ESTABLISHING A HARMONIOUS BALANCE BETWEEN HUMAN RIGHTS LAW AND DIGITAL MASS SURVEILLANCE*

İnsan Hakları Hukuku ile Dijital Kitlesel Gözetim Arasında Uyumlu Bir Denge Kurmak

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Abstract

Global and regional human rights authorities counsel nations to refrain from engaging in arbitrary, discriminate, and unlawful digital mass (bulk) surveillance. However, the interaction of digital mass surveillance with preventing crime, thwarting human exploitation, and safeguarding human rights creates a complex and dual-edged relationship. The collaboration between governments and private enterprises in the realm of monitoring individuals elevates the discourse surrounding digital mass surveillance beyond the confines of conventional governance and political frameworks. In order to acknowledge the relationship between human rights and digital mass surveillance, it is crucial to recognise their differences. It is crucial to establish a multi-stakeholder governance framework that effectively protects human rights and fosters accountability. Consequently, a harmonious balance strategy can be constructed to reconcile digital mass surveillance with the preservation of human rights and freedoms, ensuring that neither is unduly compromised.

Keywords: Digital mass surveillance, human rights, human exploitation, crime

Özet

Küresel ve bölgesel insan hakları otoriteleri devletlere keyfi, ayrım gözeten ve hukuka aykırı dijital kitlesel gözetlemelerden kaçınmalarını tavsiye etmektedir. Ancak, dijital kitlesel gözetlemenin suçun önlenmesi, insan istismarının engellenmesi ve insan haklarının korunması ile

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etkileşimi karmaşık ve iki uçlu bir ilişki yaratmaktadır. Bireyleri izleme alanında hükûmetler ve özel teşebbüsler arasındaki iş birliği, dijital kitlesel gözetimi çevreleyen söylemi geleneksel yönetişim ve siyasi çerçevelerin sınırlarının ötesine taşımaktadır. İnsan hakları ve dijital kitlesel gözetim arasındaki ilişkiyi kabul etmek için aralarındaki farkları tanımak çok önemlidir. İnsan haklarını etkin bir şekilde koruyan ve hesap verebilirliği teşvik eden çok paydaşlı bir yönetişim çerçevesi oluşturmak şarttır. Sonuç olarak, dijital kitlesel gözetleme ile insan hak ve özgürlüklerinin korunmasını uzlaştırmak için uyumlu bir denge stratejisi oluşturulabilir ve böylece her ikisinin tehlikeye atılmaması sağlanabilir.

Anahtar Kelimeler: Dijital kitlesel gözetim, insan hakları, insan istismarı, suç

Introduction

The notion of "the right to be let alone"[1] was articulated by Judge Colly in 1888, originally conceived as a safeguard against physical torts. Progressively, the right has developed to include safeguarding of personal privacy and components of a legal structure for confidentiality and privacy.[2] The right to privacy is exceeding mere property considerations and encompassing the broader right to fully experience and enjoy life. The most comprehensive interpretation of the privacy as a human right in the contemporary understanding is the right to remain undisturbed.[3] This comprehension indicates that the privacy as a human right is acknowledged as a civil liberty and the concept has indeed evolved from Colly's perspective. In contrast, the present circumstances are indicative of a perpetual cycle in which the concept of privacy is attempting to establish its position within the digital realm, while dialogues concerning cyber-digital-e-mass surveillance pertaining to this right continue simultaneously.[4]

The interconnectedness of the cyber landscape, technological advancements, and the progression of communication methods with human rights is irrefutable.[5] The discussion regarding mass surveillance and human rights in cyberspace continues to be a provocative topic within the realm of human rights law. Legal developments on this subject are ongoing, and efforts are focused on establishing a universally recognised legal framework.

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1 Thomas M. Cooley, *A Treatise on the Law of Torts, or the Wrongs Which Arise Independent of Contract* (Callaghan & Co 1888) 29.

2 Irwin R Kramer, 'The Birth of Privacy Law: A Century Since Warren and Brandeis' (1990) 39 Cath U L Rev 703, 703-724.

3 Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) 4 Harv L Rev 193.

4 Ibid 193.

5 See Dapo Akande and others (eds), *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment* (OUP 2020).

There are relevant issues regarding the convergence of digital mass surveillance and human rights. Initially, the function of digital landscapes in the realms of crime prevention, human exploitation prompts an inquiry into the interplay between digital mass surveillance and safeguarding human rights.[6] Considering the various types of information collected through intelligence operations, especially through untargeted digital mass surveillance, it becomes clear that this method of surveillance poses substantial concerns about its effects on people, notably social and religious minorities.[7] Unfortunately, the prevalence of security concerns frequently results in nations sacrificing human rights and individual freedoms in the context of digital mass surveillance.

The implementation of mass surveillance as a means to tackle security issues prompts significant apprehensions regarding the possible exploitation of the gathered data for nefarious ends.[8] Under these conditions, surveillance can stimulate discourse regarding its validity as a means of safeguarding human life and security or as a potential infringement on rights and freedoms, which could result in a constrained application of communication and its technologies.[9] The imperative of this form of surveillance for the preservation of national security continues to be a subject of persistent discourse.

Digital mass surveillance must be comprehended with both benefits and drawbacks.[10] The notion of digital mass surveillance has progressively infiltrated human existence, propelled by the development of technology, which has concurrently merged with societal oversight within the digital domain. The tension between human rights and freedoms, security anxieties and digital mass surveillance constitutes the paramount balance-necessitated discussions in the digital concept.[11]

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6 See Marcin Rojszczak, *Bulk Surveillance, Democracy and Human Rights Law in Europe: A Comparative Perspective* (Routledge 2025).

7 Ibid 12.

8 Theodore Christakis and Katia Bouslimani, 'National Security, Surveillance, and Human Rights' in Robin Geiß and Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (OUP 2021) 699.

9 Giovanni Ziccardi, *Resistance, Liberation Technology and Human Rights in the Digital Age* (Springer 2013) 202.

10 For the debates on digital mass surveillance see: Jacopo Bellasio and others, 'The Future of Cybercrime in Light of Technology Developments' (RAND 2020); Peter Swire, 'The Second Wave of Global Privacy Protection: Symposium Introduction' (2013) 74 Ohio St LJ 841. David Lyon, *The Electronic Eye: The Rise of Surveillance Societies* (Polity 1994); David Lyon, *Surveillance Society: Monitoring Everyday Life* (Open University 2001).

11 See David Lyon, *Surveillance Studies* (Kalkedon 2013).

1. Human Rights in the Glance of Digital Mass Surveillance

The mechanisms of automatic data processing, thereby instituting a legal concept to protect private data and addressing pertinent issues that are connected in the human rights framework.[12] The implementation of these surveillance techniques and ongoing operations, devoid of sufficient protections for human rights, has elicited significant apprehension.[13] In accordance with human rights states must avoid engaging in mass surveillance activities that are arbitrary or unlawful.[14] Specifically, the practice of untargeted mass surveillance, when assessed alongside the safeguarding of private life and personal data, poses a threat to human rights. To address human rights concerns, there is a clear necessity for governmental mass surveillance activities to be attached in a legal framework and executed in alignment with clear and established laws.[15] It is incumbent upon states to guarantee that any encroachment upon individual privacy, encompassing mass surveillance and the sharing of intelligence, is in accordance with international human rights law.[16]

Over time, the need to better accommodate emerging technologies directed human rights law normative frameworks to develop through highlighting the importance of informational autonomy, reinforcing the rights of data subjects, and underscores the principle of proportionality in the realm of data processing.[17] The intrinsic connection concentrates on the safeguarding of human rights and human dignity, and the fundamental principles governing digital mass surveillance, which include legality, necessity, proportionality, and transparency. These principles ensure the legitimacy of the digital mass surveillance operations, emphasising the importance of informing citizens about the matter and securing access to appropriate legal remedies in instances of unlawful actions.[18] The necessity

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12 Council of Europe (CoE) 'Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data' <https://rm.coe.int/1680078b37> accessed 2 April 2025.

13 United Nations (UN) 'Report of the General Assembly on the Seventy-Third Session: Right to Privacy, UN Doc A/73/4382' (17 October 2018) 4 <https://documents.un.org/doc/undoc/gen/n18/324/46/pdf/n1832446.pdf> accessed 12 March 2025.

14 United Nations Human Rights Council 'Report of the Human Rights Council on Its Thirty-Ninth Session: The Right to Privacy in the Digital Age UN Doc A/HRC/39/29' (3 August 2018) <https://www.ohchr.org/sites/default/files/Documents/Issues/DigitalAge/ReportPrivacyinDigitalAge/A_HRC_39_29_EN.pdf> 4 accessed 12 March 2025.

15 Ibid.

16 Ibid.

17 Cecile de Terwangne, 'Council of Europe Convention 108+: A Modernised International Treaty for the Protection of Personal Data' (2021) 40 Computer Law & Security Review 105553 <https://www.sciencedirect.com/science/article/abs/pii/S0267364920301023> accessed 10 March 2025.

18 Council of Europe 'Convention 108+' (2018).

of limited purpose in digital mass surveillance and storage of collected data, the minimisation of collected data volume, and the emphasis on accuracy are significant considerations in the effort to combat cybercrime and protect human rights.[19] Collection and retention of personal data, the interception of content data, the legality of location data collection and retention encompass legitimate aims of digital mass surveillance.[20] These measures improve the investigation and prosecution of cybercrimes while also ensuring that mass surveillance practices conform to the principles such as necessity, proportionality and transparency.

Digital mass surveillance is applicable in strict necessity and states are obliged to rigorously examine such surveillance to ensure the safeguarding right to privacy and the protection of personal data.[21] The requisite elements must be established to satisfy the legal criteria, encompassing the identification of individuals subjected to digital mass surveillance, temporal constraints, and protocols regulating the examination, utilisation, and retention of collected data. From a perspective focused on human rights, it is essential for governments to define explicit regulations regarding authorisation procedures, the judicious implementation of digital mass surveillance, the duration of data retention, and the protocols for sharing data with external entities.[22] The implementation of comprehensive safeguards is essential to avert abuse and misuse of digital mass surveillance opportunities; failing to do so may lead to significant repercussions that contravene human rights law.[23] Given the current legal discussions and the practical difficulties inherent in digital mass surveillance, these practices must adhere to strict and clearly defined guidelines to prevent any infringement on human rights.

The regional and international law texts have pioneered developments in the realm of digital law and in European Union's (EU) legal framework, articulated through the General Data Protection Regulation (GDPR) and the EU Charter of Fundamental Rights, ensures transparency, equity, and the legitimacy of surveillance methods. The confidentiality of communications aligns with international human rights standards and the constitutions of Member States of EU, as explicitly had already articulated in the ePrivacy Directive issued by the European Parliament and Council on July 12, 2002. The directive under consideration advocates for heightened awareness of the issue across the electronic communications sector and exemplifies the collaborative efforts required from various stakeholders.

