: Targeting Networks and the Challenge of Defining Cyber Military Objectives' (2015) 48 *Israel Law Review* 39, 44.

126 Antonio Cassese, *International Law* (2nd edn, OUP 2005) 171.

127 Vienna Convention on the Law of Treaties of 1969, Articles 35-36.

128 Cassese (n 127) 173.

129 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (1971) ICJ Reports 1971, para. 53.

130 Yaroslav Radziwill, *Cyber-Attacks and the Exploitable Imperfections of International Law* (Brill 2015) 4.

from the lack of international consensus on definitions to varied perceptions of threats that cyber-attacks pose.

The existence of such difficulties supports the development of a new, distinct international legal instrument that seeks to promote international consensus on the various aspects of the regulation of cyber operations. This could involve a two-dimensional exercise, whereby existing laws are extended to apply to this new context where possible, and new legal principles are established to fill cyber-related gaps and issues that plague existing law.[131] Such a development is necessary, given the increase in cyber operations, which highlights the need to arrive at an agreement as to the regulation of such operations. This could then form the basis for a binding international instrument. Thus far, debates have resulted in the emergence of general agreement on certain issues, and how they should be regulated under international law. Therefore, there is sound basis for further promotion of such agreement, for the purpose of enacting a legally binding instrument for cyber operations.

A. Cyber Operations as Use of Force and Armed Attacks: Different Approaches

A key issue is to determine how the concepts of use of force and armed attack apply to cyber-attacks. The target-based approach requires that a cyber-attack target national critical infrastructures to amount to a use of force.[132] It does not attach significance to the effects of the attack, so long as it is directed against a national critical infrastructure. This approach is unsatisfactory, because it is far too broad, and would categorise cyber operations as a use of force even in the event that they merely inconvenience, or gather information from, the target state.[133] Furthermore, there is no general consensus on the definition of 'critical national infrastructure', which could give rise to different practices between states. While the target-based approach has the advantage of easily determining whether a cyber operation amounts to a use of force or an armed attack, it fails to respond to the complexity of cyber operations.

The instrument-based approach has traditionally been applied to the regulation of armed force under the UN Charter.[134] It places focus on the means used to

---

131 Noah Simmons, 'A Brave New World: Applying International Law of War to Cyber-Attacks' (2014) 4 *Journal of Law & Cyber Warfare* 42, 48.

132 Russell Buchan and Iñaki Navarrete, 'Cyber Espionage and International Law' in *Research Handbook on International Law and Cyberspace* (Nicholas Tsagourias & Russell Buchan eds, Edward Elgar Publishing 2021) 236.

133 Ibid.

134 Michael Schmitt, 'Computer network attack and the use of force in international law: Thoughts on a normative framework' in *The Use of Force in International Law* (T Gazzini ed, Routledge 2017) 409.

commit the act, but it does not harmonise well with cyber operations, because it focuses on physical means, meaning that a malicious code could not qualify as a use of force. The instrument-based approach has been heavily criticised on the basis that it does not permit cyber operations to be identified as a use of force for the purposes of Article 2(4) of the UN Charter. While the instrument-based approach has the advantage of simplicity, it does not place focus on the consequences of operations.

The most effective approach is the effects-based approach, primarily because it recognises that states are concerned with the consequences of cyber operations than the nature of the weapon or target.[135] It is for this reason that it has received the greatest support of the three approaches. The US has indeed recognised that the international community is primarily focused on the consequences rather than the mechanism of cyber-attacks.[136] The effects-based approach may be applied to identify cyber operations that are comparable to other actions that would be defined as a use of force by the international community.[137] This approach, if embodied within an international instrument, would therefore be most likely to garner international support.

Applying the effects-based approach to cyber operations is not without its difficulties. This is because cyber operations have various consequences, that can range from mere inconvenience to the injury or death of persons, and the damage and destruction of property.[138] Thus, a boundary must be placed between political or economic coercion, and the use of force that reaches the threshold of an armed attack. It has been widely agreed that a cyber operation must have a destructive effect on property and/or persons in order to reach the threshold of armed force.[139] What is apparent is that by placing focus on the consequences, cyber operations can fit more effectively within the current international legal framework. This is also consistent with Rule 69 of the Manual, which adopts a scale and effects approach.

This gives rise to the question concerning how cyber operations that do not directly cause the death or injury of persons and/or the damage or destruction

---

135 Reese Nguyen, 'Navigating Jus Ad Bellum in the Age of Cyber Warfare' (2013) 101 *Calif. L. Rev.* 1079, 1121.

136 US Department of Defense, *An Assessment of International Legal Issues in Information Operations* (FAS 1999) 18.

137 Manual, Tule 9.13.

138 Michael Schmitt, 'Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework' in *The Use of Force in International Law* (Tarcisio Gazzini ed, Routledge 2017) 412.

139 Harold Koh, 'International Law in Cyberspace: Remarks as Prepared for Delivery by Harold Hongju Koh to the USCYBERCOM Inter-Agency Legal Conference Ft. Meade, MD, Sept. 18, 2012' (2012) *Harvard International Law Journal Online* 54, 4.

of property (particularly big data attacks) fit in with this approach. In this respect, Schmitt's development of factors that contribute to assessments of the scale and effects of cyber operations that are indirect and non-physical could apply.[140] These factors are: Severity, directness, immediacy, measurability, invasiveness, military character, state involvement, and presumptive legitimacy. It is beyond the scope of this study to examine these factors in detail, although it is important to point out that they provide a suitable basis for such analysis, as is demonstrated in the fact that they are also provided for in the Manual.[141] They have the effect of distinguishing between cyber operations that do and do not amount to armed force, by way of the fact that they inflict a minimum threshold of harm, their consequences are more imminent and direct than other types of coercion, they are more invasive than other exploitation-based cyber operations, and they have consequences that the international community seeks to avoid. Finally, the level of state involvement is sufficient for the cyber operations to be attributed to it. These factors provide for useful guidance on the categorisation of cyber operations that do not cause direct death or injury or damage or destruction of property.

B. The Application of Existing Laws or a New Law?

There is debate surrounding whether existing law is appropriate in its application to cyber operations, or whether a new international law should be drafted. It is broadly agreed that article 2(4) of the UN Charter and customary international law can be applied to cyber operations, and "must be cast in terms of the use of force paradigm".[142] The term 'armed force' in the UN Charter was intended to be an evolutionary term. Therefore, the fact that cyber operations are not conducted by traditional means is not an insurmountable obstacle to their regulation under the existing framework.[143] Furthermore, there is no evidence to suggest that a completely new international law would avoid the challenges and issues that currently exist. Therefore, a more appropriate approach would be to extend the existing framework, and clarify its application to cyber operations, as the Manual has contributed to achieving. This would also avoid foreseeable issues surrounding the attempt to achieve state ratification of a completely new legal instrument.

---

140 Michael Schmitt, 'Cyber Operations and the Jus Ad Bellum Revisited' (2011) 56 *Vill. L. Rev.* 569, 572.

141 Manual, Rule 69.9.

142 Michael Schmitt, 'Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework' in *The Use of Force in International Law* (Tarcisio Gazzini ed, Routledge 2017) 413.

143 Scott Shackelford, 'From Nuclear War to Net War: Analogizing Cyber Attacks in International Law' (2009) 27 *Berkeley J. Int'l Law* 192, 195.

There is general agreement that Articles 2(4) and 51 of the UN Charter are applicable to "any use of force, regardless of the weapon employed", which renders the idea of a completely new international instrument redundant.[144] In previous sections, it has been demonstrated that the UN Charter is able to encompass cyber operations, just as it has applied to other forms of force, such as "kinetic, chemical, biological or nuclear weaponry".[145] This does not mean, however, that challenges and gaps do not exist. This is particularly apparent in the context of where certain forms of cyber operations may be placed in terms of the requisite threshold of armed force. As Melzer points out, cyber operations (particularly those that do not cause death, injury, or destruction) "simply were not anticipated by the drafters of the UN Charter", because they fall within "the grey zone between traditional military force and other forms of coercion".[146] This highlights the need to determine how the existing legal framework should be applied within this context. Arguably, this can only be meaningfully achieved in practice, and when such events occur. At the very least, the basic requirements and thresholds are applicable to cyber operations, in that they must be attributable to a state, amount to a threat or use of force, and be conducted between states. These criteria operate to place limits on the ability to classify cyber operations as a use of force, without becoming overly restrictive or lax. Lingering details should be resolved as practical issues arise, given that there currently exists a very robust basis for the regulation of cyber operations. In contrast, drafting a completely new international regulation would either (a) give rise to new criteria that could give rise to new interpretational problems, or (b) simply emerge as a reiteration of the current law in order to avoid such problems, thereby rendering the legal instrument itself redundant.

CONCLUSION

The first conclusion is that the criteria for the use of force, armed attack, and self-defence can be extended to apply to cyber operations. The Manual has contributed significantly to clarifying the application of key legal principles to the cyber context. The Manual adopts an effects-based rather than an instrument-based approach, reflecting the widely held view that the use of force should be separate from the instrument used. This dismantles boundaries to the application of existing international law to cyber-attacks. Therefore, any use of force that has harmful effects in the form of human injury/death and/or physical damage equivalent to those resulting from military force are in violation of the prohibition, which includes cyber force. This generally excludes big data attacks, depending

144 *Nuclear Weapons Case*, para. 39.

145 Nils Melzer, *Cyberwarfare and International Law* (Policy Commons 2011) 7.

146 Ibid., 9.

on their scale and effects, which is justifiable, given the implications arising from a determination of a use of force. This is supported by the fact that the Manual implies that political or economic coercion is to be excluded from the definition of force. However, this does not mean that cyber operations that have a serious impact on critical infrastructure do not qualify as a use of force, which leaves open the potential for big data attacks to qualify as a use of force. The imposition of such strict boundaries is consistent with the general scope and content of the law on the use of force.

The second conclusion is that big data attacks will rarely meet the necessary threshold, particularly when they merely result in economic damage. It is argued that this is an appropriate approach, given the implications of the qualification of a cyber operation as a use of force. When such attacks result in the injury or death of persons, and/or the destruction of property, only then is it acceptable to define them as a use of force, lest the scope and meaning of the use of force become distorted. This does not mean that big data attacks would never amount to a use of force. The precise reason for the threshold is that an act must meet minimum standards in order to qualify as a use of force. The severity criterion measures the range of consequences of an attack, including but not limited to physical consequences. Therefore, cyber operations that have severe consequences for critical infrastructure may qualify as a use of force, regardless of whether physical damage was caused. Big data attacks, when they only result in economic damage, do not, and should not reach the threshold of the use of force. Accordingly, states should not be permitted to exercise force in self-defence against such attacks. However, if economic damage is accompanied by injury or death, or destruction of property, the right of self-defence may be exercised, provided the requirements are met.

The final conclusion is that, while the Manual (and international law) is plagued by gaps in its application to cyber-attacks, this does not mean that a new international legal instrument would remedy such problems. While international law primarily regulates big data attacks as part of armed conflict, and economic damage is not actionable outside of this context, this is a necessary limitation on the scope of the use of force in self-defence. To allow a big data attack that does not have immediate physical consequences to trigger an armed conflict cannot be reconciled with the foundations of the law on armed conflict. Thus, legislating for this in a separate instrument would conflict with existing law. This highlights the need to determine how the existing legal framework should be applied within this context. Arguably, this can only be meaningfully achieved in practice, and when such events occur. At the very least, the basic requirements and thresholds are applicable to cyber operations, in that they must be attributable to a state, amount to a threat or use of force, and be conducted between states. These criteria operate to place limits on the ability to classify cyber operations

as a use of force, without becoming overly restrictive or lax. Lingering details should be resolved as practical issues arise, given that there currently exists a very robust basis for the regulation of cyber operations.

BIBLIOGRAPHY

Books & Journals

Barkham J, 'Information Warfare and International Law on the Use of Force' (2001) 34 *NYUJ Int'l L. & Pol.* 57

Batinga J, 'Reconciling the Global North-South Divide on the Use of Force: Economic Coercion and the Evolving Interpretation of Article 2(4)' (2024) 41 *Wis. Int'l LJ* 103

Bell AM, 'Using Force against the Weapons of the Weak: Examining a Chemical-Biological Weapons Usage Criterion for Unilateral Humanitarian Intervention under the Responsibility to Protect' (2013) 22 *Cardozo J. Int'l & Comp. L.* 261

Boer LJ, 'Restating the Law as It Is: On the Tallinn Manual and the Use of Force in Cyberspace' (2013) 5 *Amsterdam LR* 4

Brunnee J, 'The Security Council and Self-Defence: Which Way to Global Security?' in *The Security Council and the Use of Force* (N Blokker & N Schrijver eds, OUP 2005)

Buchan R and I Navarrete, 'Cyber espionage and international law' in *Research handbook on international law and cyberspace* (N Tsagourias & R Buchan eds, Edward Elgar Publishing 2021)

Cassese A, *International Law* (2nd edn, OUP 2005)

Check T, 'The Tallinn Manual 2.0 on Nation-State Cyber Operations Affecting Critical Infrastructure' (2022) 13 *Nat'l Sec. L. Brief* 1

Clark, D & S Landau, 'Untangling Attribution' in *Proceedings of a Workshop on Deterring Cyberattacks: Informing Strategies and Developing Options for US Policy* (National Research Council 2010)

Coco A, T Dias and T Van Benthem, 'Illegal: The SolarWinds hack under international law' (2022) 33 *European Journal of International Law* 1275

Constantinou A, *The Right of Self-Defence under Customary International Law and Article 51 of the UN Charter* (Sakkoulas 2000)

Corn G & E Jensen, 'The use of force and cyber countermeasures' (2018) 32 *Temp. Int'l & Comp. LJ* 127

Derian-Toth G, R Walsh, A Sergueeva, E Kim, A Coon, H Hadan & J Stancombe, 'Opportunities for public and private attribution of cyber operations' (2021) 12 *Tallinn Paper Series* 8

Devins C, T Felin, S Kauffman, R Koppl, 'The Law and Big Data' (2017) 27 *Cornell Journal of Law and Public Policy* 363

Dinniss HH, *Cyber Warfare and the Laws of War* (CUP 2012)

Dinniss HH, 'The nature of objects: Targeting networks and the challenge of defining cyber military objectives' (2015) 48 *Israel Law Review* 39

Dinstein Y, *War, Aggression and Self-Defence* (CUP 2010)

Dobinson I & F Johns, 'Legal research as qualitative research' in *Research methods for law* (M McConville & WH Chui eds, 2nd edn, Edinburgh University Press 2017)

Efrony D & Y Shany, 'A rule book on the shelf? Tallinn manual 2.0 on cyberoperations and subsequent state practice' (2018) 112 *American Journal of International Law* 583

Eichensehr KE, 'Not illegal: The SolarWinds incident and international law' (2022) 33 *European Journal of International Law* 1263

Focarelli C, 'Self-defence in cyberspace' in *Research handbook on international law and cyberspace* (N Tsagourias & R Buchan eds, Edward Elgar Publishing 2021)

Foltz A, 'Stuxnet, Schmitt Analysis, and the Cyber "Use-of-Force" Debate' (2012) 67 *Joint Force Quarterly* 40

Gill TD, 'The temporal dimension of self-defence: Anticipation, pre-emption, prevention and immediacy' (2006) 11 *Journal of Conflict and Security Law* 361

Green JA, 'The ratione temporis elements of self-defence' (2015) 2 *Journal on the Use of Force and International Law* 97

Gunatileka S, '"Big Data Breaches", sovereignty of states and the challenges in attribution' (2024) 5 *University of Colombo Review* 104