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19 Council of Europe 'Convention on Cybercrime' (2001).

20 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] ECLI [C], para. 317.

21 *Szabó and Vissy v. Hungary* [2016] ECtHR [GC] 37138/14, para. 71-72.

22 Ibid.

23 *Weber and Saravia v. Germany* [2006] ECtHR [GC] 54934/00, para 95.

Recently, there has been a debate on how to balance the protection of individual rights but also combat crimes and focus on the identification and reporting of child sexual abuse material (CSAM) across online platforms within internet users' private communications in EU.[24] The objective of a proposed regulation by the European Parliament and Council establishes comprehensive guidelines at safeguarding children from sexual abuse in both digital and physical environments, which aligns with the principles articulated in the United Nations(UN) and EU human rights law texts.[25] The essentiality of safeguarding children against abuse, necessitates a series of actions, one of which involves internet providers potentially employing digital mass surveillance as a means to report any instances of abuse. The proposed system has faced scrutiny, despite its declared intention to prioritise the welfare of children and combat crime, particularly concerning potential infringements on human rights, especially privacy. A collective of 379 scientists and researchers hailing from 36 nations has articulated their concerns regarding this measure in an open letter.[26] Their findings clarified the plan's framework, which infringes upon the essential right to privacy and presents a significant potential for indiscriminate and disproportionate digital mass surveillance. Moreover, to enhance the surveillance capabilities of Member States of EU and Europol, has raised concerns regarding the potential erosion of human rights, especially in the context of immigration.[27] Civil society initiatives within the EU are actively involved in the endeavour to constitutionalise mass surveillance for respecting rights of people.[28] Civil society organisations within the EU also argue that the persistent inadequacies of digital mass surveillance in effectively tackling issues warrant the cessation of its expansion.[29] The apprehensions expressed by civil society regarding the

[24] For the debates see European Digital Rights, 'Utopian Dreams, Sobering Reality: The End We Start From In EU's Approach To Technology' (2 April 2025) <https://edri.org/our-work/utopian-dreams-sobering-reality-the-end-we-start-from-in-eus-approach-to-technology/> accessed 2 April 2025.

[25] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council Laying Down Rules to Prevent and Combat Child Sexual Abuse' COM (2022) 209 final <https://eur-lex.europa.eu/resource.html?uri=cellar:13e33abf-d209-11ec-a95f-01aa75ed71a1.0001.02/DOC_1&format=PDF> accessed 14 March 2025.

[26] Open Letter <https://nce.mpi-sp.org/index.php/s/eqjiKaAw9yYQF87> accessed 10 March 2025.

[27] European Digital Rights, 'Why The New Europol Regulation Is A Trojan Horse For Surveillance' (5 March 2025) https://edri.org/our-work/why-the-new-europol-regulation-is-a-trojan-horse-for-surveillance/ accessed 2 April 2025.

[28] Edoardo Celeste and Giulia Formici, 'Constitutionalizing Mass Surveillance in the EU: Civil Society Demands, Judicial Activism, and Legislative Inertia' (2024) 25 German LJ 427.

[29] DiEM25 Communications,'The EU's Orwellian Agenda: Using Child Protection to Justify Mass Surveillance' (08 October 2024) <https://diem25.org/the-eus-orwellian-agenda-using-child-protection-to-justify-mass-surveillance/> accessed 10 February 2025.

digital mass surveillance strategy within the EU highlight the potential for exacerbating discrimination, injustice, and oppression, ultimately functioning as a tool for the misuse of authority. The jurisprudence of the CJEU has served as the principal driver for constitutionalising, as it has judiciously concluded that a blanket ban on mass surveillance is not a practical solution.[30] The legal analyses in EU illustrate a nuanced interaction between the national security and human rights law. The absence of clarity surrounding digital mass surveillance practices in EU, coupled with the potential for these measures to be contradicting human rights, ultimately undermines the balance between digital mass surveillance and fundamental rights. In this framework, to a legitimate digital mass surveillance the principles of data security and digital mass surveillance must adhere to the tenets of legality, necessity, proportionality and transparency within a democratic society.[31] It is imperative that Member States provide adequate and effective safeguards against potential abuses in the event of any infractions. The discourse seems to be continued, even though these efforts have yet to yield a distinctly articulated resolution within the EU.

2. Human Rights Law Landmark Cases from Two Continents

Two significant cases from different continents have contributed to the debate regarding the balance between the politics of digital mass surveillance and personal rights, particularly as a part of the ongoing discussion surrounding the essential legal praxis on this issue. The North American case *Carpenter v. United States* and the decision given by the European Court of Human Rights (ECtHR) in *Big Brother Watch and Others v. The United Kingdom* and *Centrum För Rättvisa v Sweden* cases exemplify how digitisation poses new challenges to established concepts of human rights, highlighting the tension between fundamental liberties and state-sanctioned mass surveillance.

The United States Supreme Court's ruling in *Carpenter v. United States* meticulously scrutinised the ramifications of privacy rights in the digital era. The case meticulously scrutinises the data gathered from cellular phone locations. The authorities acquired the location data of the defendants' cell phones spanning several months during a criminal investigation carried out in Detroit in 2011. This incident occurred without an antecedent inquiry into probable cause. The information regarding an individual identified as Timothy Carpenter consists of 12,898 distinct location data points. This statistic indicates an average of 101 location data points discerned each day throughout a duration of four months. The matter was brought before the Supreme Court on November 29, 2017, for consideration. Carpenter challenged his conviction, which was partially based on the location data obtained from his mobile phone. The government employed

30 *Ireland v. European Parliament and Council* [2009] ECR I-00593.

31 For the details see: *Centrum För Rättvisa v Sweden* [2016] ECtHR [GC] 35252/08.

legislation that requires a court order grounded in "reasonable grounds" rather than probable cause, thereby enabling the acquisition of this information without the necessity of a search warrant. The authorities used the digital data at their disposal to meticulously analyse the past and conduct thorough digital surveillance concerning the matter previously addressed. The authorities carried out this action without obtaining a court order on valid grounds, which led the court to determine its illegality. A crucial element of the decision that could set a precedent is the absence of consideration for the third-party doctrine in the decision-making process. This notion carries considerable weight for the advancement of digital technology and safeguarding human rights, despite its application by courts in the United States. Those who opt to disclose information to external entities cannot justifiably anticipate privacy concerning that information, as delineated by the pertinent legal doctrines. The failure to effectively identify and monitor these signals resulted in the determination that the execution of this method was flawed. This decision is pivotal in assessing the enhancement of digital monitoring and safeguarding human rights in the contemporary digital landscape, as well as in implementing measures to safeguard personal information. The court case at hand exemplifies the need to assess the legal standards governing data and surveillance obtained through digital means, considering the protection of personal information alongside the requirement for compelling and justifiable reasons. The prior reference to the judicial decision substantiates this claim.[32]

On the European continent, the decision rendered by the ECtHR in *Big Brother Watch and Others v. The United Kingdom* is deeply intertwined with the implications of the Snowden affair. This case is significant due to the widely reported revelation of NSA documents to the media by Edward Snowden, a former employee of both the Central Intelligence Agency (CIA) and the National Security Agency (NSA). The disclosures illuminated the extensive scope of international surveillance initiatives conducted by the NSA. The operation of the TEMPORA program by the Government Communications Headquarters (GCHQ) holds particular importance for the United Kingdom, as it involves mass interception in collaboration with U.S. intelligence, thereby enabling the gathering data of communications from service providers.[33] Consequently, the civil society organisation Big Brothers et al. submitted an application to

[32] For the case see: *Carpenter v. United States* [2017] Supreme Court of United States No. 16–402 <https://cdn.cnn.com/cnn/2018/images/06/22/16-402_h315.pdf> accessed 2 April 2025.

[33] *Big Brothers and others v. United Kingdom* [2021] ECtHR [GC] 58170/13, 62322/14 and 24960/15 para 2: "The Edward Snowden revelations made in 2013 indicated that Government Communications Headquarters ("GCHQ", being one of the United Kingdom intelligence services) was running an operation, codenamed "TEMPORA", which allowed it to tap into and store huge volumes of data drawn from bearers. The United Kingdom authorities neither confirmed nor denied the existence of an operation codenamed TEMPORA."

the ECtHR following the Snowden revelations, asserting that the surveillance infringed upon the rights to privacy and freedom of expression. The ECtHR ultimately determined that there had been a violation of Article 8, respect for private life, and Article 10, freedom of expression, in the practices of the UK.

The case of *Centrum För Rättvisa v Sweden* centres on the claim that Sweden's legislation allowing the Swedish National Defence Radio Establishment (FRA) to perform mass surveillance of electronic communications and engage in signal intelligence practices infringes upon Article 8 of the ECHR. The ECtHR, while taking a measured stance on the mass surveillance issue, underscored that the practice in Sweden included adequate and effective guarantees. The court has assessed the judicial pre-authorisation procedure and the independent body's oversight of the surveillance in question in accordance with Article 8. Nonetheless, the court highlighted the necessity for more defined regulations and protocols concerning the storage, destruction, and dissemination of the acquired data, and the importance of enhancing aspects like transparency and accountability has been highlighted. This decision is important since its establishment as a precedent in Europe, allowing states to engage in mass signal intelligence programs while adhering to stringent conditions that safeguard fundamental human rights. According to the decision, a mass surveillance framework may be considered acceptable from a human rights perspective, contingent upon the presence of legal safeguards, independent oversight, and explicit procedural guarantees.[34]

The Court underscored that mass surveillance could be relevant under specific conditions. In the context of the *Weber and Saravia v. Germany* case, which marked a significant aspect in the realm of human rights law. Six requirements established by the Court for lawful mass surveillance: (i) the law must restrict the offences that warrant mass surveillance in order to prevent its unnecessary use; (ii) the target group of the mass surveillance must be limited to prevent indiscriminate surveillance; (iii) the timing of the mass surveillance must be limited in order to prevent endless monitoring of individuals; (iv) procedures for handling the obtained data must be in place to protect procedural guarantees; (v) safeguards must be taken when communicating data with third parties in order to prevent the use of obtained data outside of the law; (vi) essential limits must be adopted for data minimisation and timely erasure in order to mitigate the effects of surveillance. [35] In the case law the Court has also delineated several stipulations referred to as "end-to-end safeguards" to guarantee that extensive surveillance does not once more result in the infringement of human rights. In this context, the states must recognise the presence of an evaluation mechanism at every phase of the process of digital mass surveillance. This assessment

34 *Centrum För Rättvisa v Sweden (n 31).*

35 *Weber and Saravia v. Germany* (n 23) para.96.

framework pertains to the necessity and proportionality of the surveillance being executed, and the probability of individuals experiencing infringements of their rights will be remedied. Furthermore, when delineating the objective and extent of the operation, the requirement for independent authorisation from the outset might mitigate arbitrariness, as the activity ought to be overseen and subjected to an independent, ex post facto evaluation.[36]

The regulations, interpretations, and norms regarding digital mass surveillance in human rights law are very recent. The emergence of the digital era has necessitated an increased emphasis on this topic across all legal systems. The objective is to achieve a balance between individual rights and state programs, as well as social interests and security.

3. The Dichotomy of Digital Mass Surveillance, Human Exploitation and Prevent Crime

9/11 attacks shaped the evolution of global security measures, strategies for crime prevention, and the public's acceptance of mass surveillance initiatives.[37] Since then, security and the attainment of peace are accepted as fundamentally interdependent and states have exercised considerable discretion in relation to digital mass surveillance, especially as state institutions have highlighted the global dangers associated with terrorism and international crime.[38] States have responsibilities under human rights law to ensure that individuals can exist in peace and with dignity while addressing global challenges. In this context, the implementation of digital mass monitoring could potentially curtail personal liberties, all while ostensibly striving to safeguard societal interests and collect data through digital mass surveillance that transcends physical boundaries.[39] This digital mass strategy embodies the conceptual framework of the panopticon, cultivating discipline through an awareness of continuous observation.[40] Individuals perceive themselves as subjects of scrutiny while the observer remains hidden from view.[41] Nevertheless, the understanding of the panopticon framework has evolved into discussions surrounding the post-panopticon paradigm in the digital

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36 *Big Brothers and others v. United Kingdom* (n 33).

37 Lyon (n 11) 28.

38 Andrian Bogdan, 'The Right to Peace in the Context of Contemporary International Reality' (2013) 40 Revista de Stiinte Politice 46.

39 Maša Galič, Tjerk Timan and Bert-Jaap Koops, 'Surveillance Theory and Its Implications for Law' in Roger Brownsword, Eloise Scotford and Karen Yeung (eds), *Oxford Handbook of the Law and Regulation of Technology* (OUP 2017) 731.

40 Jeremy Bentham, *The Panopticon Writings* (Verso 1995).

41 Donna Susan Mathew, 'Surveillance Society: Panopticon in the Age of Digital Media' *The New Polis* (19 May 2020) <https://thenewpolis.com/2020/05/19/surveillance-society-panopticon-in-the-age-of-digital-media-donna-susan-mathew-part-2/> accessed 10 February 2025.

society.[42] The post-panopticon understanding employs advanced technologies such as closed-circuit television, biometrics, smart devices, blockchain, and social media to facilitate extensive digital mass surveillance.

In practice important questions arise regarding the relationship between digital mass surveillance, the prevention of crime, which is accepted as a legitimate aim of digital mass surveillance, and the safeguarding people's life. A set of current global data indicates that the relationship between the density of cameras in closed-circuit television systems and crime rates is far more complex than previously understood.[43] Evidence indicates that the efficacy of crime prevention cannot be solely attributed to digital mass surveillance. The proliferation of digital mass surveillance cameras does not invariably correlate with a reduction in crime rates, as there exists a minimal relationship between the number of cameras and a decrease in the crime index.[44] However, the foundational tenets of legality, applicability, and data security are essential to achieve a legitimate aim of crime prevention and apply digital mass surveillance. The digital mass surveillance against crimes may intricately link to the fundamental right to life, within the broader context of human security and enjoyment of all human rights. The right to life serves as the foundation for realising all other human rights in the indivisibility and mutual reliance of human rights. It is incumbent upon states to ensure the protection of individuals from threats that may jeopardise their fundamental rights to life.[45] In this context, digital mass surveillance may be construed as a human rights obligation for states when examined comprehensively, and these applications could be regarded as instruments employed by states to safeguard the fundamental right to life in the prevention of life-threatening crimes.[46] While digital mass monitoring initiatives have been implemented to deter crime and capture offenders, these strategies are anticipated to suppress prospective future criminal behaviour.[47] Nevertheless, these applications often involve the categorisation of individuals based on specific socioeconomic conditions or geographic locations, which consequently makes them vulnerable to biases and discriminatory practices.[48]

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42 William Bogard, 'Simulation and Post-Panopticism' in Kirstie Ball, Kevin Haggerty and David Lyon (eds), *Routledge Handbook of Surveillance Studies* (Routledge 2012) 30.

43 Paul Bischoff, 'The World's Most Surveilled Cities' *Comparitech* (23 May 2023) <https://www.comparitech.com/vpn-privacy/the-worlds-most-surveilled-cities/> accessed 22 January 2025.

44 Ibid.

45 *Lambert and Others v. France* [2015] ECtHR [GC] 46043/14

46 *Osman v. the United Kingdom* [1998] ECtHR [GC] 23452/94.

47 Margaret Hu, 'Small Data Surveillance v Big Data Cybersurveillance' (2015) 42 Pepp L Rev 773.

48 Irmak Erdoğan, 'Algorithmic Suspicion in the Era of Predictive Policing' in Georg Borges and Christoph Sorge (eds), *Law and Technology in a Global Digital Society* (Springer 2022) 89.

The digital mass surveillance contributes to the protection, defence, and promotion of people against human exploitation and trafficking.[49] States employ internet-based digital methods to identify traffickers.[50] The use of digital technologies, including the tracking of digital traffic or the application of facial recognition systems that evaluate photographic and video evidence within the digital realm, are systematic instruments of digital mass surveillance.[51] Despite the ethical dilemmas and civil rights[52] objections to the effectiveness of these systematic instruments and facial recognition method,[53] from a utilitarian viewpoint, there are potentials to achieve pertaining to crime management and deterrence.[54] The internet, functioning as an instrument of digital mass surveillance, has enabled perpetrators to reach their target population through online profiles.[55] Social media has the potential to greatly enhance the mechanisms of sexual exploitation by employing strategies that coerce individuals into unconsented prostitution. The lover-boy tactic represents a calculated approach used online to manipulate isolated individuals, often focusing on their socioeconomic weaknesses.[56] The digital revolution also has significantly improved labour efficiency and generated opportunities for supply and demand;[57] however, it has also exposed individuals to exploitation through deceptive online job advertisements and social media

49 Saba Demeke, 'A Human Rights-Based Approach for Effective Criminal Justice Response to Human Trafficking' (2024) 9 Intl J Humanitarian Action 1.

50 United Nations Office on Drugs and Crime, 'Using the Power of Technology to Help Victims of Human Trafficking' <https://www.unodc.org/unodc/frontpage/2022/July/using-the-power-of-technology-to-help-victims-of-human-trafficking.html> accessed 01 February 2025.

51 Inter-Agency Coordination Group against Trafficking of Persons, 'Human Trafficking and Technology: Trends, Challenges and Opportunities' <https://icat.un.org/sites/g/files/tmzbdl461/files/human_trafficking_and_technology_trends_challenges_and_opportunities_web.pdf> accessed 01 February 2025.

52 For civil rights debates see: Clare Garvie, Alvaro Bedoya and Jonathan Frankle, *The Perpetual Line-Up: Unregulated Police Face Recognition in America* (Center on Privacy and Technology 2016).

53 Bischoff (n 38).

54 Eric El Piza and others, 'CCTV Surveillance for Crime Prevention: A40-year Systematic Review with Meta-Analysis' (2019) 18(1) Criminology & Public Policy 135; Amanda L. Thomas and others 'The Internationalisation of CCTV Surveillance: Effects on Crime and Implications for Emerging Technologies' (2022) 46(1) International Journal of Comparative and Applied Criminal Justice 81.

55 Europol Operations Directorate, 'The Challenges of Countering Human Trafficking in the Digital Era' (18 October 2020) <https://www.europol.europa.eu/media-press/newsroom/news/challenges-of-countering-human-trafficking-in-digital-era> accessed 12 February 2025.

56 Xavier L'Hoiry, Alessandro Moretti and Georgios A. Antonopoulos, 'Human Trafficking, Sexual Exploitation and Digital Technologies' (2024) 27 Trends in Organized Crime 1.

57 Claudia Roda and Susan Perry, *Human Rights and Digital Technology* (Palgrave 2017) 174.

platforms.[58] Labour exploitation accounts for a significant portion of global human trafficking cases;[59] nevertheless, it is addressed through international soft-law frameworks.[60] Using data gathered from electronic environment—the procurement of digital evidence—facilitates the development of novel legal procedures and practices, enhances the identification of offenders of human exploitation, and strengthens initiatives aimed at safeguarding human rights.[61] The boundless attributes of the digital realm, accessibility at any moment and from any place, offer initiatives for crime prevention with the improved speed and heightened efficiency of reaching to evidences.[62] The implementation of digital mass surveillance and digital evidence streamlines the process of expediting the attainment of justice.[63]

The discussion surrounding digital mass surveillance exceeds mere state institutions; individuals and organisations alike may find themselves entangled in the complex array of risks directed to their personality that accompany this phenomenon. The practice of digital mass surveillance, primarily conducted by private entities for security reasons, raises a term that captures the exploitation of people and their rights within the digital realm—digital colonialism. Digital colonialism reflects historical patterns of human exploitation, emerging through corporations that impose digital dominance over communities, often can be described as the capitalist gaze of digital surveillance.[64] The reliance on digital technologies and the imposition of control without the explicit consent of individuals, coupled with the manipulation of personal data by foreign internet service providers and technology firms, innate transnational human rights concerns.[65] In numerous African nations, the practices of digital mass surveillance,

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58 Council of Europe, *Online and Technology - Facilitated Trafficking in Human Beings* (Council of Europe 2022) 35.

59 Council of Europe, 'Trafficking for the Purpose of Labour Exploitation: New Online Training Module' (18 November 2021) <https://www.coe.int/en/web/belgrade/-/trafficking-for-the-purpose-of-labour-exploitation-new-online-training-module> accessed 10 March 2025.

60 Letizia Palumbo, *Taking Vulnerabilities to Labour Exploitation Seriously* (Springer, 2024) 34.

61 Isabella Chen and Celeste Tortosa, 'The Use of Digital Evidence in Human Trafficking Investigations' 14 (2020) Anti-Trafficking Review 124.

62 Council of Europe (n 53).

63 Yulia Razmetaeva and Sergiy Razmetaev, 'Justice in the Digital Age: Technological Solutions, Hidden Threats and Enticing Opportunities' (2021) 4(2) Access to Justice in Eastern Europe 104.

64 For details on capitalism and surveillance see: Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Profile 2019).

65 For more detail about digital slavery see: Mick Chisnall, 'Digital Slavery, Time for Abolition?' (2020) 41(5) Policy Studies 488; Michael Kwet, 'Digital Colonialism: US Empire and the New Imperialism in the Global South' (2019) 60(4) Race & Class (2019) 3; Barbara Arneil 'Colonialism versus Imperialism' (2024) 5(1) Political Theory 146.

frequently orchestrated by Chinese enterprises, illustrate a scenario where the oversight of African populations is not conducted by their own people.[66] In the interim, recent research evaluations indicate that the implementation of digital mass surveillance in Kenya does not significantly contribute to a decrease in crime rates.[67] Advocating for liberation from digital suppression is a newly adapted-fundamental human rights imperative. Amid ongoing discourse regarding the exploitation of individuals and the commodification of humanity within the digital realm, one can engage in an exploration of the complex, multifaceted relationships that underpin these phenomena. On one side, there exists digital mass surveillance, a mechanism that can facilitate combating human exploitation; on the other, the digital realm serves as a primary instrument for such exploitation through various multilateral actors and digital colonialism.