Hayward RJ, 'Evaluating the Imminence of a Cyber Attack for Purposes of Anticipatory Self-Defence' (2017) 117 *Colum. L. Rev.* 399

Hernandez G, *International Law* (OUP 2019)

Hollis DB & TJ Van Benthem, *Threatening Force in Cyberspace* (Temple University Legal Studies Research Paper 2021)

Jensen ET, 'Computer attacks on critical national infrastructure: A use of force invoking the right of self-defence' (2002) 38 *Stan. J. Int'l L.* 207

Kilovaty I, 'Attacking Big Data as a Use of Force' *Big Data and Armed Conflict: Legal Issues Above and Below the Armed Conflict Threshold* (L Dickinson & E Berg eds, Vol. 9, OUP 2024)

Koh H, 'International Law in Cyberspace: Remarks as Prepared for Delivery by Harold Hongju Koh to the USCYBERCOM Inter-Agency Legal Conference Ft. Meade, MD, Sept. 18, 2012' (2012) *Harvard International Law Journal Online* 54

Kretzmer D, 'The inherent right to self-defence and proportionality in jus ad bellum' (2013) 24 *European Journal of International Law* 235

Kumar D, 'Interpretation of International Law under the Tallinn Manual(s)' (2021) 3 *Indian JL & Legal Rsch.* 1

Lavania A, 'The Need to Fill Legal Vacuum in International Law to Deal with Non-State Actors in Cyber Operations' (2022) 5 *Int'l JL Mgmt. & Human.* 462

Lin HS, 'Offensive cyber operations and the use of force' (2010) 4 *J. Nat'l Sec. L. & Pol'y* 63

Lubell N, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010)

Marelli M, 'The SolarWinds hack: Lessons for international humanitarian organizations' (2022) 104 *International Review of the Red Cross* 1267

Melzer N, *Cyberwarfare and International Law* (Policy Commons 2011)

Motoyoshi Y, 'The Legal Framework of the 'Unwilling or Unable' Theory and the Right of Self-Defence against Non-State Actors' (2021) 37 *Nihon University Comparative Law* 25

Nguyen R, 'Navigating jus ad bellum in the age of cyber warfare' (2013) 101 *Calif. L. Rev.* 1079

O'Meara C, *Necessity and Proportionality and the Right of Self-defence in International Law* (OUP 2021)

Osula AM, A Kasper & A Kajander, 'EU common position on international law and cyberspace' (2022) 16 *Masaryk University Journal of Law and Technology* 89

Palleti VR, S Adepu, V Mishra & A Mathur, 'Cascading effects of cyber-attacks on interconnected critical infrastructure' (2021) 4 *Cybersecurity* 1

Pipyros K, C Thraskias, L Mitrou, D Gritzalis & T Apostolopoulos, 'A new strategy for improving cyber-attacks evaluation in the context of Tallinn Manual' (2018) 74 *Computers & Security* 371

Pradeep MD, 'Legal Research-Descriptive Analysis on Doctrinal Methodology' (2019) 4 *International Journal of Management, Technology and Social Sciences* 95

Radziwill Y, *Cyber-attacks and the exploitable imperfections of international law* (Brill 2015)

Reyes P, 'Self-Defence against Non-State Actors: Possibility or reality?' (2021) 9 *Revista Facultad de Jurisprudencia* 151

Roscini M, 'Threats of armed force and contemporary international law' (2007) 54 *Netherlands International Law Review* 229

Roscini M, *Cyber operations and the use of force in international law* (OUP 2014)

Schmitt MN, 'Cyber operations and the jud ad bellum revisited' (2011) 56 *Vill. L. Rev.* 569

Schmitt MN, 'The notion of 'objects' during cyber operations: A riposte in defence of interpretive and applicative precision' (2015) 48 *Israel Law Review* 81

Schmitt MN, 'Computer network attack and the use of force in international law: Thoughts on a normative framework' in *The Use of Force in International Law* (T Gazzini ed, Routledge 2017)

Schmitt MN, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (CUP 2017)

Schmitt MN, 'Big Data: International Law Issues Below the Armed Conflict Threshold' in *Big Data and Armed Conflict: Legal Issues Above and Below the Armed Conflict Threshold* (L Dickinson & E Berg eds, Vol. 9, OUP 2024)

Schmitt MN & S Watts, 'Beyond state-centrism: International law and non-state actors in cyberspace' (2016) 21 *Journal of Conflict and Security Law* 595

Shackelford SJ, 'From nuclear war to net war: Analogizing cyber attacks in international law' (2009) 27 *Berkeley J. Int'l Law* 192

Shaw MM, *International Law* (7th edn, CUP 2014)

Simma B, DE Khan, G Nolte & A Paulus, *The Charter of the United Nations: A Commentary* (4th edn, OUP 2024)

Simmons N, 'A Brave New World: Applying International Law of War to Cyber-Attacks' (2014) 4 *Journal of Law & Cyber Warfare* 42

Stahn C, 'Terrorist Acts as Armed Attack: The Right to Self-Defense, Article 51 (½) of the UN Charter, and International Terrorism' (2003) 27 *The Fletcher Forum of World Affairs* 35

Symon P, A Tarapore, 'Defense Intelligence Analysis in the Age of Big Data' (2015) 79 *Joint Force Quarterly* 5

Tsagourias N, 'Non-State Actors and the Use of Force' in *Participants in the International Legal System: Theoretical Perspectives* (J D'Aspremont ed, Routledge 2011)

Tsagourias N, 'The Tallinn Manual on the International Law Applicable to Cyber Warfare: A Commentary on Chapter II—The Use of Force' (2012) 15 *Yearbook of International Humanitarian Law* 19

Tsagourias N, 'Cyber attacks, self-defence and the problem of attribution' (2012) 17 *Journal of Conflict and Security Law* 229

Uniacke S, 'The condition of last resort' in *The Cambridge handbook of the just war* (L May ed, CUP 2018)

Withers P, 'Do we need an effects-based approach for cyber operations?' in *Research Handbook on Cyberwarfare* (T Stevens & J Devanny eds, Edward Elgar Publishing 2024)

Yoo J, 'Using force' (2004) 71 *University of Chicago Law Review* 729

Ziolkowski K, *Stuxnet: Legal considerations* (NATO Cooperative Cyber Defence Centre of Excellence 2012)

Reports

International Criminal Court, *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP/7/ SWGCA/2 (2009)

US Department of Defense, *An Assessment of International Legal Issues in Information Operations* (FAS 1999)

Resolutions

United Nations Security Council (UNSC) Res 1373 (28 September 2001) UN Doc S/RES/1373

United Nations Security Council (UNSC) Res 1368 (12 September 2001) UN Doc S/RES/1368

Judgements

Armed Activities on the Territory of the Congo (Dem. Rep. Congo v Rwanda) (2006) ICJ 6

Bosnia and Herzegovina v Serbia and Montenegro (2007) ICJ 2

Caroline v United States, 11 U.S. 496 (1813)

Gabcikovo-Nagymaros Project (*Hungary v Slovakia*) (1997) ICJ 692

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion (1971) ICJ Reports 1971

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) ICJ Rep 28

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) (1986) ICJ Rep 14

Oil Platforms Case (Islamic Republic of Iran v United States of America) (2003) ICJ Rep 4

Prosecutor v Dusko Tadic (1999) ICTY Appeals Chamber, IT-94-1-A

Law

Charter of the United Nations 1945

Declaration on Friendly Relations 1970

Vienna Convention on the Law of Treaties 1969

MOBILE-SIERRA DOCTRINE AND ENERGY CONTRACTS*

Mobile-Sierra Doktrini ve Enerji Sözleşmeleri

Fatih GÖKYURT**

L&JR
Year: 16, Issue: 30
July 2025
pp.109-136

Article Information

Submitted : *02.12.2024*
Revision Requested : *26.02.2025*
Last Version Received : *29.05.2025*
Accepted : *22.07.2025*

Article Type

Research Article

Abstract

The Mobile-Sierra doctrine outlines the circumstances under which the Federal Energy Regulatory Commission (FERC) is authorized to intervene in wholesale energy contracts. Central to this doctrine are the legal standards of 'just and reasonable' pricing, along with the 'public interest' criteria that have been shaped by judicial interpretation. These standards are pivotal for understanding how the concept of 'public interest' is applied within U.S. administrative law.

Since the initial Mobile and Sierra decisions, and subsequent rulings by the Supreme Court, the doctrine has undergone significant development. This ongoing evolution has led to extensive debate about the practical conditions, limitations, and various dimensions of the doctrine. Changes in legal standards and judicial interpretations have continuously influenced how these conditions are applied.

Given the intensive regulatory framework of energy law, examining how contracts interact with regulatory authority, and the balance between ensuring contractual stability and exercising regulatory power, as well as the impact of the public interest concept within U.S. law, can provide valuable insights. Such an analysis could be particularly beneficial for understanding similar issues in Turkish law.

Keywords: Regulation, energy contracts, public interest, regulatory power, tariffs

* There is no requirement of Ethics Committee Approval for this study.

** Dr., T.C. The Presidency of the Small and Medium Enterprises Development and Support Administration (KOSGEB), E-mail: fatihgokyurt@gmail.com, ORDIC ID: 0000-0001-5507-1410.

Özet

Düzenleyici kurum olarak FERC'in enerji hizmetlerinde toptan satış sözleşmelerinde belirlenen fiyatlara hangi şartlarda müdahale edebileceği *Mobile-Sierra* doktrininin temelini oluşturmaktadır. Tarife belirleme dışında sözleşmelere müdahale yetkisi içeren bu alanda yasa ile belirlenen 'adil ve makul' ölçütü yanında içtihatla geliştirilen kamu yararı kriteri ABD İdare hukukundaki 'kamu yararı' kavramına ilişkin tartışmalara ışık tutması bakımından önem arz etmektedir.

Doktrinin temeli olan *Mobile* ve *Sierra* kararları ile bu alanda oluşturulan içtihat Yüksek Mahkemenin sonraki kararlarıyla daha da geliştirildiğinden doktrinin uygulamadaki koşul ve sınırları ile diğer boyutları da bu çerçevede ele alınmıştır. Bu çerçevede yasa ile belirlenen koşulların uygulamasının yargı kararlarıyla nasıl geliştiği ve değiştiği bu süreç içinde değerlendirilmiştir.

Yoğun bir düzenleme çerçevesine sahip olan enerji hukuku alanında sözleşmelerin idarenin yetkileri karşısındaki konumunun, sözleşme istikrarı ile düzenleme yetkisi arasındaki ilişkinin ve kamu yararı kavramının bu alandaki etkisinin düzenleyici kurumlar alanında önemli bir birikime sahip olan ABD hukuku çerçevesinde incelenmesinin Türk hukuku açısından da faydalı olabileceği değerlendirilmektedir.

Anahtar Kelimeler: Regülasyon, enerji sözleşmeleri, kamu yararı, düzenleme yetkisi, tarife

INTRODUCTION

The *Mobile-Sierra* doctrine has a very significant role on the energy regulation. It represents a sensitive and highly important balance between the regulatory power and contractual rights and responsibilities in the energy law.

The origin of the *Mobile-Sierra* doctrine has been described as two of the "best-known public utility decisions by the Supreme Court in [the 20th] century,"[1] Because this doctrine tries to maintain a very sensitive balance between contract stability and regulatory power. Actually this point may be seen among the main issues of the regulatory state and its powers. So its subject is neither new nor, perhaps, even resolvable problem. Basically it seems as an economic and political balance point and it can be changed according to present conditions. Depending on these conditions this balance point can either go beyond this doctrine or restrict it.

[1] *Boston Edison Co. v FERC* 233 F.3d 60, 64 (1st Cir.2000); Richard P. Bress, Michael J. Gergen, and Stephanie S. Lim, 'The Business of the Court: A Deal Is Still a Deal: Morgan Stanley Capital Group v. Public Utility District No. 1' [2007-08] Cato Sup. Ct. Rev. 285, 292.

However, this doctrine especially deals with energy regulation and wholesale energy contracts and tariffs. Therefore, beyond the general overview of the doctrine, it is necessary to focus on the specific reflections of it on the energy regulation. In order to examine the *Mobile-Sierra* doctrine firstly it is necessary to understand its origin and the main cases that constitute the main structure of the doctrine. After this general context, it can be easier to analyze its evolution and different aspects of its application in the area of energy contracts.

I. Overview of The *Mobile-Sierra* Doctrine

A. Origin

The *Mobile-Sierra* doctrine is taking its name from two same-day Supreme Court decisions: United Gas Pipe Line Co. v. Mobile Gas Service Corp. and Federal Power Commission v. Sierra Pacific Power Co.[2] The doctrine mainly puts a principle that FERC presumes the justness and reasonableness of the negotiated wholesale contract rates agreed by the parties unless it seriously harms the public interest. At first it seems a burden on the freedom of contract principle, but actually according to this doctrine, National Gas Act (NGA) and Federal Power Act (FPA) impose a restriction on the FERC's authority on the private contracts. Because after these decisions, just and reasonable standard associated and interpreted with the public interest criterion.[3]

In general, the central issue in this doctrine concerns with the rate-making authority and the constraints on that power. Wholesale energy rates are generally determined in two ways. A supplier may set rates unilaterally by selling energy according to predetermined tariffs, or they may set rates bilaterally through contracts with individual buyers, where the rate is specified within the terms of the agreement.[4]

The Mobile-Sierra doctrine is applicable where the rate is determined by a contractual agreement. Under the Mobile-Sierra doctrine, FERC may terminate or modify freely negotiated private contracts that set rates only if the public interest so requires. The doctrine provides that if two or more parties reach a negotiated settlement on a disputed rate, FERC will apply a strong presumption that the negotiated rate is just and reasonable, and FERC may intervene in the contract only for the most compelling of reasons, the public interest. Therefore, the doctrine's balance between public interest and freedom of contract constitutes the main basis of the debates in this field.

---

2 Brent Allen, 'Consumers versus Contracts: Morgan Stanley, Maine, and the Mobile-Sierra Doctrine' (2009) 1 San Diego J. Climate & Energy L. 315, 316.

3 ibid.

4 Ibid 318.

B. Legal Background

1. Regulation

Mobile-Sierra doctrine is mainly related with the interpretation of two FPA sections 205 and 206 which mainly defines the requirement of just and reasonable rates and Commission's power in case of inconsistency with this principle. FPA section 205 (a) titled "Just and reasonable rates" regulates that;

"*All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.*"[5]

In line with the previous section FPA 206 (a) regulates the Commission's power as follows;

"*Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.*"[6]

Based on these provisions, the Federal Power Act (FPA) grants FERC authority to ensure that all rates are fair and reasonable and provides FERC with the power pursuant to this duty to review and approve tariff rates before they go into effect and to change any rate or contract term upon a showing that it is "unjust, unreasonable, unduly discriminatory or preferential".

Taken together, this forms the basis for the just-and-reasonable review framework, which is the standard the Commission must use when evaluating challenges to filed rates under sections 205 and 206 of the FPA.

2. Mobile Case

The Mobile case is about contractual obligations between the United Gas Pipe Line Company and its distributor customer Mobile Gas Service Corporation (Mobile). In this case Mobile would buy gas from United at 10.7 cents per MCF (thousand cubic feet) and sell it to the end users with a complementary contract at 12 cents per MFC. But United wanted to increase this rate to the 14.5 cents level and filed new schedules with the Commission. But Mobile petitioned the

5 16 U.S.C. § 824d (2000).

6 16 U.S.C. § 824e (2000).