Despite the varied national strategies employed by countries, the interplay of digital mass surveillance, preventing crime, human exploitation and trafficking, and human rights reveals a complex duality that highlights both potential benefits and significant risks.[68] The discourse is propelled by this duality, yet it underlines the necessity for a harmonious balance approach in the realms of laws, policies, and practices of digital mass surveillance.

4. Construction of Harmonious Balance

Comprising a diverse array of philosophical, ethical, cultural, and spiritual traditions that have developed over millennia articulates the principles of harmony and balance. The presence of duality is unavoidable; however, the harmonious existence of fluid dualities is of paramount importance in reaching harmony.[69] The dynamic structure of harmony necessitates accepting the coexistence of forces that influence each other and are characterised by variability, resulting in a balance that reflects the essence of reality. To achieve balance with the understanding that the material realm's facets or concerns may display duality when compared to the inherent dignity and of human existence, one must consider the notion of harmonious balance, which encapsulates the paradoxical unity of opposing forces.[70] The interaction of the distinguishing duality through

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66 Danielle Coleman, 'Digital Colonialism, Digital Colonialism: The 21st Century Scramble for Africa through the Extraction and Control of User Data and the Limitations of Data Protection Laws' 24 (2019) Michigan Journal of Race and Law 417.

67 Njeri Wangari, 'In Africa's First 'Safe City,' Surveillance Reigns'' *Coda Story* (26 November 2024) <https://www.codastory.com/authoritarian-tech/africa-surveillance-china-magnum/> accessed 29 January 2025.

68 Ibid.

69 See Fei Xiaotong, *Globalization and Cultural Self-Awareness* (2015 Springer).

70 For more detail about the idea of the opposing forces and unity see: Tsung-I Dow, 'Harmonious Balance: The Ultimate Phenomenon of Life Experience, a Confucian Attempt and Approach'

dynamic interplay produces a state of balance that harmonises existence and transformation in the world.[71]

The digital mass surveillance and human rights relationship reveals a complex connection that may, in certain circumstances, be characterized by conflicting elements that highlight the inherent imbalance between multifaceted factors. The interplay between digital mass surveillance, the deterrence of crime, the imperative to protect individuals from exploitation, and the commitment to uphold human rights can be characterised as a double-edged sword. Remaining inside the borders of applying the digital mass surveillance, respecting and protecting human rights at the same time has the potential to augment the efficacy and harmonisation questions.

It is neither rational nor suitable to embrace an entirely rejectionist position concerning the opposite ends of the digital mass surveillance and human rights in question. The attainment of a balance, coupled with the policies, represents the most logical strategy for harmonising the evolving landscape shaped by the internet, information communication technologies, and digitalisation. Establishing a compatible harmonious balance have the potential to respect individual rights while simultaneously addressing state interests. Rather than viewing one concept as superseding the other, it is more practical to recognise that the frameworks governing digital mass surveillance and safeguarding human rights can coexist in a balanced harmony. Given the inherently dynamic nature of both phenomena, there exists an opportunity for continuous adaptation that can effectively mitigate their potential divergences.[72]

To achieve a harmonious balance, a precise knowledge of digital mass surveillance must emphasise its critical function in a democracy and should be employed just as a last resort when essential. It is essential to achieve a re-evaluation of personal liberties and surveillance at every stage of the implementation process that remains transparent to avert any potential violations within the notions of legality, necessity, proportionality and transparency thereby ensuring a measured approach with a clear timeframe and objectivity.[73] Mass surveillance must be a method wherein the legal framework is explicitly regulated for all its steps (legality), adopted to fulfil a certain purpose (necessity) by ensuring a proportionality between the purpose and individual rights (proportionality). The

in Anna-Teresa Tymieniecka (eds) *Phenomenology/Ontopoiesis Retrieving Geo-cosmic Horizons of Antiquity. Analecta Husserliana* (Springer, 2011) 645.

71 Ibid.

72 See Mamoona Asghar, et al., 'Visual Surveillance Within the EU General Data Protection Regulation: A Technology Perspective,' (2019) 7 IEEE Access 111709-111726.

73 See David Wright, Michael Friedewald and Raphael Gellert, 'Developing And Testing A Surveillance Impact Assessment Methodology' (2015) 5 (1) International Data Privacy Law 40-53.

mass surveillance must be in maximum openness and accessibility throughout the process (transparency). executed within a reasonable and defined timeframe (timeframe), and wherein the actions and their oversight are grounded in explicit criteria (objectivity).

The interaction between security and human rights must be evaluated at every stage of digital mass surveillance. Importantly, organisations -be they private or governmental- utilising digital mass surveillance for security purposes must embrace a perspective that highlights transparency, accountability, and, most critically, the essential rights of all individuals within a sustainable security framework.[74] Sustainable security advocates for the formulation of a security framework through the attainment of the Sustainable Development Goals (SDGs) 2030 Article 16.[75] The objectives of SDGs 2030 Article 16 necessitate a dedication to safeguarding human rights while tackling security issues, establishing effective, accountable and inclusive institutions at all levels, and secure institutions grounded on the rule of law, and guaranteeing equitable access to justice. A through sustainable security strategy evaluated within the framework of human rights law and practices in alignment with the rule of law to reach a harmonious balance must consistently upheld.[76]

The construction of harmonious balance also rests upon the policies of detection, investigation, and execution.[77] Detection and investigation of internet activities, cryptocurrency transactions, and file sharing, are all vital for uncovering criminal patterns and safeguarding security. The current foremost challenge is the digital evidence. Non-discrimination and right to equality before law standards are upheld to establish veracity of digital data-evidence acquired via digital mass surveillance. The minimum essential guarantees of the right to a fair trial must be implemented in the digital sphere in relation to digital mass surveillance and human rights [78] The standards for the acceptance of digital evidence may include being in compliance with the law, collecting and analysing digital evidence in a manner that is fair, and being necessary for a democratic society. Additional requirements may encompass the capacity to challenge the reliability of digital evidence and particular regulations delineating the conditions

74 Inter-Agency Coordination Group against Trafficking of Persons (n 46).

75 Fiona de Londras, 'Sustainable Security' in Dapo Akande and other (eds) *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment* (Oxford 2020) 108.

76 See Finn Kjaerulf and Rodrigo Barahona, 'Preventing Violence And Reinforcing Human Security: A Rights-Based Framework For Top-Down And Bottom-Up Action' Pan American Journal Of Public Health (2010) 27(5) 382-395.

77 Council of Europe (n 53).

78 Radina Stoykova, 'The Right to a Fair Trial as a Conceptual Framework for Digital Evidence Rules in Criminal Investigations' (2023) 49 Computer Law & Security Review 105801 <https://doi.org/10.1016/j.clsr.2023.105801> accessed 22 March 2025.

under which authorities may conduct digital mass surveillance.[79] The execution policy encompasses collaboration and training. Efficiency is imperative for actors to collaborate with independent human rights NGOs that operate within the parameters of their national requirements during the phase of cooperation. Global collaboration ought to be harnessed to advance this essential objective. Appropriate training initiatives, particularly in the realm of digital human rights law, can ensure that all parties remain informed about the evolving landscape of the digital era and grasp the complexities of the digital domain and combating the digital divide,[80] fostering digital literacy,[81] encouraging digital activism.[82] These three concepts are interrelated. Deficiencies stemming from the use of digital technologies—digital divide— and the requisite knowledge and comprehension to interpret and employ digitised content and digital tools—collectively referred to as digital literacy—will produce adverse effects. This condition ultimately jeopardises engagement with civil society or the involvement of political and social events online, which constitutes digital activism.[83] In this regard, the requisite strategy to guarantee accountability in the digital realm must involve the governance of the multi-stakeholder digital framework, in which various entities and stakeholders, such as technology firms, governmental bodies, and individuals, share accountability for digital actions.

In order to establish a harmonious balance in cyberspace, the principles of human rights law, particularly those pertaining to the obligations of states, must be adhered to.[84] States are obligated to uphold human rights also within the digital realm, particularly in relation to their digital sovereignty,[85] and states can

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79 For details about right to fair trial see: Council of Europe, 'Guide on Article 6 of the European Convention on Human Rights Right to a Fair Trial (Criminal Limb)' (31 December 2019) <https://rm.coe.int/1680304c4e> accessed 22 March 2025.

80 Cynthia K. Sanders and Edward Scanlon, 'The Digital Divide Is a Human Rights Issue: Advancing Social Inclusion Through Social Work Advocacy' (2021) 6(2) Journal of Human Rights and Social Work 130.

81 See Pritika Reddy, Bibhya Sharma, and Kaylash Chaudhary, 'Digital Literacy: A Review of Literature' (2020) 11 International Journal of Technoethics 65-94.

82 See Anne Kaun and Julie Uldam,'Digital Activism: After The Hype' (2018) 20 New Media & Society 2099-2106.

83 Bruce Mutsvairo, 'Dovetailing Desires for Democracy with New ICTS' Potentiality as Platform for Activism' in Bruce Mutsvairo (eds) *Digital Activism in The Social Media Era* (Palgrave 2023) 3.

84 The White House*, International Strategy for Cyberspace: Prosperity, Security, and Openness in a Networked World* (The White House 2011) 9.

85 United Nations Human Rights Council, 'Report of the United Nations High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism UN Doc. A/HRC/13/36' (22 January 2010) <https://documents.un.org/doc/undoc/gen/g10/104/42/pdf/g1010442.pdf> accessed 10 March 2025.

also be deemed responsible for human rights violations that take place beyond their borders.[86] UN accepts that: It would be unconscionable to permit a state to violate human rights, e.g. civil and political rights on another state's territory.[87]

Accountability should be understood in a comprehensive manner and the imperative to uphold human rights transcends conventional governmental entities, as private enterprises increasingly design and oversee technological frameworks.[88] Governments may engage private entities to circumvent their obligations, thus enabling indirect monitoring and acquisition of personal data, which ultimately infringes upon individual rights. Private enterprises frequently engage in partnerships with governmental bodies in the realm of digital mass surveillance initiatives. Social media platforms function as mechanisms for the digital monitoring of individuals, while simultaneously generating revenue for the private entities that manage these platforms and promoting financial inclusion within the context of digital mass surveillance.[89]

Collaborative efforts among institutions and the equitable distribution of responsibilities are crucial for the protection of human rights as articulated in Article 30 of Sustainable Development Goals (SDGs) 2030. The SDGs 2030 pertains to the institutional reforms to be executed, engaging all actors in the processes of implementation and monitoring.[90] Digital rights encompass the creation of multi-stakeholder accountability that aligns with human rights and the sustainability goals of SDGs 2030. According to SDGs 2030, institutional collaboration in the execution of programs for sustainable security necessitates cooperation among all to respect, protect, and fulfil human rights.

In the accountability within the realm of digital mass surveillance both the sovereign powers of the state and the non-state actors-private business

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86 Vassilis P. Tzevelekos, 'Reconstructing the Effective Control Criteria in Extraterritional Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility' 39 (2015) Michigan Journal of International Law 146.

87 *Sergio Euben Lopez Burgos v. Uruguay* [1981] United Nations Human Rights Committee R.12/52, U.N. Doc. Supp. No. 40 (A/36/40).

88 Office of the United Nations High Commissioner for Human Rights, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (UN Human Rights Office 2012) <https://www.ohchr.org/sites/default/files/Documents/Publications/HR.PUB.12.2_En.pdf> accessed 10 March 2025.

89 For details about financial inclusion see: Albérico M. Rosário and Joana Dias, 'Marketing Strategies on Social Media Platforms' (2023) 19(1) International Journal of E-Business Research (IJEBR); Aaron Martin, 'Mobile Money Platform Surveillance' (2019) 17(1/2) Platform Surveillance 213-222.

90 The Danish Institute for Human Rights, 'Human Rights and the 2030 Agenda for Sustainable Development' (2018) <https://www.humanrights.dk/sites/humanrights.dk/files/media/dokumenter/sdg/hr_and_2030_agenda-web_2018.pdf> accessed 12 February 2022.

enterprises must be acknowledging as significant stakeholders.[91] Embracing multi-stakeholder responsibly allows for a legal approach to rectify the accountability gap concerning human rights in the realm of digital mass surveillance. Adopting a contrary perspective and depending solely on state accountability could enable governments to manipulate private business entities as intermediaries, thereby infringing upon and denying individual liberties and rights. The accountability of governments to uphold human rights legislation must be agreeably aligned with the private entities engaged in the digital mass surveillance sector. This alignment aims to foster a collective sense of responsibility and promotes the realization of the SDGs 2030. Additionally, it seeks a harmonious balance for the advancement of the intersection of digital mass surveillance and accountability mechanisms.[92]

The Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law mandates that authorities that implement artificial intelligence (AI)-facilitated digital mass surveillance must consider human rights, democratic principles, the rule of law, and civic engagement.[93] The Convention highlights the importance of preventing illegal and arbitrary practices in AI-driven digital mass surveillance, serving as an important document that sets rules of accountability. The multi-stakeholder approach has been embraced in AI-driven digital mass surveillance, and the existence of the responsibilities of individuals, organisations, and entities has been acknowledged in this context.[94] In the Convention, the principle of transparency refers to the clarity of the AI system's purpose, structure, and actions as well as all of its processes.[95] Additionally, independent oversight is promoted as the presence of mechanisms that have been devised to monitor, evaluate, and guide the activities of AI systems, thereby ensuring a human rights-based oversight.[96]

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91 For extraterritorial obligations see: Helen McDermott, 'Application of the International Human Rights Law Framework' in Dapo Akande and other (eds) *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment* (Oxford 2020) 190.

92 Dorothée Baumann-Pauly and Lilach Trabelsi, 'Complementing Mandatory Human Rights Due Diligence: Using Multi-Stakeholder Initiatives to Define Human Rights Standards' (January 22, 2021) New York University Stern School of Business Research Paper Series <http://dx.doi.org/10.2139/ssrn.3810689> accessed 15 February 2025.

93 Council of Europe, 'Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law" 05.09.2024 <https://www.coe.int/en/web/artificial-intelligence/the-framework-convention-on-artificial-intelligence> accessed 23 July 2025, Article 5.

94 Ibid., Article 9.

95 Ibid., Article 8(57).

96 Ibid., Article 8(63).

The Convention also suggests effective, accessible remedies[97] and procedural safeguards[98] for people who have been impacted by human rights violations of the AI-driven digital mass surveillance. The Convention proposes measures to be accepted in the AI-driven digital mass surveillance in case of a threat to human rights, democracy, or the rule of law that may be evaluated as the balance between AI-supported mass digital surveillance and the protection of human rights. [99]

Conclusion

The growing ubiquity of digital mass surveillance, propelled by security concerns, is now associated with the digital exploitation and subjugation, both of which warrant recognition as infringements upon human rights. The digital age necessitates the cultivation of a society that is both globally interconnected and self-sufficient, alongside the establishment of productive partnerships among all participants in information and communication technology to protect digital human rights. The digital landscape and the intrinsic relationship between security and human rights can harness the capabilities of the digital age and engage in strategic actions utilising specific technological instruments. The legal consequences of human rights concerning digital mass surveillance, laden with controversy, oscillate between positive and negative viewpoints.

Choosing a stance or maintaining an unbiased perspective in these discussions can be quite challenging; nevertheless, serves as a framework to elucidate the intricate web of interconnections between benefits and risks across all dimensions of digital infrastructures, including the phenomenon of digital mass surveillance. The principles, such as legality, necessity proportionality and transparency hold significant importance in this context, mandating that surveillance measures must be indispensable for the prevention or investigation of serious crimes. Moreover, digital mass surveillance should be congruent with its designated objectives and the strategies utilised, guaranteeing that personal rights and freedoms are upheld.

Future dialogues will progressively centre on the intricacies of human rights, the expansion of digital mass surveillance, and, importantly, and the implications of digital colonisation, which have attracted considerable scrutiny from both governments and corporate entities. However, maintaining a relevant stance in the digital era by acknowledging that human rights are inherently inalienable and that the nature of colonisation can transform or wane over the course of human history is essential for justice.

A harmonious balanced constructed in towards the digital mass surveillance, human rights, and collaboration is crucial for a framework that alleviates the

97 Ibid., Article 14.

98 Ibid., Article 15.

99 Ibid., Article 16 (112).

uncertainties linked to digitalisation. The harmonious balance requires adopting sustainable security approach, policies of detection, investigation, and execution and multistakeholder accountability that positions both in digital mass surveillance and safeguarding human rights.

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BIG BROTHER ON DUTY: HUMAN RIGHTS CONCERNS ON BIOMETRIC FACIAL RECOGNITION FOR CRIME PREVENTION*

Büyük Birader İş Başında:
Suç Önleme Amaçlı Biyometrik Yüz Tanımaya İlişkin İnsan Hakları Sorunları

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Abstract

Smart technologies, which permeate every aspect of our daily lives today, not only detect criminals but also prevent them. Since the innovation of artificial intelligence (AI) and biometric technologies, there has been a significant increase in the recording and storage of personal data, particularly in terms of data protection. The use of the aforementioned technologies by law enforcement and other judicial authorities raises issues of interference with individuals' right to respect for private life under the European Convention on Human Rights. In the literature, this use has been studied in relation to the right to respect for private life, the right to the protection of personal data, the regime of interference, the criminal consequences of unlawful use, and the issue of compensation for the violation. However, the effects of the use of biometric-based facial recognition systems for the purpose of crime prevention on human rights have not been subject to theoretical and critical evaluation. This study raises a critical question as to whether these systems will lead to a future like the dystopia described in Orwell's 1984, and aims to examine if the states' processing of biometric data, primarily through facial recognition technologies (FRTs), is leading us towards a dystopia or a utopia where crimes are minimized. The study delves into both the shortcomings and efficiency of facial recognition systems by pointing out the related case law of the European Court of Human Rights (ECtHR).

Keywords: Facial recognition technology, biometric data, crime prevention, right to privacy, European Court of Human Rights

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Özet

Günlük hayatın her alanına nüfuz eden akıllı teknolojiler, günümüzde yalnızca suçluları tespit etmekle kalmayıp aynı zamanda önlemeye matuf olarak kullanılmaktadır. Yapay zekâ ve biyometrik teknolojilerin gelişmesiyle de özellikle veri koruma alanında kişisel verilerin kaydedilmesi ve saklanmasında önemli bir artış olmuştur. Mezkûr teknolojilerin kolluk ve diğer adli makamlar tarafından kullanımı, bireylerin Avrupa İnsan Hakları Sözleşmesi'nin özel hayata saygı hakkı kapsamında müdahaleleri gündeme getirmektedir. Nitekim literatürde bu kullanım özel hayata saygı hakkı ve daha özelde kişisel verilerin korunması hakkı bağlamında müdahale rejimi itibarıyla incelendiği gibi hukuka aykırı kullanımların suç tipi olarak karşılıkları veya ihlalin giderimine ilişkin tazminat meselesi ele alınmıştır. Fakat özellikle biyometrik tabanlı yüz tanıma sistemlerinin suçların önlemesi amaçlı olarak kullanımının insan hakları üzerindeki etkileri kuramsal ve kritik bir değerlendirmeye tabi tutulmuş değildir. Bu çalışma ise bu sistemlerin Orwell'ın 1984 distopyasındaki gibi bir geleceğe yol açıp açmadığına dair kritik bir soruyu gündeme getirmekte ve devletlerin başta yüz tanıma teknolojileri olmak üzere biyometrik verileri işlemesinin toplumu bir distopyaya mı yoksa suçların en aza indirildiği bir ütopyaya mı götürdüğünü incelemeyi amaçlamaktadır. Çalışma, Avrupa İnsan Hakları Mahkemesi'nin ilgili içtihadına işaret ederek yüz tanıma sistemlerinin hem eksikliklerini hem de etkililiğini ele almaktadır.

Anahtar Kelimeler: Yüz tanıma teknolojisi, biyometrik veri, suç önleme, özel hayat hakkı, Avrupa İnsan Hakları Mahkemesi

INTRODUCTION

"*The poster with the enormous face gazed from the wall. It was one of those pictures which are so contrived that the eyes follow you about when you move. BIG BROTHER IS WATCHING YOU*"[1]

Being vastly applicable in computer network login to e-commerce, driving licence to social security, border checkpoints, without any doubt the use of biometrics is a part of ordinary life. Yet, the tight connection between biometrics and commercial sphere and governmental sphere did not remain far away from law enforcement purposes to be utilized[2]. Imagine that you are going to work on

1 George Orwell, *1984* (Arcturus Publishing, 2013) 9.

2 *Jain et al* divided the applications of biometrics into three categories: commercial applications, including internet access, medical records management, and distance learning; governmental applications, including passport controls and ID cards; and lastly, forensic applications, including law enforcement purposes, such as terrorist identification, criminal investigation, and other purposes related to missing children and parenthood determination. See Anil K. Jain, Arun Ross, and Salil Prabhakar, 'An Introduction to Biometric Recognition' (2004) 14 (1) IEEE Transactions on Circuits and Systems for Video Technology 11; Another classification

an ordinary day. At the moment you walk down the street, the surveillance camera starts to watch and record you. Only the surveillance camera? The police officers wearing smart glasses quickly scan you and the hundreds of people waiting for the subway at the station. The glasses then send the captured images of these people to a facial recognition database, which then compares these images with those for whom an arrest warrant has been issued. Two police officers wearing smart glasses come near you and arrest not you but a couple of persons at the station. Interestingly, all of this occurred in just a few seconds.