Commission to reject United's filing and claimed that United could not unilaterally change the contract rate. After Commission rejected this contention, Mobile filed a petition for review in the Court of Appeals for the Third Circuit. That Court reversed the Commission's order, directed it to reject United's new schedule and held Mobile entitled to a return of the amounts paid above the contract rate. Upon the petition for certiorari of the United and the Commission, Supreme Court hold that the "Natural Gas Act does not give natural gas companies the right to change their rate contracts by their own unilateral action."[7]

The question in this case is whether under the Natural Gas Act a regulated natural gas company may, without the consent of the distributing company, change the rate specified in the contract simply by filing a new rate schedule with the Federal Power Commission.[8]

According to the Court:

> "(T)he provision of the Natural Gas Act directly in issue here is 4(d), and this article provides that 'no change shall be made by any natural-gas company in any such (filed) rate … or contract … except after thirty days' notice to the Commission', which notice is to be given by filing new schedules showing the changes and the time they are to go into effect."[9]

The Court stated that 4 (d) is "simply a prohibition, not a grant of power". In another words "[t]he section says only that a change cannot be made without the proper notice to the Commission; it does not say under what circumstances a change can be made."[10]

Besides the Court rejects the claim that the 4(d), 4(e) and 5(a) sets alternative rate-changing 'procedures' and expresses that:

> "These sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies."[11]

---

7 *United Gas Pipe Line Co. v Mobile Gas Serv. Corp.* 350 U.S. 332, 334-337 (1956).

8 ibid 334.

9 ibid 339.

10 Ibid.

11 ibid 341.

According to the Court, under the 5(a) the basic power of the Commission was "to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential'"[12]. However, the Court stressed that "[t]his is neither a rate-changing nor a rate-making' procedure. This provision only regulates the Commission's 'power to review' and "if they are determined to be unlawful, to remedy them".[13]

As the Court stated, these conditions mainly defined in the Natural Gas Act. However, the Court added another element for this determination. Contracts for sale of gas by natural gas companies are "fully subject to paramount power of Federal Power Commission to modify them when necessary in the *public interest*."[14]

It must be noted that, either the provisions or the Court's definition is about the nature and the conditions of the Commission's power to change the contract rates. However, the difference is, while the statutory conditions are about the features of rates and contracts, the judiciary "public interest" standard describes a more general criterion.

Besides, although, the statutory provisions set out an objective or independent standard for the Commission and both sides of the contract, 'public interest' can be considered a more discretionary standard for the Commission.

As a result "if the Commission, after hearing, determines the contract rate to be so low as to conflict with the public interest, it may under §5(a) authorize the natural gas company to file a schedule increasing the rate."[15]

But it must be noted that, while natural gas companies are precluded from unilaterally changing their contracts which it is in their private interests to do so, they can get an avenue of relief when their interests coincide with the public interest.[16] Therefore the issue is not whether a rate is low, but whether it is so low as to adversely affect the public interest[17].

The Court states that "[t]he Act affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other."[18] This finding points out the core trade-off of the *Mobile-Sierra*.

---

12 Ibid.

13 ibid.

14 ibid 344.

15 ibid 345.

16 ibid 344.

17 Harold Glenn Drain, 'Union Pacific Fuels, Inc. v. FERC: The FERC's Ability to Abrogate Natural Gas Transportation Contracts' (1998) 33 Tulsa L.J. 931, 934.

18 *United Gas Pipe Line Co. v Mobile Gas Serv. Corp.* 350 U.S. 332, 344 (1956).

As a summary, with this decision, the Court added public interest standard to statutory 'unjust, unreasonable, unduly discriminatory, or preferential' standards. But the Court did not explain the relation between these two standards. To examine this relation we can get more clues from the Sierra Case.

3. Sierra Case

The Court decided another important case in the same day with Mobile and this decision determined another component of the doctrine. The case was between petitioner Pacific Gas and Electric Company (PG&E), a 'public utility' and respondent distributor, Sierra Pacific Power Company (Sierra). PG&E made a 15-year contract for power at a special low rate with Sierra in June 1948 and filed it with Federal Power Commission. But in 1953, PG&E, unilaterally filed with the Commission a schedule aims to increase its rate to Sierra by approximately 28% under §205(d) of the Federal Power Act.[19]

The Commission denied the Sierra's motion against the PG&E, challenging the unilaterally changing the contract. After the hearings, the Commission, reaffirmed its refusal and held the new rate not to be 'unjust, unreasonable, unduly discriminatory, or preferential.'[20]

Sierra filed a petition for review in the Court of Appeals for the District of Columbia. That Court, holding that the contract rate could be changed only upon a finding by the Commission that it was unreasonable, reversed the Commission's order, directed it to reject PG&E's new schedule and held Sierra entitled to a return of the amounts paid above the contract rate.[21]

When it came before the Supreme Court, the Court held that their interpretation on the Natural Gas Act is equally applicable to the Federal Power Act. Therefore the Court concluded that, Federal Power Act is also not authorizing unilateral contract changes and "neither PG&E's filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change PG&E's contract with Sierra."

When we look at the difference between these two same day decisions, it can be said that: in Mobile, the Court puts public interest standard as a different criterion for contract modification apart from the statutory standards. But in Sierra the Court takes a further step and moves up the public interest standard to a higher level and expands the scope of it. Besides, it tries to set these statutory standards as the elements of the 'higher' public interest standard.

According to the Court, it is necessary to determine whether there is a an adverse effect on the public interest "as by impairing financial ability of utility

---

19 *Fed. Power Comm'n v Sierra Pac. Power Co*. 350 U.S. 348, 352 (1956).

20 ibid.

21 ibid.

to continue its service, by casting upon other consumers excessive burden, or by being unduly discriminatory."[22] These three factors were named as the three prong test of the Sierra.

II. Energy Contracts and Market-Based Rate Regime

The interstate wholesale rates of natural gas and electricity are regulated through tariffs or bilateral contracts. Under the Natural Gas Act (NGA) and the Federal Power Act (FPA) regulated utilities have to file their tariffs with FERC and to comply with these terms and rates when they are providing service to customers. Besides if they want to change the existing rates they are required to submit a notification to the Commission within a prescribed time.[23] A similar procedure also exists in the contractual rate making. These contracts also must be filed with the Commission before the implementation.[24]

However, under FERC's current regulatory regime, a wholesale electricity seller may file a "market-based" tariff, which simply states that the utility will enter into freely negotiated contracts with purchasers. As a different procedure, those contracts are not filed with FERC before they go into effect.[25]

III. Application of the *Mobile-Sierra* to the Energy Contracts

Although some court decisions defined the *Mobile-Sierra* doctrine as a "refreshingly simple" principle, the application of this presumption caused a lot of disputes around the criteria and scope of it.

While examining the application of the *Mobile-Sierra*, it is necessary to begin with the applicability and then to explore the necessary conditions of application and rebuttal of the doctrine.

A. Applicability of the *Mobile-Sierra* to the Contracts

At the first step, we need to explore the several circumstances that cause some disputes about whether or to which extent the *Mobile-Sierra* doctrine or presumption can be applied.

When we look at the applicability problems of the *Mobile-Sierra*, it can be said that they generally stem from the court of appeals decisions. Although the

---

22 ibid.

23 Michael A. Rosenhouse, Annotation, 'Construction and Application of Mobile-Sierra Doctrine, Under Which Federal Energy Regulatory Commission Must Presume Gas or Electricity Rate Set in Freely Negotiated Wholesale Contract Meets Statutory "Just and Reasonable" Standard' (2012) 62 A.L.R. Fed. 2d 427.

24 ibid.

25 *Morgan Stanley Capital Group Inc. v Pub. Util. Dist. No. 1 of Snohomish County, Wash.* 554 U.S. 527, 537 (2008).

Supreme Court had established the 'public interest' standard, the interpretation and implementation of it by the courts of appeals sometimes caused different applicability problems for Mobile-Sierra.

1. Low Rate-High Rate Contracts Distinction

In Mobile case the Court held that "if the Commission, after hearing, determines the contract rate to be so low as to conflict with the public interest, it may under §5(a) authorizes the natural gas company to file a schedule increasing the rate."[26]

According to the Court, under the Natural Gas Act, the Congress aims to protect the consumers from excessive prices and at the same time considers the legitimate interests of natural gas companies. [27]

Memphis decision also implied that *Mobile-Sierra* should apply both to seller-side and buyer-side complaints. Because the Court saw the function of the doctrine as respecting contracts and it was not exclusively about constraining regulated sellers for the benefit of consumers.[28]

Court of Appeals also applied *Mobile-Sierra* equally to buyers and sellers before *Morgan Stanley* decision.[29] However, in *Morgan Stanley* case, the Ninth Circuit held that it is necessary to use a different standard for overcoming the *Mobile–Sierra* presumption[30] when a purchaser challenges a contract: whether the contract exceeds a "zone of reasonableness."[31] The Court also held that the three factors identified in Sierra are neither exclusive nor "precisely applicable to the high-rate challenge of a purchaser."[32] Because those three factors are not the 'exclusive components' of the public interest.[33]

But the Court rejected a different standard for the high-rate contracts and stated that 'zone of reasonableness' test cannot provide an adequate level of protection to contracts, therefore, "the standard for a buyer's rate-increase

---

26 *United Gas Pipe Line Co. v Mobile Gas Serv. Corp.* 350 U.S. 332, 345 (1956).

27 *United Gas Pipe Line Co. v Memphis Light, Gas and Water Division* 358 U.S. 103, 113 (1958).

28 David G. Tewksbury, Stephanie S. Lim, Grace Su, 'New Chapters In The Mobile-Sierra Story: Application Of The Doctrine After NRG Power Marketing, LLC V. Maine Public Utilities Commission' (2011) 32 Energy L.J. 433, 439.

29 Ibid. (citing *Potomac Elec. Power Co. v F.E.R.C.* 210 F.3d 403 (D.C. Cir. 2000); Boston Edison Co. v. F.E.R.C., 856 F.2d 361 (1st Cir. 1988).

30 The Supreme Court also referred to the Mobile-Sierra doctrine as the "Mobile-Sierra presumption" in *Morgan Stanley Capital Group Inc. v Public Utility District No. 1 of Snohomish County* 554 U.S. 527, 534 (2008).

31 *Morgan Stanley Capital Group Inc. v Pub. Util. Dist. No. 1 of Snohomish County, Wash.* 554 U.S. 527, 544 (2008).

32 ibid 566.

33 ibid 549.

challenge must be the same, generally, as the standard for a seller's challenge: The contract rate must seriously harm the public interest."

2. Fixed Rate and Going Rate Distinction

In *Memphis*, the Court separates the 'fixed rate' from the 'going rate'. According to the Supreme Court, the Court of Appeals erred when it decided that the utility cannot change unilaterally also a going rate contract. In the Court's interpretation, this type of contract gives the seller an authority to file unilateral changes for rate increases[34]. Therefore when the public utility filed for a new rate increase, it was not "unilaterally changing its contractual obligations", but "simply exercised its rights reserved by contract."

But the difference between the going rate and fixed rate has not been always clear.[35] The most considerable determination for that is the D.C. Circuit's holding in the Texaco Inc. v. FERC. According to the court "[a]bsent contractual language 'susceptible to the construction that the rate may be altered while the contract[] subsist[s],' the *Mobile-Sierra* doctrine applies."[36]

According to this interpretation, it is necessary to look at the language of the contract. If the parties had not reserved a right to modify the contract the parties could not change the contract. If the parties did not give themselves that ability, the Commission was also prevented from modifying the contract. But this situation did not bind the Commission if there were necessary conditions for the application of the *Mobile-Sierra*.[37]

There can be also middle options between the *Mobile–Sierra* and *Memphis*. In Papago the D.C. Circuit held that although the parties do not give themselves a right to file new rates, they can permit Commission "to set aside the contract rate if it results in an unfair rate of return, not just if it violates the public interest".[38]

3. Contractual Determination

Although *Memphis* has an importance for the fixed rate-going rate distinction for application of *Mobile-Sierra*, the application of this decision is not limited to this issue. In *Memphis* the Court concluded that "[u]nder provisions of Natural Gas Act, natural gas supplier has right, in first instance, to change rates at will,

---

34 William A. Mogel, 'The Federal Power Commission's Authority to Set Area Rates By Rulemaking' (1973) 5 Seton Hall L. Rev. 31 1973-1974, 41.

35 David G. Tewksbury & Stephanie S. Lim, 'Applying the Mobile-Sierra Doctrine to Market-Based Rate Contracts' (2005) 26 Energy L.J. 437, 445.

36 *Texaco Inc. v FERC* 148 F.3d 1091, 1096 (D.C. Cir. 1998) (citing *Appalachian Power Co. v FPC* 529 F.2d 342, 348 (D.C. Cir. 1976).

37 Carmen L. Gentile, 'The Mobile-Sierra Rule: Its Illustrious Past and Uncertain Future' (2000) 21 Energy L.J. 353, 383.

38 *Papago Tribal Util. Auth. v F.E.R.C.*, 723 F.2d 950, 953 (D.C. Cir. 1983).

unless it has undertaken by contract not to do so." This condition was named as "Memphis clause" and accepted as a limitation of the *Mobile-Sierra* doctrine.

Accordingly, since the Supreme Court's decision in *Memphis*, the courts have generally stated that the *Mobile-Sierra* doctrine applies unless the contract explicitly provides otherwise in a "Memphis clause."[39]

The Memphis clause can have several results for the modification of the contract. It can give the parties' a right to modify the contractual rate unilaterally, preserve the FERC's rights or restrict the FERC's modification rights to *Mobile-Sierra*.[40]

4. Is It Required Previously to File with the FERC?

Because of the contracts at issue in Mobile and Sierra cases were previously filed with and reviewed by FERC, the subsequent cases revealed a controversy about the applicability of *Mobile-Sierra* for the contract that are not previously filed with FERC. According to DC Circuit and First Circuit the previous filing with the Commission is not a necessary condition for the application of *Mobile-Sierra*. But the First Circuit implied that if the contract was not submitted to the FERC previously, the public interest standard can be applied less strictly.[41]

Morgan Stanley decision also argued this issue and the Supreme Court clarified this dispute by citing Sierra and stated that "Sierra thus provided a definition of what it means for a rate to satisfy the just-and-reasonable standard in the contract context—a definition that applies regardless of when the contract is reviewed."[42] The Court also concluded that the Sierra decision could not be read as an initial Commission opportunity for review was necessary for the application of the *Mobile-Sierra*.[43] The Court held that according to Sierra a rate set out in a contract must be presumed to be just and reasonable, absent serious harm to the public interest, regardless of *when* the contract is challenged, and thus, the presumption applied to challenged market-based rate contracts" [44]

---

39 *Texaco Inc. v FERC*, 148 F.3d 1091, 1096 (D.C. Cir. 1998); See also Boston Edison Co. v. FERC, 233 F.3d 60, 67 (1st Cir. 2000); *La. Power & Light Co. v FERC*, 587 F.2d 671, 675 (5th Cir. 1979).

40 *Papago Tribal Util. Auth. v F.E.R.C.*, 723 F.2d 950, 953 (D.C. Cir. 1983).

41 David G. Tewksbury, Stephanie S. Lim, 'Applying the Mobile-Sierra Doctrine to Market-Based Rate Contracts' (2005) 26 Energy L.J. 437, 446 & n.87; See also Northeast Utilities. Serv. Co. v. FERC, 993 F.2d 937, 961 (1st Cir. 1993), *Sam Raybum Dam Elec. Coop. v FPC*, 515 F.2d 998, 1008 (D.C. Cir, 1975).