Now turning back to the reality, 33 suspects have been detained in Zhengzhou, China, exactly the same way[3]. In China, public surveillance is everywhere, from banks to airports. By the end of 2018, there were 200 million surveillance monitors in China, and this number is expected to increase to approximately 626 million by 2020. The widespread application of FRT for the sake of public safety, prevention of crime or solving crime is not peculiar to China, considering emergence of FRT's use corresponded right after the 9/11 attacks in the USA with SmartGate technology[4]. Thus, *Feldstein*'s study, which collected data and findings from 176 countries, confirms that at least 75 of the sample countries actively apply AI technologies for the following purposes: 56 for smart/safe cities, 64 for facial recognition systems, and 52 for smart policing[5].

Until now, the legal academia's perspective on the processing of personal data has been diverse, ranging from advocating for a dystopian future with privacy concerns, to legal scholars who have shifted their focus to biometric or genetic data. These scholars appear to be satisfied with the use of DNA samples and the processing of personal data to solve serious crimes, as well as less serious ones such as theft or property damage. However, domestic authorities often

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as *Marciano* splendidly charted a surveillance network with the elements that are divided into five levels, respectively: (1) states over both citizens or non-citizens in the context of national security, public services, and welfare; (2) institutions over wards in the context of prisons, schools, and hospitals; (3) employers over employees in the context of the workplace; (4) corporations over consumers in the context of markets; (5) individuals over sub-individuals in the context of their homes. See Avi Marciano, 'Reframing biometric surveillance: from a means of inspection to a form of control' (2019) (21) Ethics and Information Technology 128.

3 Springwise, 'Chinese Police Adopt Smart Glass Technology' (2018) <https://www.springwise.com/chinese-police-adopt-smart-glass-technology/#:~:text=Using%20facial%20recognition%20technology%2C%20these,technology%20to%20assist%20police%20work> accessed 15 December 2024.

4 Marcus Smith and Monique Mann, 'Facial Recognition Technology and Potential for Bias and Discrimination' in Rita Matulionyte and Monika Zalnieriute (eds) *The Cambridge Handbook of Facial Recognition In The Modern State*, (Cambridge University Press, 2024) 88.

5 Steven Feldstein, 'The Global Expansion of AI Surveillance' (2019) Carnegie Endowment For International Peace <https://carnegieendowment.org/research/2019/09/the-global-expansion-of-ai-surveillance?lang=en> accessed 21 December 2024 7.

maintain the belief that the use of biometric technologies serves public safety and has no connection to privacy issues[6]. Police officers in Beijing's outskirts use smart glasses created by LLVision, which scan the faces of vehicles and car plates before sending the data to the central system. When a face matches the blacklist, it triggers a warning signal. Wu Fei, the chief executive of LLVisions asserts that China employs this technology for noble objectives. According to Wu Fei, this system ensures people's privacy is not a concern[7].

Contrary to governments' purposes of the use of FRT for law enforcement, the discussions and concerns surrounding FRT span a wide range, including privacy and data protection, discrimination, the lack of transparency regarding the purposes of processed data, and the potential chilling effect on freedom of expression, peaceful marches, and assembly[8]. For instance, one of the concerns pertains to a predictive crime forecasting algorithm known as PredPol. This algorithm gathers historical criminal events from departments into datasets, directing police attention towards high-risk areas. However, it also labels certain minority neighbourhoods, potentially leading to structurally biased policing in these areas[9]. Not only did the newly developed FRT tool raise concerns, but the European Court of Human Rights (ECtHR) also began considering FRTs due to similar concerns. This was evident in the case of *Glukhin v. Russia*, where facial recognition cameras detected the applicant, a peaceful solo demonstrator in the Moscow subway, and found him guilty of a minor offence for not informing public authorities about his demonstration. The ECtHR pursued its case law on peaceful demonstrations, concluding that there was no danger or major disruption of daily life, despite the absence of prior notification to public authorities[10]. Besides, the Court correlated the issue with FRTs and stated that intrusive use of FRT leads to a chilling effect on peaceful protests[11].

The ECtHR's jurisprudence traces these concerns to the use of biometric techniques. Since the landmark case of *S. and Marper v. the United Kingdom*,

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6 Rahime Erbas, 'DNA Databases For Criminal Justice System: A Pathway Towards Utopian or Dystopian Future?' (2022) (18) The Age of Human Rights Journal 331-332.

7 Pie Li and Cate Cadell, 'China Eyes 'Black Tech' To Boost Security As Parliament Meets' (Reuters, 2018) <https://www.reuters.com/article/technology/china-eyes-black-tech-to-boost-security-as-parliament-meets-idUSKBN1GM06M/> accessed 15 December 2024.

8 Rita Matulionyte and Monika Zalnieriute, *The Cambridge Handbook of Facial Recognition In The Modern State*, (eds) Rita Matulionyte and Monika Zalnieriute (Cambridge University Press, 2024) 1-2; Neil Shah, Nandish Bhagat and Manan Shah, 'Crime forecasting: a machine learning and computer vision approach to crime prediction and prevention' (2021) 4 (9) Visual Computing for Industry, Biomedicine, and Art 3.

9 Feldstein (n 4) 20.

10 *Glukhin v. Russia*, Application no. 11519/20, 4 July 2023, paras. 56-57.

11 *Glukhin v. Russia*, para. 88.

where the Strasbourg Court found a violation of art. 8 in terms of the proportionality requirement by emphasising that the applicants were not convicted of the accused offences and the risks of misuse or abuse of retained data without any time limits[12] both legal scholars have discussed the relationship between biometric data processing and human rights violations.

This study aims to highlight the concerns surrounding the use of FRTs in a concise manner, adopting a sceptical and Orwellian stance towards the use of biometric technologies. Rather than adopting a jurisdictional approach, I prefer to focus on the concerns that the ECtHR briefly outlines. This is because citizens from all over the world living in states that apply FRTs face the risk of becoming trapped in totalitarian superstates like Oceania in 1984. Since the study focuses on human rights violations, the ECtHR's interference analysis method serves as the most effective method. This can demonstrate that the second step of the method legitimately aims to prevent crimes and capture criminals, while the third step, known as proportionality, also recognises privacy, discrimination, and incorrect matches on biometric technologies as legitimate goals. Excluding a domestic-jurisdictional approach may lead to a strict reliance on domestic law for the definition of legality, thereby taking the legality of interference, the first step in the ECtHR's methodology, for granted. Furthermore, the study limits itself to considering only the biometric data processed with the aim of crime prevention, as the current trends in criminal justice and the use of biometric technologies tend to favor ex-ante prevention.

I. FACIAL RECOGNITION AS A NEW FORM OF BIOMETRICS

Compared to conventional identification methods such as ID, tokens, and passwords, biometric methods provide a much higher level of security and accuracy in terms of identification due to the uniqueness of biometric data[13]. In such, even though several international legal documents defined biometric data with different wordings so far, all of them basically focused on its uniqueness and special data processing technicality. While Convention for the protection of individuals with regard to the processing of personal data (Convention 108+) art. 6/1 does not provide a clear definition or align with the concept of "uniquely identifying a person", both the European Union's documents General Data Protection Regulation numbered 2016/679 (GDPR) art. 4/14 and Law Enforcement Directive numbered 2016/680 (LED) art. 3/13 precisely define:

> "personal data resulting from specific technical processing relating to the physical, physiological, or behavioural characteristics of a natural

12 *S and Marper v. The United Kingdom*, Applications nos. 30562/04 and 30566/04, 4 December 2008, para. 125.

13 Jain et al (n 1) 9.

> person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data".

Measurements of physiological and/or behavioural characteristics qualify as biometrics as long as they meet the requirements of universality, distinctiveness, permanence, and collectability[14].

Despite that genetic analysis on DNA, the shape of the ear and cartilaginous tissue of the pinna, hand geometry, scanning iris and retina, and storage of fingerprints on AFIS, and the captured images transfer via surveillance cameras to a facial recognition database[15] meet these criteria to be accepted as biometrics, the accuracy rates may vary on the applied biometric methods and condition of the data subject, whereas booking the fingerprints for a data subject who has no fingers or providing hand geometry for a signature from an illiterate person would apparently be infeasible[16].

As being one of the methods on biometrics FRT is widely recognized as a tool that utilizes

> "a technology that can detect and extract a human face from a digital image and then match this face against a database of pre-identified faces".

There are currently three distinct forms of this concept. To classify, first of all, one-to-one matching functions to match a human face extracted from a digital image against one pre-identified face, such as the smartphone's users are already familiar with unlocking the Face ID feature. Given that it is designed to only match a pre-identified face, one-to-one facial recognition does not pose a significant risk to the processing of additional personal data or the identification of potential unauthorized users[17]. Secondly, the one-to-many form of FRT excels in identifying a face from a crowd and matching it to an identity by comparing the captured face with a database containing thousands or even millions of faces.

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14 Jain et al (n 1) 4; O. Iloanusi, and C. Osuagwu, 'Biometric Recognition: Overview and Applications' (2008) 27 (2) Nigerian Journal of Technology 37.

15 Jain et al (n 1) 8-10.

16 About these methods see Oliver Chevella N. and Kumar, Sajeesh, 'Biometric Technology Towards Prevention of Medical Identity Theft: Physicians' Perceptions' (2016) 5 (1) Health Informatics- An International Journal 13-14; Iloanusi and Osuagwu (n 13) 38.

17 Neil Selwyn, Mark Andrejevic, Chris O'Neill, Xin Gu, and Gavin Smith, 'Facial Recognition Technology Key Issues and Emerging Concerns' in Rita Matulionyte and Monika Zalnieriute (eds) *The Cambridge Handbook of Facial Recognition In The Modern State* (Cambridge University Press, 2024) 11; Giulia Gabrielli, 'The Use of Facial Recognition Technologies in the Context of Peaceful Protest: The Risk of Mass Surveillance Practices and the Implications for the Protection of Human Rights' (2025) (16) European Journal of Risk Regulation 517.

Indeed, mass surveillance commonly employs the one-to-many form of FRT[18]. The third form of FRT, known as facial processing, is more adept at assessing an individual's characteristics such as gender, race, age, emotional state, personality type, and behavioural intentions. Indeed, societies that experienced the COVID-19 pandemic and recognized high body temperature and virality symptoms reflected on the face found facial scanning to be nothing extraordinary[19].

II. THE LEGITIMATE REASONING BEHIND APPLICATION OF BIOMETRICS IN LAW ENFORCEMENT

The premise behind the use of biometrics is the concept of deterrence, as the Strasbourg Court, in its *Van Der Velden v. The Netherlands* decision, succinctly summarized the purpose of the Dutch DNA Testing (Convicted Persons) Act, which facilitates the processing of DNA profiles for the prevention, detection, prosecution, and trial of criminal offences. The Court stated that the purpose of retaining DNA profiles is

> "to assist in the solving of crimes, including bringing their perpetrators to justice, since, with the help of the database, the police may be able to identify perpetrators of offences faster, and to contribute towards a lower rate of reoffending, since a person knowing that his or her DNA profile is included in a national database may dissuade him or her from committing further offences"[20].

This reasoning continues to be applied in subsequent cases. In one of the landmark cases involving the use of biometrics for law enforcement, the Grand Chamber emphasized in *S. and Marper v. The United Kingdom* that while the collection of DNA information aids in the detection of a suspected individual and the commission of a crime, its detention serves a broader purpose. In its own words, "its retention pursues the broader purpose of assisting in the identification of future offenders"[21].

In fact, this reasoning aligns with Bentham's panopticon, albeit with slight modifications; rather than focusing on prisoners, it instills in everyone in society the awareness of surveillance as a means of committing an offence. This axiomatic idea is realized by CCTV cameras in every corner of the streets and the crowds from airports, stations, squares, and malls, whereas there is no thorough criminological research[22] or official statistics to indicate the relationship

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18 Selwyn et al (n 16) 11-12.

19 Selwyn et al (n 16) 12.

20 *Van Der Velden v. The Netherlands*, paras. 6-7.

21 *S and Marper v. The United Kingdom*, para. 100.

22 *Shah et al* highlighted that algorithms like linear regression, additive regression, and decision

between public surveillance and crime rates. In an effort to mitigate the risk of oversurveillance, academic endeavours have proposed several solution. While some academics focused on criminogene, suggesting that instead of randomly selecting CCTV and FRT points, provinces should be selected based on factors such as public safety, hot spots with high crime rates, and the use of crime maps[23], others emphasized the importance of collaboration and consultation between neighbours and law enforcement authorities. Accordingly, unless structural measures such as lightening the area and hiring security staff are sufficient to prevent crimes, public surveillance should come to the fore.

To minimise the risk of oversurveillance, the application of these technologies could be allocated only for law enforcement agencies. Although not directly related to FRT, tracking phones via a stingray is one of the innovations applied for police surveillance purposes and is disputable in terms of the Fourth Amendment in the USA[24]. As the regulatory agency, the Federal Communications Commission intervened; the manufacturer of this technology turned out to follow these criteria: that the marketing and sale of the technology is only for the purpose of public safety to the local, state and federal extent and by law enforcement officials. Moreover, law enforcement agencies are subject to the authorisation of the FBI for acquisition and use of the device[25].

III. APPLYING A COST-BENEFIT APPROACH AND SEEK A FAIR BALANCE BETWEEN UTOPIA AND DYSTOPIA

A. Function Creep

The concerns from bias to discrimination are regarding the path towards a dystopia that stems from the phenomenon of "function creep"[26], which essentially implies that the function of FRT may be expanding beyond its original purpose of ensuring public safety. Qouting Smith and Mann

> "The roots of discrimination in policing do not stem entirely from the use of new technology in and of itself, but rather the institutions

stumps can be used to predict crime, and it's believed that machine learning techniques are good and precise for forecasting violent crime trends. See Shah et al (n 7) 3.

23 Nancy G. La Vigne, Samantha Lowry, Allison M. Dwyer, and Joshua A. Markman, *Using Public Surveillance Systems for Crime Control and Prevention* (Washington DC, The Urban Institute, 2011) 5.

24 Shah et al (n 7) 2.

25 Shah et al (n 7) 2-3.

26 For detailed information on this phenomenon, see Erbas (n 5) 339-340; for a semantic approach in detail, see Bert Jaap Koops, 'The Concept of Function Creep' (2021) 13 (1) Law, Innovation and Technology 30.

> of policing and the actions of police officers in discretionary and discriminatory enforcement of the law"[27].

implies the phenomenon as well as the narrative reflected in *Glukhin v. Russia* also implicitly hints at. In other words, bias or discrimination concerns does not inherently stem from the use of FRT; FRT is a tool that enables the repressive governments to use for their own goals to detect the ones being considered as a "threat" to them. However, the ECtHR's approach in *Glukhin v. Russia* is criticised for focussing too much on safeguards instead of FRT itself[28]. In reality, the safeguards come from concerns, which should also be carefully considered because of the imbalance of power between people who can use FRT and law enforcement agencies who can use it, as well as the possibility of misusing FRT[29]. Furthermore, procedural safeguards are not novel considering the ECtHR's juridprudence on biometric and genetic data protection, as the Court emphasized in *Gaughran v. The United Kingdom* that even though time limits for retention of such data fall within the margin of appreaciation of the state, it rested on certain safeguards for retention of data such as seriousness of offence, continuing need for retention, right to be deleted for personal data, data subject's age[30].

The Council of Europe's approach to mass surveillance is not rigid, as it does not inherently violate human rights, provided that its implementation aligns with the right to freedom of expression as well as the right to private life[31]. However, in the *Glukhin v. Russia* case, function creep primarily targeted political opponents, demonstrating a different approach from the conventional police approach. Rather than intervening with protestors and opponents, the police preferred gatherings to occur, capturing faces through face recognition technology. After a few days, the police initiated detentions, ultimately finding

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27 Smith and Mann (n 3) 92.

28 *Zalnierute* refers to the ECtHR's stance as "procedural fetishism" and believes it oversimplifies the use of FRT. She attempts to highlight a hypothetical scenario in which both authoritarian and liberal states would legally accept the use of FRT, provided that procedural safeguards are already in place. In the end, this acceptance may impose a solid risk of misleading the public's attention rather than focusing on substantial questions about FRT. See. Monika Zalnieriute, 'Facial recognition technologies---freedom of expression--right to private life--surveillance--protest--biometric data--data privacy European Convention on Human Rights' (2023) 117 (4) American Journal of International Law 695-698.

29 Selwyn et al (n 16) 13.

30 *Gaughran v. The United Kingdom*, Application no. 45245/15, 13 February 2020, paras. 94-98.

31 Saadet Yuksel, 'New Technologies through a Human Rights Lens: Reflecting on Personal Autonomy and Non-Discrimination' (2022) 10 (2) Journal of Penal Law and Criminology 290.

the individuals involved guilty for their participation in the gatherings[32]. Other concerns can be expanded to include instances of discrimination reflected in the media, such as the use of FRT by police and security agencies, which has led to instances of racialized discrimination in the USA, fishing, and blacklisting of ethnic and religious minorities, such as the Uyghur population in China, or as a means of silencing political opponents in Myanmar[33]. For instance, people express concerns about discrimination against the Uyghurs, citing their unique appearance compared to the Han-descendant majority in China and the ease with which discrimination can occur after recording them. In other words, the concern emerges on the basis that FRT will automatically confront and follow the Uyghurs at every step[34] considering that China's giant database called Integrated Joint Operations Platform (IJOP) where individuals' personal data collected from a wide array of data sources including CCTV cameras, wifi sniffers, FRT, banking and health data in Xinjiang residents in the meantime collect mandatory DNA samples aged 12-65 there[35].

Feldstein's observation on FRTs' use by the governments actually summarizes with one word "unsurprisingly" and keeps on

> "countries with authoritarian systems and low levels of political rights are investing heavily in AI surveillance techniques. Many governments in the Gulf, East Asia, and South/Central Asia are procuring advanced analytic systems, facial recognition cameras, and sophisticated monitoring capabilities"[36].

Considering the mind-boggling amount of data processed by FRTs, function creep leads to concerns about privacy owing to the unique characteristics of biometric data, which may consist of information related to the health and ethnic

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32 This narrative is based on the reflected case by Human Rights in Russia after a student participated in a rally in support of Russian opponent Navalnyy. See 'How the Russian state uses cameras against protesters' 17 January 2022 <https://en.ovdinfo.org/how-authorities-use-cameras-and-facial-recognition-against-protesters#1> accessed 20 January 2025. For detailed explanation about freedom of expression and right to assembly in accordance with international human rights law see. Gabrielli (n 17) 522 ff.

33 Selwyn et al (n 16) 13-14. For ethical challenges and bias on FRT see Pedro Robles, Daniel J. Mallinson, Eric Best, Cheryl Devaney, and Lauren Azevedo, 'Global Perspectives on Regulating Facial Recognition Technology Utilization for Criminal Justice Arrests' 5 (2025) Global Public Policy and Governance 189.

34 Paul Mozur, 'One Month, 500,000 Face Scans: How China Is Using A.I. to Profile a Minority' (New York Times, 2019) <https://www.nytimes.com/2019/04/14/technology/china-surveillance-artificial-intelligence-racial-profiling.html> accessed 17 January 2025.

35 Feldstein (n 4) 21.

36 Feldstein (n 4) 8.

origin of data subjects[37]. Using deep learning and facial analysis, it has up to a 96.6% correct matching rate in determining whether a person takes their pills or not or has a genetic disease such as DiGeorge syndrome[38].

B. Mismatches

The risk of discrimination may not only stem from function creep but also from the accuracy rates of the FRT itself, despite that FRT's correct matching rate increasing day by day in fascinating figures, such as in DeepFace, which was presented by Facebook in 2014 and had a 97.25 percent correct matching rate; the year after, FaceNet, which was presented by Google, had a 99.63 percent correct matching rate. In the meantime, using Google Photos, Facebook automatically tags people based on their recognition[39], and this increases the data and the possibility of correct matching rates even more. However the high mismatch rates are valid too as it reflected by an independent report of the United Kingdom's Metropolitan Police that FRTs error rates are nearly 81 percent, or Axon, USA police body camera supplier whose independent ethics board stated that "Face recognition technology is not currently reliable enough to ethically justify its use"[40]. In that, factors such as ageing, plastic surgery, cosmetics, image quality, a person's posture, and the camera's perspective can influence FRT's matching potential[41]. The age of the data subject affects the matching potential, as bone elasticity and shifts of children and adolescents who continue to grow up change more sharply. The National Institute of Standards and Technology's research on facial recognition algorithms also reveals a higher error rate when matching images of children.

Additionally, physical and environmental factors like sweaty or wet fingers, cuts on the fingers, or incomplete placement of the fingers on the censor briefly called noisy data can cause mismatches in biometric data[42]. A study on the Face2Rec smart glasses revealed that a data subject's angle too far from the camera could reduce image quality, and wearing glasses could potentially confuse the algorithm, thereby increasing the risk of mismatches[43].

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37 Matthias Pocs, 'Legally compatible design of future biometric systems for crime prevention' (2013) 26 (1-2) Innovation: The European Journal of Social Science Research 44.

38 Thales Group, 'Facial Recognition: Top 7 Trends (Tech, Vendors, Markets, Use Cases and Latest News)' (2018) <https://www.thalesgroup.com/en/markets/digital-identity-and-security/government/biometrics/facial-recognition> accessed 20 January 2025.