42 *Morgan Stanley Capital Group Inc. v Pub. Util. Dist. No. 1 of Snohomish County, Wash.* 554 U.S. 527, 546 (2008).

43 ibid.

44 ibid 528.

5. Third Party Claim

In Maine (2008) DC Circuit referred to the Mobile and stated that Supreme Court has emphasized that the "the relations between the parties may be established by contract, subject only to public interest review". In a previous case DC Circuit also held that *deferential public interest* standard only applies to "*freely negotiated private contracts* that set firm rates or establish a specific methodology for setting the rates for service."[45]

Because according to the DC Circuit, *Mobile-Sierra* doctrine sets a highly-deferential public interest standard of review to preserve the terms of the bargain as between the contracting parties. But if a rate challenge is brought by a non-contracting third party, the *Mobile-Sierra* doctrine simply does not apply; the proper standard of review remains the "just and reasonable" standard in section 206 of the Federal Power Act." In accordance with these decisions and holdings, DC Circuit rejected FERC's decision and concluded that, as a challenge brought by a non-contracting third party, Maine case is "clearly outside the scope of the *Mobile-Sierra* doctrine".[46]

After the court of appeals' decision, NRG Power Marketing, LLC, and other energy companies that have settled with the FERC petitioned the Supreme Court for review. According to petitioners, the public-interest standard applies whether the FERC's investigation is initiated in response to a contracting party's or a noncontracting party's complaint, or by the FERC acting sua sponte. Petitioners argued that the public interest standard is specifically constructed to protect the interests of members of the public who are not part of the contract[47].

When this case went before the Supreme Court, the Court reversed DC Circuit's decision. In this case the United States Supreme Court held that "the Mobile–Sierra presumption does not depend on the identity of the complainant who seeks FERC investigation. The presumption is not limited to challenges to contract rates brought by contracting parties. It applies, as well, to challenges initiated by third parties."[48]

B. Necessary Criteria for the Application of *Mobile-Sierra* to the Energy Contracts

Above mentioned situations can be seen as the disputes about the *Mobile-Sierra*'s applicability under some specific conditions. These situations have

---

45 *Atl. City Elec. Co. v. FERC* 295 F.3d 1, 14 (D.C.Cir.2002). (emphasis added)

46 *Maine Pub. Utilities Comm'n v F.E.R.C.* 520 F.3d 464, 477 (D.C. Cir. 2008).

47 Grenig, Jay E, 'Does the Mobile-Sierra Doctrine Apply When a Contract Is Challenged By a Noncontracting Third Party?' (2009) 37 Preview of United States Supreme Court Cases; Chicago 112, 114.

48 *NRG Power Mktg., LLC v Maine Pub. Utilities Comm'n* 130 S. Ct. 693, 701, 62 A.L.R. Fed. 2d 427 (2010).

different features than the Mobile and Sierra cases. But if the case it suitable to apply *Mobile-Sierra* under the applicability conditions, it is necessary to decide whether the application requirements are satisfied in the case.

Under the *Mobile-Sierra*, if the contractual rate is just and reasonable it can be modified only if it does not satisfy the public interest standard. Therefore, the basic and most important reason to modify a contract under the *Mobile-Sierra* is the public interest standard. But at the same time the contract rate must be just and reasonable.

However, the relation between these two terms has a long story in the court's decisions. As the main conditions for the application of the *Mobile-Sierra*, it is necessary to examine the basic views about this relation in a more detailed way.

Besides for the application of *Mobile-Sierra*, the contract should be made based on arm's length negotiation.

1. The Just and Reasonable & Public Interest Standards

There are different interpretations about the relation between just and reasonable standard and public interest standard. While in some decisions these standards can be seen as the same, some other decisions separate one from another. For example, as we mentioned above, in the third party challenges, just and reasonable standard was used instead of public interest standard. The assumption behind this distinction was more deferential weight of public interest standard. According to this opinion, the public interest standard has a higher burden of proof than the just and reasonable standard. Therefore, the intervention of the FERC was restrained more than just and reasonable standard.

However, for instance, in *Morgan Stanley* the Court stated that "the term 'public interest standard' refers to the differing application of that just-and-reasonable standard to contract rates."[49] Besides it suggested that these two applications of the "just and reasonable standard" can be separated as "the "ordinary" "just and reasonable standard" and the "public interest standard."[50]

Following *Papago*, the court divided all contracts into three categories: those permitting unilateral rate changes by the utility under §205, those permitting changes under §206 subject to the *Mobile-Sierra* public interest standard, and those permitting changes under section 206 subject to the just and reasonable standard.[51]

---

49 *Morgan Stanley Capital Grp. Inc. v Public Util. Dist. No. 1 of Snohomish Cnty* 554 U.S. 527, 535 (2008).

50 ibid.

51 Carmen L. Gentile, 'The Mobile-Sierra Rule: Its Illustrious Past and Uncertain Future' (2000) 21 Energy L.J. 353, 360-61.

a. *The Just-and-Reasonable Standard*

"Just and reasonable" standard unlike the public interest is a statutory standard. FPA §206 and NGA§5(a) establishes this standard as a presumption and if this presumption is not met, the contract can be subject to the FERC's modification.

In *Maine* decision (2008) Supreme Court held that "[w]hen two or more parties reach a negotiated settlement over a disputed electricity rate, the Federal Energy Regulatory Commission (FERC) applies a strong presumption that the settled rate is just and reasonable and may only set aside the contract for the most compelling reasons."[52]

In some cases the courts prefer this standard to the public interest standard. In *Papago*, the D.C. Circuit found 'public interest standard' as "almost insurmountable". In *Kansas Cities* D.C. Circuit repeated this ruling and stated that;

To assume that a contractual provision pertaining to rate adjustment refers to that standard is to assume that it was intended to be virtually inoperative; whereas to interpret it as referring to just-and-reasonable changes is to give it a content that is both substantial and fair to both sides. Thus, courts and the Commission have almost universally construed contractual references to future rate changes to authorize §206 proceedings with a just-and-reasonable standard of proof.[53]

In *Morgan Stanley*, the Supreme Court also stated that "[t]he statutory requirement that rates be "just and reasonable" is obviously incapable of precise judicial definition, and we afford great deference to the Commission in its rate decisions."[54]

As the Court stated, 'just and reasonable' standard gives a great deference to the Commission's decisions. This approach also shows that the Court tries to limit the 'public interest' standard and wants to remove 'almost insurmountable' obstacles in front of the FERC's discretionary power.

At the same time, it tries to clarify the neglected 'just and reasonable' standard. According to the Court "FERC must choose a method that entails an appropriate 'balancing of the investor and the consumer interests'."[55]

b. *The Scope of the Public Interest Standard*

In *Mobile*, the Court held that "the contracts for sale of gas by natural gas companies are fully subject to paramount power of Federal Power Commission to modify them when necessary in the public interest."[56]

---

52 *Maine Pub. Util. Comm'n v FERC* 520 F.3d 464, 477 (D.C.Cir.2008).

53 *Kansas Cities v F.E.R.C.* 723 F.2d 82, 88 (D.C. Cir. 1983).

54 *Morgan Stanley Capital Grp. Inc. v Public Util. Dist. No. 1 of Snohomish Cnty.* 554 U.S. 527, 532 (2008).

55 ibid.

56 *United Gas Pipe Line Co. v Mobile Gas Serv. Corp.* 350 U.S. 332, 344 (1956).

In *Mobile* the Court also held that "[t]he basic power of the Commission is that given it by § 5(a) is to set aside and modify any rate or contract which it determines, after hearing, to be unjust, unreasonable, unduly discriminatory or preferential"[57]

According to these holdings the public interest standard was regarded as the same with the statutory 'unjust, unreasonable, unduly discriminatory or preferential' criteria.

As we pointed out above, in *Sierra*, the Court detailed the 'public interest' standard through a three-prong test. Under this test there can be an adverse effect on the public interest "as by impairing financial ability of utility to continue its service, by casting upon other consumers excessive burden, or by being unduly discriminatory."[58] Besides it put the statutory 'unduly discriminatory' standard under the public interest standard and therefore defined the public interest standard as a more important criterion.

However, in *Morgan Stanley* the Court stated that the Sierra's three prong test is not applicable to all circumstances. Those three factors are "in any event not the exclusive components of the public interest."[59]

Another important point is that, merely the interest of public utility is not enough to prove a public interest. In *Sierra*, the Court critics the Commission's approach and states that "In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest-as where it might impair the financial ability of the public utility to continue its service"

But the Court stated that that the purpose of the power given the Commission by §206(a) is the protection of the public interest and it is necessary to distinguish this form the "private interests of the utilities". In other words, the public utility's interest is considered different from the public interest. And the Court concluded that "a contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable to the public utility"[60]

Even though, in *Sierra*, the Court was using the public interest standard as a broader standard than the just and reasonable standard, nevertheless, this holding shows that just and reasonable standard has a very close meaning to the public interest standard. Because in this holding the Court implied that 'interest of the public utility' was not a 'public interest'. But it used the notion of 'just

57 ibid 341.

58 *Fed. Power Comm'n v Sierra Pac. Power Co.* 350 U.S. 348, 355 (1956).

59 *Morgan Stanley Capital Grp. Inc. v Public Util. Dist. No. 1 of Snohomish Cnty.* 554 U.S. 527, 549 (2008).

60 *Federal Power Commission v Sierra Pacific Power Co*. 350 U.S. 348, 355 (1956).

and reasonable' instead of 'public interest'. This choice shows us that the Court could use these two standards as substitutes for each other.

However, under *Mobile-Sierra* doctrine, the weight of the causation between the public interest and FERC's power to modify can be worded differently. For example D.C. Circuit held in *Texaco* that "Federal Energy Regulatory Commission (FERC) may abrogate or modify the contract only if the public interest so requires.[61] But in *Union Pacific* case the same court held that "Federal Energy Regulatory Commission (FERC) may exercise rate-making authority to abrogate existing contracts, under Natural Gas Act, only where public interest imperatively demands such action."[62]

Although, it can be claimed that there is a slight difference between these decisions, the language of the second decision seems a stricter interpretation of the FERC's power to modify.

The eligibility of the findings for the satisfaction of the public interest standard have also considered in some decisions. While some decisions let the FERC to modify the agreements based on the generic findings[63], some other decisions require FERC rely on particularized findings.[64]

c. *The Relation between These Standards*

Is the public interest standard same with the just and reasonable standard or one of them is the interpretation of another?

As we pointed out above, in *Mobile*, the just and reasonable standard and public interest standard are seen almost as the same with each other. But, the Supreme Court consciously puts this standard beside the statutory standard. In addition, it extends the scope of public interest standard and uses this standard when determining the modification power of the FERC instead of statutory 'just and reasonable' standard.

By this way, the public interest standard became a different and a further standard 'above' and 'apart from' the statutory standards. Because even though a contractual rate is just and reasonable if there is a likely adverse effect in terms of public interest standard, the Commission can modify this contract on the basis of its regulatory power.

---

61 *Texaco Inc. & Texaco Gas Mktg. Inc. v Fed. Energy Regulatory Comm'n* 148 F.3d 1091, 1095 (D.C. Cir. 1998).

62 *Union Pac. Fuels, Inc. v F.E.R.C.* 129 F.3d 157, 157 (D.C. Cir. 1997).

63 *Arizona Corp. Comm'n v F.E.R.C.* 397 F.3d 952, 955, 62 A.L.R. Fed. 2d 427 (D.C. Cir. 2005).

64 Michael A. Rosenhouse, Annotation, 'Construction and Application of Mobile-Sierra Doctrine, Under Which Federal Energy Regulatory Commission Must Presume Gas or Electricity Rate Set in Freely Negotiated Wholesale Contract Meets Statutory "Just and Reasonable" Standard' (2012) 62 A.L.R. Fed. 2d 427.

A similar approach can be seen in the Supreme Court's interpretation of the Natural Gas Act and Federal Power Act. Natural Gas Act and Federal Power Act in almost the same language establishes that all rates and charges of any public utility subject to the jurisdiction of FERC should be just and reasonable and any such *rate* or charge that is not just and reasonable is unlawful.[65] These provisions require FERC to determine whether the rates are just and reasonable, not whether they are unlawful.

But in *Sierra* the Supreme Court held that "[t]he Commission has undoubted power under §206(a) to prescribe a change in contract rates whenever it determines such *rates* to be *unlawful*."[66]

The difference between these two approaches is: while the statutory provision establishes the 'unlawfulness' as a result of the just and reasonable standard, the Supreme Court changes it to a condition for the modification of the contract. This interpretation gives a broader authority to FERC to modify the contract clauses. Because the term 'unlawful' have a broader extent than the just and reasonable standard.

Referring to the *Mobile-Sierra* as a presumption causes the just and reasonable standard to become less effective. Because, this interpretation makes this standard only a presumption for the contracts not a criterion to modify them. Therefore, it can be said that the public interest standard has gradually become the sole standard for contract modifications, while it was not a statutory standard.

As a general observation, we can say that the courts of appeals see these standards more different from each other than the Supreme Court. In some cases "public interest" standard is considered "much more restrictive" than the FPA's just and reasonable standard.[67] Above mentioned *Maine* case can be shown as an example of this approach. In Papago, the D.C. Circuit has defined the public interest standard as 'practically insurmountable'. And it stated that "specific acknowledgment of the possibility of future rate change is virtually meaningless unless it envisions a just-and-reasonable standard."[68]

There are also some decisions that try to put a strict separation between these standards. For instance in *Northeast* the court stated that "[t]he distinction between the 'just and reasonable standard' and 'public interest' standards loses its meaning entirely if the Commission may modify a contract under the public

65 15 U.S.C. § 717c(a); 16 U.S.C. § 824d(a) (emphasis added).

66 *Federal Power Commission v Sierra Pacific Power Co.* 350 U.S. 348, 353 (1956).

67 *Maine Pub. Utilities Comm'n v F.E.R.C.* 520 F.3d 464, 476 (D.C. Cir. 2008), *Union Pacific Fuels, Inc. v FERC*, 129 F.3d 157, 161 (D.C.Cir.1997), *San Diego Gas & Elec. Co. v. FERC* 904 F.2d 727, 730 (D.C.Cir.1990).

68 *Papago Tribal Util. Auth. v F.E.R.C.* 723 F.2d 950, 954 (D.C. Cir. 1983).

interest standard where it finds the contract 'may be unjust [or] unreasonable."[69]

In *Papago*, the D.C. Circuit clearly separated the public interest standard from the just and reasonable standard and held that the parties may eliminate "the Commission's power to impose changes under § 206, except the indefeasible right of the Commission under § 206 to replace rates that are contrary to the public interest."[70]

According to this decision while the parties can eliminate even the statutory standards, the public interest standard is protected and cannot be eliminated. Because it establishes an 'indefeasible right' for the Commission.

However as a newer decision, in *Morgan Stanley* noted that the "public interest standard" is not an exception to the statutory 'just and reasonable' standard. It refers to only a "differing application of that just-and-reasonable standard to contract rates."[71]

The important point of this decision is that it puts the just and reasonable standard to a higher level. While the Court in *Sierra* tries to extend the scope of the public interest standard, this decision gives a priority to the statutory just and reasonable standard.

As a general evaluation, we can say that, while the court of appeals tends to see these two standards as different standards, the Supreme Court does not want to see them as two separate standards. As we can see in *Morgan Stanley*, the Supreme Court has almost the same consideration with *Mobile* and *Sierra* decisions after 50 years later.

2. Arm's Length Negotiation

Arm's lengths negotiation is the basic assumption of the *Mobile-Sierra* presumption. Because, *Mobile-Sierra* actually defends the contract stability against the excessive regulatory intervention. But if the contract was not established based on arm's length principle, we cannot mention about a fair use of freedom of contract.

In *Morgan Stanley* the Court stated that "the premise on which the Mobile–Sierra presumption rests: that the contract rates are the product of fair, arms-length negotiations."[72] The Court also stated that "[u]nder the Mobile–Sierra doctrine, the Federal Energy Regulatory Commission (FERC or Commission) must presume that the rate set out in a *freely negotiated* wholesale-energy contract

69 *Northeast Utilities. Serv. Co. v FERC* 993 F.2d 937, 962 (1st Cir. 1993).

70 *Papago Tribal Util. Auth. v FERC* 723 F.2d 950, 953 (D.C. Cir. 1983).

71 *Morgan Stanley Capital Grp. Inc. v Public Util. Dist. No. 1 of Snohomish Cnty* 554 U.S. 527, 535 (2008).

72 ibid.

meets the "just and reasonable"[73]

The Supreme Court also reaches important conclusions about the evaluation of this principle in this decision. As a result of the previous holdings the Court held that "FERC has ample authority to set aside a contract where there is unfair dealing at the contract formation stage—for instance, if it finds traditional grounds for the abrogation of the contract such as fraud or duress." If there is not a fair dealing in the contract formation stage, we cannot claim that it deserves to be protected and to be sustained against the governmental regulation. On the contrary it can be a necessity to intervene these kinds of contracts for the sake of public interest.

C. Some Situations That Impede the Application of *Mobile-Sierra*

Mobile-Sierra presumption is based on some prerequisites. Most importantly, it is presumed that private parties have negotiated an agreement that they view as just and reasonable over the time period covered. These prerequisites can be related to contract negotiations procedure, service requirements or price determination. If there were some problems about these issues or they emerged after the contract has been made, it can cause the rebuttal of the presumption that the negotiated contract rates were "just and reasonable" under the *Mobile-Sierra* doctrine. These kinds of improprieties can undermine the basis for *Mobile-Sierra* just as does a Memphis clause.[74] Here some circumstances will be examined.

1. Changing Conditions of a Contracting Party

In some cases, the decrease of the quality of service can be seen as an adverse effect to the public interest. In *Arizona Corp.* case, FERC determined that capacity curtailments existed on a natural gas company's main line were severe enough to render firm service unreliable and converted the full requirements contracts of natural gas shippers to contract demand arrangements, therefore such shippers were obligated to pay for the additions to capacity necessitated by the growth in their demand. The DC Circuit justified the FERC's decision pursuant to the *Mobile-Sierra* public-interest standard.[75]

According to the D.C. Circuit, the Commission "exercised its *Mobile-Sierra* authority to prevent "the imposition of an excessive burden" on third parties."[76]

---

73 ibid 530.

74 Scott H. Strauss and Jeffrey A. Schwarz, 'The Mobile-Sierra Doctrine: A Return to Its Statutory Roots' (2007) 145 No. 5 Pub. Util. Fort. 60.

75 *Arizona Corp. Com'n v F.E.R.C.* 397 F.3d 952, 953 62 A.L.R. Fed. 2d 427 (D.C. Cir. 2005).

76 ibid 954. (citing *Northeast Utils. Serv. Co. v FERC* 55 F.3d 686, 691 (1st Cir.1995)).

2. FERC Intervention to the Market

Another dispute under this issue is whether the effects of the orders of the FERC are enough to overrule the *Mobile-Sierra* presumption. In Tenneco Oil case[77], FERC set down national minimum price of $0.18/mcf for natural gas and abrogated all contracts below this limit. Although there was no finding that service would be impaired and adversely affected the public interest in the absence of such price-setting, the court rejected this argument and concluded that this decision satisfied the "public interest" standard of *Mobile-Sierra*.

However, in some cases the courts do not see this kind of conflicts between the pre-existing agreements and FERC's general arrangements as enough for public interest standard. For instance, in Atlantic City case, FERC issued two orders that requires the owners of transmission assets entering into an agreement for an Independent System Operator ("ISO") to give up their right to file changes in tariff rates, terms, and conditions under section 205 of the Federal Power Act and to modify their ISO agreements to forbid any owner from withdrawing without prior FERC approval pursuant to section 203 of the Act. The court held that "FERC's requirement of generic reformation of pre-existing wholesale power contracts, without making a particularized finding that the public interest requires modification of a particular agreement, is a violation of the *Mobile-Sierra* doctrine."[78]

In this case, the court has narrowly construed the FERC's authority to modify the pre-existing contracts. Indeed, its approach can be understood from the first sentence of its legal analysis. According to the court "[a]s a federal agency, FERC is a "creature of statute," having "no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." … Thus, if there is no statute conferring authority, FERC has none"

3. Anticompetitive or Dysfunctional Market Conditions

In some cases, the FERC have modified the contracts on the grounds that they had anticompetitive effects on the energy market.

In *Texaco* case FERC established an order that modifies a pipeline company's service agreements with natural gas shippers by requiring the company to set its rates according to a straight fixed-variable (SFV) method. The court noted that the aim of the FERC's order was to foster competition among natural gas producers by ensuring that commodity prices reflected the difference in extraction costs at the wellhead. Therefore, the court concluded that FERC satisfied the public-interest requirement of *Mobile-Sierra*.

---

77 *Tenneco Oil Co. v Federal Energy Regulatory Commission* 571 F.2d 834, 62 A.L.R. Fed. 2d 427 (5th Cir. 1978).

78 *Atl. City Elec. Co. v F.E.R.C.* 295 F.3d 1, 62 A.L.R. Fed. 2d 427 (D.C. Cir. 2002).

In this case it can be observed that the court construed the FERC's power to regulate a little bit broadly. According to the court "public interest necessary to override a private contract is significantly more particularized and requires analysis of the manner in which the contract harms the public interest *and* of the extent to which abrogation or reformation mitigates the contract's deleterious effect."[79] The court's interpretation of the *Mobile-Sierra* seems to extend the public interest standard to the different criteria.

In *Morgan Stanley* the Court concluded that, "if it is clear that one party to a wholesale energy contract for future energy supplies engaged in extensive unlawful market manipulation as to alter the playing field for contract negotiations" the contract cannot be presumed as just and reasonable under the *Mobile-Sierra*.[80]

In addition, if there is "dysfunctional" – not imperfect, or even chaotic- market conditions caused by illegal action of one of the parties, FERC should not also apply the Mobile–Sierra presumption.[81]

4. Price Discrimination

Price discrimination also overrules the *Mobile-Sierra* presumption. In *Potomac Elec. Power* case, the court stated that "rate disparity attributable to the operation of the *Mobile-Sierra* doctrine is not, on that basis alone, unduly discriminatory." Besides, the court stated that "the fact that a contract has become uneconomic to one of the parties does not necessarily render the contract contrary to the public interest."[82] According to the court it is necessary to present enough evidence "regarding how the contract rates are unduly discriminatory."[83]

D. The Importance of Mobile-Sierra

As we pointed out in the introduction, these two cases and the following decisions are examples of a regulation and contract conflict in energy law. However, they also have a special place in terms of the concept of public interest. Considering the limited usage of the public interest criterion in US law, *Mobile-Sierra* is one of the most prominent examples of public interest analysis by the US courts. When both dimensions are taken into account together, it can be said that the most important aspect of *Mobile-Sierra* is the incorporation of the concept of public interest by judicial decision as an additional independent

---

79 *Texaco Inc. and Texaco Gas Marketing Inc. v Federal Energy Regulatory Com'n* 148 F.3d 1091, 1097 62 A.L.R. Fed. 2d 427 (D.C. Cir. 1998) (emphasis added).

80 *Morgan Stanley Capital Grp. Inc. v Public Util. Dist. No. 1 of Snohomish Cnty, Wash.* 554 U.S. 527, 554 (2008).

81 ibid 547-548.

82 *Potomac Elec. Power Co. v F.E.R.C.* 210 F.3d 403, 407 (D.C. Cir. 2000)

83 ibid.

criterion for regulatory agencies to intervene in contracts, apart from the criteria in the legislation.

After these cases, it is seen that the discussions on how to apply the public interest principle in US law have led to different views and evaluations regarding the contract stability, the effect of regulatory powers and how to evaluate the public interest criterion.

At the outset, it should be noted that after these decisions of the Supreme Court, the discussions on how to establish a relationship between the conditions in the legislation and the public interest criterion continued with subsequent cases, and various conditions were set for the application of this standard, as explained above.

In applying *Mobile-Sierra*'s public interest standard, some approaches expand FERC's authority to intervene by applying the standard broadly, while others take a restrictive approach by interpreting the standard more narrowly. It shows that the public interest can also be an assessment tool that limits the conditions in the legislation and should not necessarily be considered as an expansive criterion.

However, it is clear that there has been a significant body of experience in bringing together legislative requirements and public interest assessment. Therefore, this doctrine is also important in terms of how the concept of public interest is technically interpreted. The main feature of this doctrine is that the public interest assessment is carried out within the framework of the standards in the legislation and by taking into account some additional criteria that have been developed.

Although tariff setting is a regulatory power, its effect on current contracts is a highly controversial issue. Because even the two sides of the wholesale energy contracts are private companies, the mere public utility nature of the energy services gives the regulatory authority the power to control the price for the benefit of end users.

While the debate between regulatory power and existing contracts is also present in US law, the use of the concept of public interest as a criterion in the balance between contract and regulation in this field makes the debate on this concept more important. Therefore, it would be useful to touch upon the approaches to the concept of public interest in this balance.

In this respect, the discussions on how the public interest criterion should be evaluated are also important in terms of reflecting the different perspectives between the regulators and the judiciary in US law on the interpretation of this principle. In this framework, it is argued that an assessment focused on the price level alone is not sufficient, that the long-term regulatory effect of the protection of competition on prices should also be taken into account, and that the long-term effects of anti-competitive interventions should be taken

into account as well as short-term results. Therefore, the Commission has been reluctant to implement *Mobile-Sierra* public interest standard because of its broad meaning. In *Philadelphia Electric Co.*, the Commission rejected the claim that the *Sierra* case definitively established the only three factors relevant to the public interest that could justify modifying rates under Section 206. Instead, the Commission stated that the public interest is "a fluid concept, dynamic in nature, and necessarily discernible only within a particular context once a full appreciation of all relevant facts is achieved." According to the Commission, the factors identified in *Sierra* were merely illustrative. The Commission also disagreed with the administrative law judge's conclusion that a rate failing to recover sufficient revenue to cover costs is automatically contrary to the public interest[84].

In another case on public interest assessment, Western Utilities in California were forced to enter into long-term contracts in 2001 when spot prices rose, but then applied to FERC to reduce the prices. FERC rejected this application using the *Mobile-Sierra* public interest standard, claiming that although the dysfunction in the California spot market affected the prices in the forward market, merely this fact cannot be a sufficient reason to abrogate all the forward contracts. The 9th Circuit reversed the FERC's decision. The 9th Circuit's decision was based on the grounds that FERC should have evaluated the circumstances under which the contracts were entered into and assessed whether the prices were reasonable before applying the *Mobile-Sierra* public interest standard. Secondly, even if the public interest standard was used, the public interest assessment should include an analysis of market prices. However, the Supreme Court subsequently upheld FERC's decision. According to the majority opinion, the FERC is authorized to revise contracts only when they cause serious harm to consumers[85].

The experience of the *Mobile-Sierra* standard in terms of public interest assessment is also important for other areas of regulation in US law. In this respect, it is possible to say that *Mobile-Sierra* is a referenced theory in terms of the public interest standard for the intervention of regulatory authorities in contracts. For example, in the telecommunications sector, *Mobile-Sierra* could be used to enable the Federal Communications Commission (FCC), as a regulatory authority, to intervene in the terms of contracts between internet service providers and their edge service providers that disadvantage other edge service providers in competition. Although the contract is between internet service providers and their edge service providers, the advantages granted to

[84] David C. Hjelmfelt, 'Fixed Rate Contracts Under The Federal Power and Natural Gas Acts' (1979-1980) 57 Denv. L.J. 559, 569.

[85] Giuseppe Bellantuono, 'Contract Law, Regulation and Competition in Energy Markets' (2009) 10 Competition & Reg. Network Indus. 159, 183.

these edge service providers over others may lead to monopolization and price increases in the market, which may be contrary to the public interest[86].

CONCLUSION

In *Mobile*, the Supreme Court stated that "[t]he [Natural Gas] Act affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other."[87] This finding points out the core trade-off of the *Mobile-Sierra*.

Because *Mobile-Sierra* presumes that the rate set out in a freely negotiated wholesale-energy contract is considered as 'just and reasonable'. This presumption "may be overcome only if FERC concludes that the contract seriously harms the public interest."[88] While the first part of this presumption favors the contract stability, the second part supports the regulatory power of the FERC.

However the naming of the *Mobile-Sierra* as a presumption shows that it mandates respect for private contracts by shielding them from regulatory interference except when necessary in the public interest.[89] Actually the *Mobile-Sierra* doctrine created a sphere of quasi-deregulation years before the Commission adopted the concept of market-based rate-making.[90] As the Supreme Court pointed out in *Morgan Stanley*, "[o]ver the past 50 years, decisions of this Court and the Courts of Appeals have refined the Mobile–Sierra presumption to allow greater freedom of contract."[91]

Indeed, the *Mobile-Sierra* public interest test has created a significant barrier to the Commission's intervention to bilateral contracts. However, the Commission also has amended or abrogated a lot of contract under the public interest standard as part of the implementation of broad-based policy initiatives. And the courts have permitted these modifications. In other words, these initiatives viewed as satisfying the *Mobile-Sierra* public interest standard.[92] Because, as the D.C. Circuit

---

86 McKenzie Schnell, 'The Mobile-Sierra Doctrine: An Unlikely Friend for Opponents of ZeroRating' (2018) 70 Federal Communications Law Journal 329, 332.

87 *United Gas Pipe Line Co. v Mobile Gas Serv. Corp.* 350 U.S. 332, 344 (1956).

88 *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Wash.* 554 U.S. 527, 530 (2008).

89 David G. Tewksbury, Stephanie S. Lim, Grace Su, 'New Chapters In The Mobile-Sierra Story: Application Of The Doctrine After NRG Power Marketing, LLC V. Maine Public Utilities Commission' (2011) 32 Energy L.J. 433.

90 Carmen L. Gentile, 'The Mobile-Sierra Rule: Its Illustrious Past and Uncertain Future' (2000) 21 Energy L.J. 353.

91 *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Wash.* (2008) 554 U.S. 527, 534.

92 Carmen L. Gentile, 'The Mobile-Sierra Rule: Its Illustrious Past and Uncertain Future' (2000) 21 Energy L.J. 353, 365.

held in *Maine* "Federal Energy Regulatory Commission's (FERC) interpretation of the scope of its jurisdiction [was] entitled to *Chevron* deference."[93]

Furthermore in some cases FERC is given a more authority even beyond the *Mobile-Sierra*. For instance, in Union Pacific Fuels, Inc. v. FERC, the D.C. Circuit strengthened FERC's discretion in regulating rates in the natural gas industry and weakened the *Mobile-Sierra* doctrine. Because according to the court FERC can intervene without showing that public interest demands that it do so. Policy changes also can have a legal basis for the Commission's discretion to alter the existing contractual terms.[94] However this change also causes some criticisms about the FERC's increased regulatory discretion while it attempts to deregulate the natural gas industry.[95]

Although the *Mobile-Sierra* actually tries to limit the FERC's regulatory power on the contracts in favor of contract stability, the interpretation of this doctrine can change the weight of the FERC's discretion on the contracts. As we noted above, the Supreme Court also tries to limit the 'almost insurmountable' public interest standard and favors statutory just and reasonable standard. Accordingly, as a general observation, we can say that the FERC is given more discretionary power in recent years. In other words, the interpretation of the *Mobile-Sierra* can also be regarded as a benchmark for the scope of the regulatory power of the FERC.

REFERENCES

Atl. City Elec. Co. v FERC, 295 F.3d 1 (D.C.Cir.2002).

Arizona Corp. Com'n v F.E.R.C. 397 F.3d 952 (D.C. Cir. 2005).

Boston Edison Co. v FERC 233 F.3d 60 (1st Cir.2000).

Brent Allen, 'Consumers versus Contracts: Morgan Stanley, Maine and the Mobile-Sierra Doctrine' (2009) 1 San Diego J. Climate & Energy L. 315.

Carmen L. Gentile, 'The Mobile-Sierra Rule: Its Illustrious Past and Uncertain Future' (2000) 21 Energy L.J. 353.

David G. Tewksbury & Stephanie S. Lim, 'Applying the Mobile-Sierra Doctrine to Market-Based Rate Contracts' (2005) 26 Energy L.J. 437.

David G. Tewksbury, Stephanie S. Lim, Grace Su, 'New Chapters in the Mobile-Sierra Story: Application of The Doctrine After NRG Power Marketing

93 *Maine Pub. Util. Comm'n v FERC*, 520 F.3d 464, 479 (D.C.Cir.2008) (emphasis added)

94 Kerri M. Millikan, 'Recent Decisions of the United States Court of Appeals for the District of Columbia: Energy Law' (1999) 67 Geo. Wash. L. Rev. 937, 943.

95 ibid.

LLC V. Maine Public Utilities Commission' (2011) 32 Energy L.J. 433.

David C. Hjelmfelt, 'Fixed Rate Contracts Under The Federal Power and Natural Gas Acts' (1979-1980) 57 Denv. L.J. 559.

Federal Power Commission v Sierra Pacific Power Co. 350 U.S. 348 (1956).

Grenig, Jay E, 'Does the Mobile-Sierra Doctrine Apply When a Contract Is Challenged by a Noncontracting Third Party?' (2009) 37 Preview of United States Supreme Court Cases; Chicago 112.

Giuseppe Bellantuono, 'Contract Law, Regulation and Competition in Energy Markets' (2009) 10 Competition & Reg. Network Indus. 159.

Harold Glenn Drain, 'Union Pacific Fuels, Inc. v. FERC: The FERC's Ability to Abrogate Natural Gas Transportation Contracts' (1998) 33 Tulsa L.J. 931.

Kansas Cities v. F.E.R.C. 723 F.2d 82 (D.C. Cir. 1983).

Kerri M. Millikan, 'Recent Decisions of the United States Court of Appeals for the District of Columbia: Energy Law' (1999) 67 Geo. Wash. L. Rev. 937.

La. Power & Light Co. v FERC 587 F.2d 671 (5th Cir. 1979).

Maine Public Utilities Com'n v. F.E.R.C. 520 F.3d 464, 380 (D.C.Cir.2008).

McKenzie Schnell, 'The Mobile-Sierra Doctrine: An Unlikely Friend for Opponents of ZeroRating' (2018) 70 Federal Communications Law Journal 329.

Michael A. Rosenhouse, Annotation, 'Construction and Application of Mobile-Sierra Doctrine, Under Which Federal Energy Regulatory Commission Must Presume Gas or Electricity Rate Set in Freely Negotiated Wholesale Contract Meets Statutory "Just and Reasonable" Standard' (2012) 62 A.L.R. Fed. 2d 427.

Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, Wash., 554 U.S. 527 (2008).

Northeast Utilities. Serv. Co. v FERC 993 F.2d 937 (1st Cir. 1993).

NRG Power Mktg., LLC v Maine Pub. Utilities Comm'n 130 S. Ct. 693, 701, 62 A.L.R. Fed. 2d 427 (2010).

Papago Tribal Util. Auth. v F.E.R.C. 723 F.2d 950, 953 (D.C. Cir. 1983).

Potomac Elec. Power Co. v F.E.R.C. 210 F.3d 403 (D.C. Cir. 2000).

Richard P. Bress, Michael J. Gergen, and Stephanie S. Lim, 'The Business of the Court: A Deal Is Still a Deal: Morgan Stanley Capital Group v. Public Utility District No. 1' (2007-2008) Cato Sup. Ct. Rev. 285.

San Diego Gas & Elec. Co. v FERC 904 F.2d 727 (D.C.Cir.1990).

Scott H. Strauss and Jeffrey A. Schwarz 'The Mobile-Sierra Doctrine: A Return to its Statutory Roots' (2007) 145 No. 5 Pub. Util. Fort. 60.

Tenneco Oil Co. v Federal Energy Regulatory Commission 571 F.2d 834 (5th Cir. 1978).

Texaco Inc. & Texaco Gas Mktg. Inc. v Fed. Energy Regulatory Comm'n 148 F.3d 1091 (D.C. Cir. 1998).

United Gas Pipe Line Co. v Memphis Light, Gas and Water Division, 358 U.S. 103 (1958)

United Gas Pipe Line Co. v Mobile Gas Serv. Corp. 350 U.S. 332 (1956).

Union Pac. Fuels, Inc. v F.E.R.C. 129 F.3d 157 (D.C. Cir. 1997).

William A. Mogel, 'The Federal Power Commission's Authority to Set Area Rates By Rulemaking' (1973) 5 Seton Hall L. Rev. 31 1973-1974, 41

ISRAEL AND SYRIA DISPUTE: THE LEGAL CONSEQUENCES OF THE EXPANSION OF THE OCCUPATION OF THE GOLAN HEIGHTS*

İsrail ve Suriye Uyuşmazlığı: Golan Tepeleri İşgalinin Genişletilmesinin Hukuki Sonuçları

Ali Osman KARAOĞLU**

L&IR
Year: 16, Issue: 30
July 2025
pp.137-152

Article Information

Submitted	*: 22.04.2025*
Revision Requested	*: 26.05.2025*
Last Version Received	*: 04.07.2025*
Accepted	*: 22.07.2025*

Article Type

Research Article

Abstract

The principal source of contention between Syria and Israel is the Golan Heights, which Israel occupied during the 1967 Six-Day War. In that war, Israel launched an attack on neighboring Arab states, occupying the entire territory of Palestine, the Sinai Peninsula from Egypt, and the Golan Heights from Syria. Following the 1973 Yom Kippur War, negotiations began between Israel and neighboring states, but only Egypt and Israel managed to conclude a lasting peace agreement through the Camp David Accords. The dispute with Syria over the Golan Heights, however, remained unresolved. Only a Ceasefire Agreement was signed in 1974, but Israel retained its status as an occupying power. In 1981, Israel formally annexed the Golan Heights, an act that was recognized by the U.S. President in 2019. Syria, meanwhile, has not undertaken any major military operation to recover the territory since the 1973 Yom Kippur War. Furthermore, the Golan Heights dispute remained a secondary issue due to Syria's preoccupation with civil war from March 2011 until December 2024. During this time, Israel not only maintained but further entrenched its occupation through military means and the establishment of illegal settlements. In December 2024, with the fall of the Assad regime, Israel expanded its occupation to include Mount Hermon and the United Nations Buffer Zone established under the 1974 Ceasefire Agreement, thereby deepening the conflict. This study will first examine the international legal consequences of Israel's occupation of the Golan

* There is no requirement of Ethics Committee Approval for this study.

** Assoc. Prof. Dr., Yalova University Faculty of Law, E-mail: ali.karaoglu@yalova.edu.tr, ORCID ID: 0000-0003-2979-7001.

Heights since 1967, and the expansion of this occupation at the end of 2024. It will then assess the potential avenues for resolving the dispute. In this context, the paper will initially consider diplomatic avenues and subsequently explain the legal possibilities for the use of force within the framework of Article 51 of the UN Charter and General Assembly Resolution 3314 on the Definition of Aggression.

Keywords: International Law, Six-Day War, Syria, Israel, Golan Heights, Mount Hermon

Özet

Suriye ve İsrail arasındaki en büyük uyuşmazlık konusu 1967'de yaşanan Altı Gün Savaşı'nda İsrail tarafından işgal edilen Golan Tepeleri'dir. Nitekim 1967'de yaşanan savaşta İsrail komşu arap ülkelerine saldırmış ve Filistin'in tamamını, Mısır'dan Sina Yarımadası'nı ve Suriye'den de Golan Tepeleri'ni işgal etmiştir. 1973 tarihli Yom Kippur savaşından sonra ise İsrail ile bölge devletleri arasında müzakereler başlamış ancak bunlar arasında sadece Mısır ile yapılan Camp David görüşmeleri sonrası kalıcı barış andlaşması akdedilmiştir. Suriye ile olan Golan Tepeleri uyuşmazlığı ise çözümlenememiş sadece 1974 yılında bir ateşkes anlaşması imzalanmış ve İsrail'in işgalci statüsü devam etmiştir. 1981 yılına gelindiğinde ise Golan Tepeleri İsrail tarafından ilhak edilmiş ve bu ilhak 2019 yılında ABD Başkanı tarafından tanınmıştır. Suriye ise 1973 Yom Kippur savaşından sonra Golan Tepeleri'ni geri almak için askeri bir operasyon yapamamıştır. Ayrıca Suriye Mart 2011 tarihinden Aralık 2024'e kadar iç savaş ile meşgul olduğundan dolayı Golan Tepeleri sorunu geri planda kalmıştır. İsrail ise geçen süre zarfında Golan Tepeleri'ndeki işgalini hem askeri açıdan hem de yeni illegal yerleşim birimleri kurarak tahkim etmiştir. Aralık 2024'te Esed rejiminin devrilmesi ile birlikte Golan Tepeleri'ndeki işgalini genişletmiş ve Hermon Dağı ile 1974 Ateşkes Anlaşması ile oluşturulan BM Tampon Bölgesi'ni de işgal etmiştir. Bu durum da iki devlet arasındaki sorunu derinleştirmiştir. Bu çalışma öncelikle İsrail'in 1967 tarihinden bu yana Golan Tepeleri üzerindeki işgalinin ve 2024 sonunda işgalin genişletilmesinin uluslararası hukuk bakımından sonuçlarını ele alacaktır. Çalışma daha sonra uyuşmazlığın çözümüne ilişkin ihtimalleri değerlendirecektir. Bu anlamda çalışma ilkin diplomatik yolları ele alacak, daha sonrasında ise BM Andlaşmasının 51. maddesi ve 3314 sayılı Saldırının Tanımına İlişkin Genel Kurul kararı çerçevesinde kuvvet kullanımı imkanını izah edecektir.

Anahtar Kelimeler: Uluslararası Hukuk, Altı Gün Savaşı, Suriye, İsrail, Golan Tepeleri, Hermon

INTRODUCTION

The conflict that erupted in Syria in 2011 rapidly evolved into a civil war in 2012[1], transforming the country into a fragmented territory over which neither the

[1] ICRC in Syria, Facts and Figures, (2012), p.1. https://www.icrc.org/sites/default/files/external/doc/en/assets/files/2013/syria-facts-and-figures-2012-icrc-eng.pdf accessed 28 May 2025.

Assad regime nor the opposition could establish full control for thirteen years.[2] Support from Russia, Iran, and Hezbollah—despite expectations of Assad's swift downfall—enabled the regime to remain in power far longer than anticipated. In this contested landscape, where terrorist organizations such as ISIS and the YPG were also present[3], opposition forces failed to mount sufficient operations to topple the regime, and since 2019, the conflict had reached a state of semi-stability. However, the near-total elimination of ISIS, Russia's partial withdrawal of forces due to the war in Ukraine, the assassination of Hezbollah's senior leadership by Israel leading to its internal preoccupations, and the weakening of Iran's regional influence together created a favorable environment for a long-planned offensive by the opposition. As a result, opposition forces successfully entered Damascus in a short time. With the collapse of external support for the regime, the fall of Assad's government was swift. Thus, on 8 December 2024, the Assad regime—which had ruled Syria in an authoritarian and militarized manner for 61 years—was overthrown.[4] Although the transition of power and the establishment of a new system in Syria will undoubtedly take time, developments concerning Israel during this period have rekindled longstanding questions about the future of the Golan Heights dispute, which has persisted since 1967.

During the transition of power on 8 December 2024, following the fall of the Assad regime, Israel exploited the political vacuum and expanded its occupation of the Golan Heights to include Mount Hermon (Arabic: Jabal al-Shaykh) and the United Nations Buffer Zone.[5] Mount Hermon, Syria's highest peak, offers a strategic vantage point overlooking a vast area from Damascus to Lebanon's Bekaa Valley. Utilizing the collapse of the Assad regime, Israel first occupied the UN Buffer Zone established in 1974 and subsequently extended its control to Mount Hermon, thereby expanding its occupation from the Lebanese border to the outskirts of Damascus. This act, which Israel justified on security grounds, constitutes a clear violation of both relevant United Nations Security Council (UNSC) resolutions and the 1974 Ceasefire Agreement.[6] The full unconditional support of the Trump administration undoubtedly emboldened Israel's unlawful conduct. It is worth recalling that during his first presidential term, President

---

2 Christopher Phillips, 'The International System and the Syrian Civil War' (2022) 78(3) International Relations 379.

3 Kasım İleri, 'The Implications of Great Power Politics in the Decade Long Syrian Civil War' (2024) 14(1) İnsan ve Toplum Dergisi 1.

4 See: Bilal Salaymeh, 'Syria Under al-Assad Rule: A Case of Neopatrimonial Regime' (2018) 10(2) Ortadoğu Etütleri 140.

5 Syria: UN chief calls for urgent de-escalation by Israeli forces, withdrawal from Golan buffer zone (2024). https://news.un.org/en/story/2024/12/1158131 accessed 28 May 2025.

6 Separation of Forces Agreement Between Israel and Syria, May 31, 1974. https://avalon.law.yale.edu/21st_century/pal04.asp accessed 28 May 2025.

Trump cultivated close ties with the Netanyahu government, aligning with Israel on numerous issues, including the relocation of the U.S. Embassy from Tel Aviv to Jerusalem[7] and the recognition of Israel's annexation of the Golan Heights. These actions flagrantly contravened binding UNSC resolutions that the United States itself had not vetoed.[8] The Trump Administration's blatant violations of international law in favor of Israel reveal the strength of their bilateral alliance and have emboldened Israel to pursue further unlawful actions. Currently, the Netanyahu government seeks to create *fait accompli* by expanding the occupation of the Golan Heights during Syria's political transition. Yet, this occupation—which began in 1967 and has now been extended to encompass both the UN Buffer Zone and Mount Hermon—is unequivocally unlawful under international law. These territories must be returned to Syria, the rightful sovereign.

This study first addresses Israel's occupation of the Golan Heights following the 1967 Six-Day War and demonstrates the illegality of its subsequent annexation under international law. The analysis references the 1949 Geneva Conventions, relevant UNSC resolutions, and advisory opinions of the International Court of Justice (ICJ). Then, the legal implications of third states' recognition of Israel's occupation—particularly that of the United States—are examined, with special attention to documents such as the so-called "Deal of the Century" (Trump Peace Plan). Finally, the paper explores the legal avenues for the resolution of the dispute, including Syria's legitimate means to recover the occupied territories.

1. The Six-Day War and the Occupation of the Golan Heights

The conflict known as the Six-Day War, which began on 5 June 1967 and ended on 10 June 1967, was essentially an act of aggression by Israel against Arab states, resulting in the occupation of their territories.[9] Although Israel justified its actions on the grounds of self-defense, subsequent developments and documents that came to light revealed that Israel had, in fact, launched a war of aggression. Indeed, Israel routinely invokes the doctrine of self-defense to justify its actions that are otherwise contrary to international law. Even assuming *arguendo* that the self-defense claim were valid, such justification does not permit the prolonged occupation of foreign territory.[10] Abi-Saab and Kohen recently argue that the occupation regime loses its legal coherence when occupation becomes prolonged

7 Victor Kattan, 'Why US Recognition of Jerusalem Could Be Contrary to International Law' (2018) 47(3) Journal of Palestine Studies 72.

8 United Nations Security Council Resolution 478 (20 August 1980), S/RES/478(1980), para.5.3.

9 John Quigley, 'The Six-Day War and Israeli Self-Defense: Questioning the Legal Basis for Preventive War' (New York: Cambridge University Press, 2013) 141-177.

10 James A Green, 'The ratione temporis Elements of Self-defence' (2015) 2(1) Journal on the Use of Force and International Law 114.

and entrenched. The erosion of the temporariness principle not only undermines the normative foundations of the law of military occupation but risks enabling the very forms of domination and annexation the law was designed to prevent.[11] Furthermore, UN Special Rapporteur John Dugard argued in his report that Israel's occupation has over the years become tainted with illegality.[12] Occupation law is premised on the idea that occupations are inherently temporary, are at all times based on military necessity, and eventually involve the transfer of effective control over the territory back to the ousted sovereign at the end of hostilities. The presumption that occupation is temporary and exceptional is meant to act as a bulwark against *de jure* or *de facto* annexation.[13]

Israel's conduct, both in the lead-up to the war and its subsequent statements and actions, unmistakably reveal its violations of international law. As Quigley has noted, following the Suez Crisis[14], statements by the Israeli Prime Minister indicating that military operations would be expanded gave rise to concerns among Arab states—especially Syria—that Israel was preparing to launch attacks. These fears were compounded by intelligence reports shared by the Soviet Union with Arab states. For instance, the absence of tanks in Israel's Independence Day military parade on 15 May was interpreted by the Soviets as evidence that Israel had massed its armored divisions near the Syrian border and was poised for war. Acting on this intelligence, Egypt closed the Strait of Tiran to Israeli shipping and conducted a military buildup along its border with Israel. Egypt's objective was to deter Israel from attacking Syria. However, Israel construed these actions as evidence of an imminent assault by Egypt and

---

11 Georges Abi-Saab and Marcelo Kohen, Is 'prolonged occupation' still 'military occupation' governed by IHL? May 5, 2025, EjilTalk, https://www.ejiltalk.org/is-prolonged-occupation-still-military-occupation-governed-by-ihl/ accessed 28 May 2025.

12 Report of the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, para. 8, U.N. Doc. A/62/275.

13 Salvatore Fabio Nicolosi 'The Law of Military Occupation and the Role of De Jure and De Facto Sovereignty', (2011) 31 Polish Yearbook of International Law, 165-187.

14 The Suez Crisis of 1956 was a major international conflict triggered by Egyptian President Gamal Abdel Nasser's nationalization of the Suez Canal, previously controlled by British and French interests. In response, Britain, France, and Israel launched a coordinated military intervention to regain control and topple Nasser. The crisis escalated tensions during the Cold War and drew sharp condemnation from both the United States and the Soviet Union. It was resolved through international legal and diplomatic pressure, particularly via the United Nations. See: Pnina Lahav, 'The Suez Crisis of 1956 and Its Aftermath: A Comparative Study of Constitutions, Use of Force, Diplomacy and International Relations', (2015) 95 Boston University Law Review 1297.

other Arab states.[15] Israel's response, therefore, constituted a preventive strike[16], which cannot be qualified as lawful self-defense under international law. As a result of the Six-Day War, Israel occupied the entire territory of Palestine, the Sinai Peninsula from Egypt, and the Golan Heights from Syria.

In response, the United Nations Security Council adopted Resolution 242, calling for Israel's withdrawal from the territories it had occupied.[17] However, Israel refused to comply with this resolution. In 1973, Egypt and Syria launched the Yom Kippur War in an effort to recover their territories. The UNSC subsequently adopted Resolution 338, which called for an immediate ceasefire.[18] Although neither the Sinai Peninsula nor the Golan Heights were recovered during the conflict, peace negotiations eventually commenced between the parties. These negotiations culminated in a peace treaty between Egypt and Israel in 1979.[19] However, negotiations with Syria failed due to Israel's unwillingness to return the Golan Heights. Although a lasting peace treaty was never concluded between Syria and Israel, the two parties signed a ceasefire agreement in 1974—the Agreement on Disengagement between Israel and Syria. Under this agreement, the parties withdrew their forces and a demilitarized buffer zone was established between them. The agreement also stipulated that the withdrawal process would be monitored by the United Nations Disengagement Observer Force (UNDOF).[20] It should be noted, however, that ceasefire agreements do not determine permanent borders but serve only to suspend hostilities.[21]

Moreover, not only did Israel fail to return the Golan Heights to Syria, but it also enacted the Golan Heights Law through the Israeli Knesset in 1981, thereby unilaterally annexing the territory.[22] This annexation was recognized in 2019 by U.S. President Donald Trump, who formally declared the Golan Heights to

---

15 John Quigley, '*The Case for Palestine: An International Law Perspective'* (Duke University Press 2005) 158–59.

16 See: Tom Ruys, Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice (Cambridge University Press 2010) 318–22.

17 UN Security Council Resolution 242 (22 November 1967) UN Doc S/RES/242 (1967) para 1.

18 UN Security Council Resolution 338 (22 October 1973) UN Doc S/RES/338 (1973) para 1.

19 Treaty of Peace between the Arab Republic of Egypt and the State of Israel (signed 26 March 1979, entered into force 25 April 1979) 1138 UNTS 59.

20 Edmund Jan Osmańczyk, Encyclopedia of the United Nations and International Agreements: A to F (Taylor & Francis 2003) 2263.

21 See: James Crawford, *'The Creation of States in International Law'* (2nd edn, Oxford University Press 2006) 421.

22 Golan Heights Law, 5742–1981, available at https://main.knesset.gov.il/EN/about/history/Documents/kns10_golan_eng.pdf accessed 10 March 2025.

be part of Israeli territory.[23] The "Deal of the Century,"[24] unveiled by Trump and Prime Minister Netanyahu at the White House in 2020, also depicted the Golan Heights as part of Israel in its proposed maps.[25] However, the United States' recognition of Israel's annexation stands in direct violation of UNSC Resolution 497, which the United States itself did not veto. That resolution declared Israel's annexation of the Golan Heights to be null and void under international law and affirmed that Israel remains an occupying power pursuant to the 1949 Geneva Conventions.[26] The resolution also called upon Israel to rescind its annexation measures.[27] Under customary international law, any acquisition of territory through the use of force or in violation of the right to self-determination must not be recognized by third states.[28] Indeed, Article 41 of

---

23 Official Proclamation: "The State of Israel took control of the Golan Heights in 1967 to safeguard its security from external threats. Today, aggressive acts by Iran and terrorist groups, including Hizballah, in southern Syria continue to make the Golan Heights a potential launching ground for attacks on Israel. Any possible future peace agreement in the region must account for Israel's need to protect itself from Syria and other regional threats. Based on these unique circumstances, it is therefore appropriate to recognize Israeli sovereignty over the Golan Heights. NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by virtue of the authority vested in me by the Constitution and the laws of the United States, do hereby proclaim that, the United States recognizes that the Golan Heights are part of the State of Israel. IN WITNESS WHEREOF, I have hereunto set my hand this twenty-fifth day of March, in the year of our Lord two thousand nineteen, and of the Independence of the United States of America the two hundred and forty-third. Donald J Trump, 'Proclamation on Recognizing the Golan Heights as Part of the State of Israel' (White House, 25 March 2019) https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-recognizing-golan-heights-part-state-israel/ accessed 10 March 2025.

24 White House, Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/01/Peace-to-Prosperity-0120.pdf accessed 10 March 2025.

25 A closer look at the map reveals that Israel does not want to give up not only the Golan Heights but also East Jerusalem, as well as the illegal settlements.

26 Articles 47 to 78 of the Fourth Geneva Convention are entitled "Occupied Territories" and regulate the obligations of the occupier.

27 UN Security Council Resolution 497 (17 December 1981) UN Doc S/RES/497 (1981) paras 1–3.

28 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?' in Christian Tomuschat and Jean-Marc Thouvenin (eds), The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes (Martinus Nijhoff Publishers 2006) 99. Martin Dawidowicz, 'The Obligation of Non-Recognition of an Unlawful Situation', in James Crawford, and others (eds), *The Law of International Responsibility*, Oxford Commentaries on International Law (2010; OUP), 677-686. Yaël Ronen, 'The Obligation of Non-recognition, Occupation and the OPT Advisory Opinion', VerfBlog, 2024/10/14, https://verfassungsblog.de/the-obligation-of-non-recognition-occupation-and-the-opt-advisory-opinion/ accessed 28 May 2025.

the International Law Commission's 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts provides that no state shall recognize as lawful a situation created by a serious breach of a peremptory norm of general international law (*jus cogens*), as elaborated in Article 40.[29] In this context, the annexation of the Golan Heights by force constitutes such a serious breach.

2. The Expansion of the Occupation: The Seizure of Mount Hermon and the UN Buffer Zone

Mount Hermon (Jabal al-Shaykh) is the highest peak in Syria and provides a vantage point with visibility extending from Damascus to Lebanon's Bekaa Valley. Seizing the opportunity created by the collapse of the Assad regime, Israel first occupied the United Nations Buffer Zone established in 1974, and then extended its control to include Mount Hermon, thereby expanding its occupation from the Lebanese border to the outskirts of Damascus. Though Israel justified its actions on grounds of national security, these acts clearly amount to an expansion of occupation and constitute violations of both United Nations Security Council (UNSC) resolutions and the 1974 disengagement agreement. Prime Minister Netanyahu's statements regarding respect for Syria's territorial integrity stand in stark contrast to the reality. As previously noted, Israel not only annexed the Golan Heights—a Syrian territory—but also incorporated it into maps as part of its sovereign territory (i.e. Deal of Century). It is likely that Israel will either formally annex the newly occupied areas in the future or maintain its occupation indefinitely under the pretext of security concerns. Indeed, the initial occupation of the Golan Heights on security grounds eventually turned into formal annexation, and the territory now hosts more than 35 illegal settlements with a population of nearly 25,000 settlers.[30]

It must be emphasized that the national security rationale is frequently invoked by Israel to justify nearly all of its actions that are otherwise contrary to international law. From illegal settlements and military checkpoints to the construction of the separation wall in the West Bank and the ongoing blockade and incursions in Gaza, Israel has routinely cited security concerns to rationalize its conduct. Moreover, Israel refuses to apply provisions of the Fourth Geneva Convention on the ground that the territory is disputed. However, both the United Nations Security Council and General Assembly, as well as the International Court of Justice (ICJ)—one of the UN's principal organs—have consistently rejected this justification. In its 2024 Advisory Opinion on Israel's practices in

---

[29] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) UN Doc A/56/49(Vol I)/Corr.4, arts 40–41.

[30] Gideon Sulimani and Raz Kletter 'Settler-Colonialism and the Diary of an Israeli Settler in the Golan Heights: The Notebooks of Izhaki Gal' (2021), 21(1) Journal of Holy Land and Palestine Studies 48-71.

the Occupied Palestinian Territories, the ICJ reaffirmed that the expansion of territory under the pretext of security violates international law. According to the Court: "Israel's claims of sovereignty and acts of annexation over certain territories, as set forth above, constitute violations of the prohibition on the acquisition of territory by force. This breach directly affects the legal status of Israel's continuing presence as an occupying power in the Occupied Palestinian Territory. The Court concludes that Israel has no right to assert sovereignty or to exercise sovereign authority over any part of the Occupied Palestinian Territory. Furthermore, Israel's security concerns cannot override the prohibition on the acquisition of territory by force." In this Advisory Opinion, the Court also referred to the Golan Heights as "Occupied Golan," thereby affirming its legal status under international law.[31] The principle prohibiting the acquisition of territory by force—even for security purposes—therefore applies equally to the Golan Heights and to newly occupied Syrian territories. It is important to underscore that not only the Golan Heights but also the United Nations Buffer Zone—until now considered neutral territory—is in fact part of Syrian sovereign territory. The ceasefire line demarcated in 1974 was intended as a temporary measure and did not represent a permanent boundary. Likewise, the UN Buffer Zone was established as a provisional arrangement. Indeed, the United Nations, as an organization, cannot hold territorial sovereignty.

Furthermore, Prime Minister Netanyahu's justification for the occupation of the UN Buffer Zone on the basis that it had fallen into the hands of "rebels" is legally unsustainable. Agreements of this nature do not become void due to changes in government, and more importantly, the Buffer Zone was established by a binding UNSC resolution. Legally, it remains part of Syrian territory. Once the UNSC resolution is lifted or amended, the administration of this territory shall revert to the then-existing Syrian government. Accordingly, Israel's actions not only constitute an unlawful occupation of Syrian territory but also amount to a violation of a binding UNSC resolution. Prior to the regime change, Israel had based its security justification on the threat posed by Iranian influence in Syria.

---

[31] Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem (Advisory Opinion) [2024] ICJ Rep, para 254. In its Advisory Opinion, the International Court of Justice (ICJ) declared Israel's continued occupation of the Palestinian territories—including the West Bank, East Jerusalem, and Gaza—as unlawful under international law. The Court found that Israel's policies, such as settlement expansion, annexation efforts, and the transfer of its population into occupied areas, violate the prohibition against acquiring territory by force and infringe upon the Palestinian people's right to self-determination. The Court concluded that Israel must cease all settlement activities, evacuate settlers, repeal discriminatory laws, and provide reparations for damages caused. It also emphasized that all states and international organizations are obligated not to recognize the legality of the occupation or assist in maintaining it, urging collective efforts to end Israel's unlawful presence in the occupied Palestinian territory.

After the opposition forces—also opposed to Iran—took control, Israel shifted its rationale by portraying these new actors as threats as well. It is therefore evident that Israel's justifications are opportunistic and lack consistency, further undermining their credibility under international law. Both UN resolutions and ICJ advisory opinions emphasize that Israel's justifications are invalid in accordance with international law.

3. The Recovery of Occupied Syrian Territories

The legal implications of Israel's occupation of Syrian territory and the possible avenues for redress can be grouped under two main categories: non-forcible means (not including use of force) and forcible means (including use of force) of dispute resolution. The Charter of the United Nations[32] provides a framework for both. Accordingly, peaceful methods such as negotiation, mediation, conciliation, arbitration, or judicial settlement are available, while in certain circumstances, the use of force may be permissible through the right of self-defense or by authorization of the Security Council. In general, under the UN Charter, peaceful means of dispute resolution are recommended to be exhausted before the use of force for self defense is contemplated if active hostilies are ceased.[33] Only when such means fail, a state may resort to self-defense or Security Council-authorized enforcement measures. However, this is a recommeded practice rather than an absolute rule. Although Israel and Syria have occasionally engaged in diplomatic negotiations, these efforts have consistently failed, primarily due to Israel's unwillingness to return the Golan Heights. With the outbreak of the Syrian civil war in 2011, the Golan issue faded from the international agenda.

Donald Trump, who served as President of the United States between 2017 and 2021, was re-elected and is set to begin his second term in January 2025. As noted earlier, Trump had previously developed close ties with the Netanyahu government and consistently aligned himself with Israeli interests. His administration relocated the U.S. embassy from Tel Aviv to Jerusalem and formally recognized Israel's annexation of the Golan Heights—acts that flagrantly contravened binding Security Council resolutions that the United States itself had not vetoed. This open disregard for international law underscores the strength of the U.S.–Israel alliance and, more specifically, the alignment of Trump and Netanyahu's political agendas. In his second term, Trump is expected to continue supporting Israel's creation of *fait accompli*. Consequently, Israel may seek, with U.S. backing, to negotiate a diplomatic settlement under the guise of normalization, aimed at

---

32 Charter of the United Nations (adopted on 26 June 1945, entered into force on 24 October 1945) 1 UNTS 16.

33 Emilia Justyna Powell and Krista E. Wiegand, 'Legal Systems and Peaceful Attempts to Resolve Territorial Disputes' (2010) 27(2) Conflict Management and Peace Science 129.

securing Syrian recognition of Israel's sovereignty over the occupied territories. For instance, Israel might offer to relinquish control over Mount Hermon and the UN Buffer Zone in exchange for Syrian recognition of Israeli sovereignty over the Golan Heights. The Trump administration, consistent with this approach, may claim that Israel's actions in these territories are temporary and security-driven, rather than formal annexations. However, such a proposal would be legally untenable and politically unacceptable for Syria. It would also place the United States and Israel in continued violation of international law. Both Security Council resolutions and ICJ advisory opinions affirm the illegality of Israel's occupation and annexation of the Golan Heights and emphasize Israel's obligations under the Fourth Geneva Convention.[34]

A second scenario involves the potential resumption of active armed conflicts between Israel and Syria. Under international law, a state whose territory has been occupied by another state retains the right to recover that territory by force. According to the 1974 United Nations General Assembly Resolution 3314 on the Definition of Aggression, military occupation—regardless of its duration—constitutes an act of armed attack.[35] The existence of an armed attack triggers the inherent right of self-defense under Article 51 of the UN Charter.[36] In other words, a prolonged occupation constitutes an ongoing armed attack, and the victim state retains the right to respond with force in self-defense. The timing, conditions, and means of exercising this right are left to the discretion of the state entitled to invoke it. A state's lack of immediate military or economic capacity, or the presence of unfavorable domestic or international political conditions, does not signify a waiver of its right to self-defense, nor does it amount to acceptance of the *status quo*. The mere cessation of hostilities cannot be construed as abandonment of sovereign territory. In fact, Syria once tried to recover Golan Heights. The 1973 Yom Kippur War is an example.[37] Israel

---

34 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) 75 UNTS 287.

35 "The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof". UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/3314(XXIX), art. 3/a. For further information see: Julius Stone, 'Hopes and Loopholes in the 1974 Definition of Aggression' (1977) 71 *American Journal of International Law* 224. Taciano Scheidt Zimmermann, 'Critical Remarks on the ICJ's Interpretation of Article 3(g) of the Definition of Aggression' (UNGA Resolution 3314/1974) (2018) 14(1) *Revista Direito GV* 99.

36 Yoram Dinstein, *'War, Aggression and Self-Defence'* (7th edn, Cambridge University Press 2017) 197–260.

37 Françoise Dubuisson and Vaios Koutroulis, 'The Yom Kippur War – 1973' in Tom Ruys, Olivier Corten and Alexandra Hofers (eds), *The Use of Force in International Law: a Case-Based Approach* (Oxford University Press 2018), 189.

occupied the Sinai Peninsula from Egypt and the Golan Heights from Syria in 1967 and has not withdrawn from these territories despite being ordered to do so by UNSC Resolution 242.[38] Therefore, the Yom Kippur War, which Egypt and Syria launched in 1973 to recover their own territories under Israeli occupation, was essentially a war of self-defense. In the Falklands War between Argentina and the United Kingdom in 1982, the recovery of territory through self defense was also discussed.[39] Azerbaijan's recapture of Nagorno-Karabakh in 2020—after decades of Armenian occupation—serves as a contemporary example of a state exercising its right of self-defense against unlawful occupation. In this regard, Syria also retains the legal right to launch a military operation to recover the Golan Heights, Mount Hermon, and the UN Buffer Zone.

Although some commentators argue that the existence of a ceasefire agreement might preclude the use of force. According to Ruys and Silvestre, the right of self-defense cannot not be invoked if there is not an ongoing armed attack. Despite lacking a legal basis, a *status quo* has been established through occupation and the ceasefire. In such a case, the peaceful means of dispute settlement prescribed by the Charter must be employed. The preservation of peace remains a fundamental principle under international law.[40] However, In cases of occupation that are in breach of the prohibition on the use of force, there is no specific timeframe for determining when an armed attack is deemed to have ended. Similarly, Article 51 of the United Nations Charter does not prescribe a temporal limitation for the exercise of the right of self-defense. In this regard, the prolonged duration of an occupation does not extinguish the right of the affected state to invoke self-defense. According to Akande and Tzanakopoulos, the use of force to resolve a territorial dispute must not be conflated with the lawful exercise of the right of self-defense arising from an unlawful armed attack. United Nations General Assembly Resolution 3314, which defines aggression, explicitly states that military occupation constitutes an act of armed attack. In this respect, as long as the occupation persists, the armed attack is deemed to be continuing, and consequently, the right of self-defense remains in effect.[41] Furthermore, this argument holds little weight given Israel's repeated

---

38 UNSC Res 242 (22 November 1967) UN Doc S/RES/242.

39 Etienne Henry, 'The Falklands/Malvinas War – 1982' in Tom Ruys, Olivier Corten and Alexandra Hofers (eds), *The Use of Force in International Law: a Case-Based Approach* (Oxford University Press 2018), 363-64.

40 Tom Ruys and Felipe Rodriguez Silvestre, 'Military Action to Recover Occupied Land: Lawful Self-defense or Prohibited Use of Force? The 2020 Nagorno-Karabakh Conflict Revisited' (2021) 97 International Law Studies 682. Muhammed Emre Hayyar, Saving Homeland: The Legality of Unilateral Use of Force to Recover Occupied Territory (LLM thesis, Ghent University 2021) 47–50.

41 Dapo Akande and Antonios Tzanakopoulos, 'Use of Force in Self-Defence to Recover Occupied Territory: When Is It Permissible?' (EJIL:Talk, 18 November 2020) https://www.ejiltalk.org/use-of-force-in-self-defence-to-recover-occupied-territory-when-is-it-permissible/ accessed 16 April 2025.

violations of the 1974 agreement, rendering it effectively void. Nevertheless, given the recent regime change and the new government's immediate need to focus on internal reconstruction, economic recovery, and restoring the rule of law, the likelihood of renewed hostilities with Israel in the short term appears minimal. This, however, must not be interpreted as Syria's acquiescence to Israeli occupation. On the contrary, Syria's right of self-defense remains intact and may be exercised at a time and in a manner of its choosing, in accordance with international law.

CONCLUSION

One of the foremost priorities of Syria's new post-conflict administration is the restoration of the country's territorial integrity. The Golan Heights—occupied by Israel in 1967, formally annexed in 1981, and recognized as Israeli territory by the United States in 2019—remains legally under Syrian sovereignty. Therefore, both as a matter of law and of fact, Syria's territorial integrity requires that Israel terminate its occupation and return the Golan Heights to its rightful owner. However, instead of complying with this legal obligation, Israel has exploited the regime change in Syria to further expand its occupation, extending it to encompass Mount Hermon and the United Nations Buffer Zone. In doing so, Israel has, since 1967, consistently acted in violation of both binding United Nations Security Council resolutions and the Fourth Geneva Convention of 1949. These unlawful actions have most recently been reaffirmed as such by the International Court of Justice in its 2024 Advisory Opinion. The Golan Heights dispute between Israel and Syria may be resolved through two possible avenues. The first—diplomatic negotiations and peaceful settlement—has thus far proved unsuccessful. While sporadic talks have taken place, they have invariably collapsed due to Israel's refusal to return the Golan Heights. Following the outbreak of the Syrian civil war in 2011, these efforts ceased entirely. Given the current context, with Israel escalating the conflict through new territorial acquisitions, and given the rhetoric of Israeli leaders, the prospects for a peaceful resolution through dialogue remain ambiguous even in the long term.

This situation may ultimately compel Syria to pursue the second available option. According to United Nations General Assembly Resolution 3314, military occupation constitutes an act of armed attack regardless of its duration. Where there is an armed attack, the victim state possesses an inherent right of self-defense under Article 51 of the UN Charter. As long as the occupation persists, so too does the armed attack—and thus the right of self-defense. Syria may, at its discretion, invoke this right and lawfully use force to recover its occupied territory, including the Golan Heights, Mount Hermon and UN Buffer Zone. Although the exercise of this right is unlikely in the immediate future—due to Syria's ongoing post-conflict reconstruction—it is highly probable that it will be asserted once Syria regains sufficient capacity and strength. However, a

peaceful resolution is the best way for two neighbouring states. Accordingly, the most reasonable and equitable solution would be for Israel to restore the Golan Heights to Syria and dismantle the illegal settlements before the resumption of active armed conflict.

BIBLIOGRAPHY

Abi-Saab G and Kohen M, Is 'prolonged occupation' still 'military occupation' governed by IHL? May 5, 2025, EjilTalk, https://www.ejiltalk.org/is-prolonged-occupation-still-military-occupation-governed-by-ihl/ accessed 28 May 2025

Akande D and Tzanakopoulos A, 'Use of Force in Self-Defence to Recover Occupied Territory: When Is It Permissible?' (EJIL:Talk, 18 November 2020) https://www.ejiltalk.org/use-of-force-in-self-defence-to-recover-occupied-territory-when-is-it-permissible/ accessed 16 April 2025

Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16

Crawford J, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006)

Dawidowicz M, 'The Obligation of Non-Recognition of an Unlawful Situation', in James Crawford, and others (eds), *The Law of International Responsibility*, Oxford Commentaries on International Law (2010; OUP), 677-686

Dinstein Y, *War, Aggression and Self-Defence* (7th edn, Cambridge University Press 2017)

Dubuisson F and Koutroulis V, 'The Yom Kippur War – 1973' in Tom Ruys, Olivier Corten and Alexandra Hofers (eds), *The Use of Force in International Law: a Case-Based Approach* (Oxford University Press 2018), 189

Nicolosi SF, 'The Law of Military Occupation and the Role of De Jure and De Facto Sovereignty', (2011) 31 Polish Yearbook of International Law, 165-187

Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) 75 UNTS 287

Golan Heights Law, 5742–1981 https://main.knesset.gov.il/EN/about/history/Documents/kns10_golan_eng.pdf accessed 10 March 2025

Green JA, 'The ratione temporis Elements of Self-defence' (2015) 2(1) *Journal on the Use of Force and International Law* 114

Hayyar ME, *Saving Homeland: The Legality of Unilateral Use of Force to Recover Occupied Territory* (LLM thesis, Ghent University 2021)

Henry E, 'The Falklands/Malvinas War – 1982' in Tom Ruys, Olivier Corten and Alexandra Hofers (eds), *The Use of Force in International Law: a Case-*

Based Approach (Oxford University Press 2018), 363-64

ICRC in Syria, Facts and Figures, (2012), p.1. https://www.icrc.org/sites/default/files/external/doc/en/assets/files/2013/syria-facts-and-figures-2012-icrc-eng.pdf accessed 28 May 2025

ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001) UN Doc A/56/49(Vol I)/Corr.4

İleri K, 'The Implications of Great Power Politics in the Decade Long Syrian Civil War' (2024) 14(1) *İnsan ve Toplum Dergisi* 1

International Court of Justice, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem (Advisory Opinion)* [2024] ICJ Rep

Kattan V, 'Why US Recognition of Jerusalem Could Be Contrary to International Law' (2018) 47(3) *Journal of Palestine Studies* 72

Lahav P, 'The Suez Crisis of 1956 and Its Aftermath: A Comparative Study of Constitutions, Use of Force, Diplomacy and International Relations', (2015) 95 Boston University Law Review 1297

Osmańczyk EJ, *Encyclopedia of the United Nations and International Agreements: A to F* (Taylor & Francis 2003)

Peace to Prosperity: A Vision to Improve the Lives of the Palestinian and Israeli People (White House) https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/01/Peace-to-Prosperity-0120.pdf accessed 10 March 2025

Phillips C, 'The International System and the Syrian Civil War' (2022) 78(3) *International Relations* 379

Powell EJ and Wiegand KE, 'Legal Systems and Peaceful Attempts to Resolve Territorial Disputes' (2010) 27(2) *Conflict Management and Peace Science* 129

Ronen Y, 'The Obligation of Non-recognition, Occupation and the OPT Advisory Opinion', VerfBlog, 2024/10/14, https://verfassungsblog.de/the-obligation-of-non-recognition-occupation-and-the-opt-advisory-opinion/ accessed 28 May 2025

Quigley J, *The Case for Palestine: An International Law Perspective* (Duke University Press 2005)

Quigley J, 'The Six-Day War and Israeli Self-Defense: Questioning the Legal Basis for Preventive War' (Cambridge University Press, 2013)

Report of the UN Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, para. 8, U.N. Doc. A/62/275

Ruys T, *Armed Attack and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010)

Ruys T and Rodriguez Silvestre F, 'Military Action to Recover Occupied Land: Lawful Self-defense or Prohibited Use of Force? The 2020 Nagorno-Karabakh Conflict Revisited' (2021) 97 *International Law Studies* 682

Salaymeh B, 'Syria Under al-Assad Rule: A Case of Neopatrimonial Regime' (2018) 10(2) *Ortadoğu Etütleri* 140

Separation of Forces Agreement Between Israel and Syria, May 31, 1974. https://avalon.law.yale.edu/21st_century/pal04.asp accessed 28 May 2025

Stone J, 'Hopes and Loopholes in the 1974 Definition of Aggression' (1977) 71 *American Journal of International Law* 224

Sulimani G and Kletter R, 'Settler-Colonialism and the Diary of an Israeli Settler in the Golan Heights: The Notebooks of Izhaki Gal' (2021) 21(1) *Journal of Holy Land and Palestine Studies* 48

Syria: UN chief calls for urgent de-escalation by Israeli forces, withdrawal from Golan buffer zone (2024). https://news.un.org/en/story/2024/12/1158131 accessed 28 May 2025

Talmon S, '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?' in Christian Tomuschat and Jean-Marc Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Martinus Nijhoff Publishers 2006)

Treaty of Peace between the Arab Republic of Egypt and the State of Israel (signed 26 March 1979, entered into force 25 April 1979) 1138 UNTS 59

Trump DJ, 'Proclamation on Recognizing the Golan Heights as Part of the State of Israel' (White House, 25 March 2019) https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-recognizing-golan-heights-part-state-israel/ accessed 10 March 2025

UNGA Res 3314 (XXIX) (14 December 1974) UN Doc A/RES/3314(XXIX)

UNSC Res 242 (22 November 1967) UN Doc S/RES/242 (1967)

UNSC Res 338 (22 October 1973) UN Doc S/RES/338 (1973)

UNSC Res 478 (20 August 1980), S/RES/478(1980)

UNSC Res 497 (17 December 1981) UN Doc S/RES/497 (1981)

Zimmermann TS, 'Critical Remarks on the ICJ's Interpretation of Article 3(g) of the Definition of Aggression' (UNGA Resolution 3314/1974) (2018) 14(1) *Revista Direito GV* 99