39 Thales Group (n 37).

40 Feldstein (n 4) 19.

41 Interpol, 'Facial Recognition' (2020) <https://www.interpol.int/How-we-work/Forensics/Facial-Recognition.> accessed 20 January 2025 1; Smith and Mann (n 3) 89.

42 Jain et al (n 1) 6-14.

43 Gabriella A. Mayorga, Xuan Do, and Vahid Heydari, 'Using Smart Glasses for Facial Recognition' 15 (4) (2019) American Journal of Undergraduate Research 32.

In addition to physical and situational factors, the development of FRTs and the data they rely on raises concerns about potential racial discrimination against people of color. For example, the number of Black and Latino adolescents involved in juvenile criminal proceedings increased significantly in 2017. In fact, the Black adolescent rate is 15 times higher[44]. In 2017, Apple's Face ID faced criticism in China for its inability to distinguish Chinese faces[45]. Simultaneously, the police's use of facial recognition systems in Cardiff during the Champions League Final led to the incorrect detection of approximately 2000 people as suspects[46]. Additionally, the 2019 report from the National Institute of Standards and Technology revealed that the FRT's accuracy rates for African American and Asian faces are significantly low, resulting in a misidentification rate that ranges from 10 to 100 times higher[47]. FRTs' mismatching potential is affected by intersectionality as well, where the scanned picture belongs to women from minority groups as it emphasized that "the darker the skin, the more errors arise—up to nearly 35 percent for images of darker skinned women"[48].

This, of course, not only distorts the credibility of the FRT, but also poses a risk to the right to presumption and the right to liberty. The risk of how criminology's efforts by Lombroso in 19th-century people are based on metricising and pointing out visual markers of criminals[49]. FRTs contain such threat in the 21st century on the people the FRTs algorithm does not develop enough on accuracy. As one of the cases reflected by media shows, a theft suspect's image was recorded via CCTV camera. However, there was no match in the facial recognition database. The competent officer for the facial recognition system likened the suspect to a celebrity and uploaded the high-resolution picture of the celebrity from Google Images to the database. In this manner, the system established a match, leading to the arrest of the suspect[50]. This implies that, even in the absence of a match in the facial recognition database, the system may utilize a similar picture, someone else's picture, or a picture from Facebook. Should there be a potential mismatch, the individual may face arrest merely for resembling someone else. In fact, when a match is provided correctly, this does not result in disregarding

44 Joseph Goldstein and Ali Watkins, 'She Was Arrested at 14 Then Her Photo Went to a Facial Recognition Database' (2019) <https://www.nytimes.com/2019/08/01/nyregion/nypd-facial-recognition-children-teenagers.html.> accessed 15 January 2025.

45 Thales Group (n 37).

46 Ross Kelly, 'Facial Recognition Technology: Dystopia or Hysteria?' (2019) <https://digit.fyi/facial-recognition-technology-dystopia-or-hysteria/> accessed 17 January 2025.

47 Smith and Mann (n 3) 91.

48 Feldstein (n 4) 19.

49 Mareile Kaufmann and Maja Vestad, 'Biology and Criminology: Data Practices and the Creation of Anatomic and Genomic Body 'Types' (2023) 31 (4) Critical Criminology 1219.

50 Clare Garvie, 'Garbage In Garbage Out: Face Recognition on Flawed Data' (2019) <https://www.flawedfacedata.com/> accessed 18 January 2025.

the presumption of innocence. While what the match actually means is that one belongs to a certain face in the database, and other evidence should be corroborated with as well to solve the crime and convict the defendant[51].

Human rights activists have made several attempts to prohibit the use of FRT due to the aforementioned concerns. For instance, in London, they have argued that installing surveillance cameras and facial recognition systems in public spaces is both intrusive and dangerous for pedestrians. So much so that a passerby who covered his face in front of the camera has faced up with police intervention and been fined £90[52]. In the same vein, Amnesty International AI and human rights researcher emphasised,

> "Facial recognition risks being weaponised by law enforcement against marginalised communities around the world. From New Delhi to New York, this invasive technology turns our identities against us and undermines human rights"[53].

These efforts have also been successful in some parts of the world, such as San Francisco, where the prohibition of FRT stems from concerns that it interferes with civil rights, exacerbates racial discrimination, and jeopardizes the freedom to live without government monitoring[54].

However, FRT proponents have their own optimistic arguments. Without any doubt, the use of FRT has created a massive market and commercial interest; the proponents apply a wide array of compelling benefits of the FRT to society. The reasoning on FRTs use for crime prevention is also nourishing by each state's dynamics on threats with the support of tech companies. For instance, Huawei advertising its smart city public safety technologies puts its lenses to regional security issues as *Feldstein* emphasized that

> "in the Middle East, its platforms can prevent "extremism"; in Latin America, safe cities enable governments to reduce crime; and that in North America, its technology will help the United States advance "counterextremism" programs"[55].

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51 Pocs (n 36) 40.

52 BBC News, 'Could Facial Recognition Cut Crime?' (2019) <https://www.bbc.co.uk/news/av/technology-48228677> accessed 12 January 2025.

53 The Guardian, 'Human rights group urges New York to ban police use of facial recognition' (2021) <https://www.theguardian.com/technology/2021/jan/25/new-york-facial-recognition-technology-police.> accessed 12 January 2025.

54 Amended In Committee 5/6/19 File No. 190110 Ordinance No. article 1/d. For detailed explanation about the situation in USA comparatively Canada, Germany, Italy, and France see Robles et al (n 33) 192 ff.

55 Feldstein (n 4) 17.

The pleaded benefits of FRT are mostly nourished by pro-social uses apart from prevention of crime or crime solving. One of the primary arguments in favor of FRT is its ability to locate individuals who are vulnerable, particularly those suffering from Alzheimer's, dementia, and similar diseases. The Thales Group, a reputable player in the electronics sector, praises this use. The reference picture provided by the missing person's family allows for a comparison with images in facial recognition databases, facilitating easy identification of the missing person[56]. *Atkinson*, aligned with Thales Group, portrays the FRT as more utopian than dystopian, depicting a Hollywood-style scenario where police officers check the child's family-provided picture in a national database for a positive match. The facial recognition system detects the child sitting near the kidnapper as he passes the tollbooth, triggering an automated signal to the police. Thirty miles ahead, police officers stop the car, capture the kidnapper, and deliver the child safely to their family[57].

Indeed, the San Diego County Sheriff's Department has implemented this argument, known as The Take Me Home Programme, for the benefit of the public, particularly those with autism, dementia, and various other personal situations. As a lost person is not able to speak or is unconscious, the police officer tries to detect whether they have any allergies, have a pacemaker or not, and reach family or relatives of the person by comparing their image with the images in the database and matching[58].

The pro-social uses could be even exemplified as "*They could also be used for navigation by giving them information about the distance"* considering wearable smart technologies[59]. The use of FRT in healthcare facilities provides societal benefits by maintaining socio-economic safety too. As social insurance systems are intrigued by the deterrent effect of biometrics, medical identity theft turns out to be devastating costs on the system prevalent in societies where healthcare services charge a high amount of money and the social insurance system is not inclusive for the underprivileged[60]. Rather than health insurance cards or social security numbers, biometric technologies seemed to be a resolvent for this crime

56 Thales Group (n 37).

57 Robert D. Atkinson, 'Facial-Recognition Technology: Closer to Utopia Than Dystopia' (2019) <https://www.nationalreview.com/2019/11/facial-recognition-technology-closer-to-utopia-than-dystopia/> accessed 12 January 2025.

58 Anthony M. Carter, 'Facing Reality: The Benefits and Challenges of Facial Recognition' Master Thesis, (California, 2018) <https://apps.dtic.mil/sti/trecms/pdf/AD1065272.pdf> accessed 10 February 2025.

59 Hermann Schweizer, 'Smart glasses: technology and applications' (2014) <https://vs.inf.ethz.ch/edu/FS2014/UCS/reports/HermannSchweizer_SmartGlassesTechnologyApplications_report.pdf> accessed 16 February 2025 4.

60 Oliver and Kumar (n 15) 11.

phenomenon[61]. Another pro-social benefit is the reduction of bureaucracy and paperwork, such as the common use of one-to-one FRT for electronic passport and visa checks at airports without waiting in long lines, or the use of face IDs for book borrowing from libraries and paying for canteens at campuses[62].

Given the extensive use of FRTs for pro-social purposes, crime prevention, and criminal capture, it's plausible that the rapid advancements in these technologies could overshadow concerns about mismatching rates. Indeed, technical developments on FRTs may easily handle the issues stemming from mismatching and its ramifications for minorities. Even at present, despite the limitations of existing technologies, states' enthusiasm for FRTs seems to indicate that concerns about function creep and mismatches do not deter them from implementing them. However, the concern about states misuse or abuse is not anything novel and could have been dated back to struggles in human rights history, even if the function creep mostly corresponds to developing technology cases. That's why the inevitable everyday use of FRTs paves the way for a dystopian approach to mass surveillance. To that extent, the authoritarian state's reluctance[63] toward freedoms would turn into an oxymoronic way, where people wanting to stand up for civil liberties against mass surveillance may not even enjoy freedom of assembly to form public opinion because of the chilling effect of FRTs.

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61 Oliver and Kumar (n 15) 14.

62 Selwyn et al (n 16) 16.

63 States' reluctance extends beyond the freedom of assembly to other spheres of human rights, as exemplified by a case from Turkiye, which highlights their positions against human rights. Code of Social Insurance and General Health Insurance numbered 5510 enables biometric identity verification. Article 67/3 of the Code stipulates that when the insured and those under their care apply to healthcare providers, they must undergo identity verification using biometric methods or documents, such as an identity card or driving license, unless an emergency occurs. Even in emergency situations, the verification process should continue after the emergency situation has passed. Yet, while the mentioned article was promulgated, there was no personal data protection code in Turkiye, and this resulted in a constitutional objection to the article before the Turkish Constitutional Court in terms of the interference being in accordance with the law. The Court ruled that the article did not violate the right to respect private and family life, citing the safety of biometric methods against unauthorized use and their ability to prevent corruption in public authorities given the inadequacy of existing methods for identity verification. However, the Court disregarded the fact that the data protection code was not available until 2016, which resulted in a lack of protection for personal data subjects. This was due to the absence of a clear provision for the data processing regime, the data subjects' rights, the controller's obligations, and the conditions of data transfer. Consequently, the processing of individuals' biometric data was not in accordance with the law, as a single article 67/3 was insufficient to protect the data subject and did not meet these quality of law requirements. See the judgment of Turkish Constitutional Court, E. 2014/180, K. 2015/30, 19.3.2015.

As Mayorga et al emphasized that;

> "As long as the technology is used to protect citizens and not abused, facial recognition can be extremely beneficial"[64].

The lesson derived from the history of human rights could fulfill this "as long as". As the protection of human rights is inherently enshrined in several human rights documents, including the European Human Rights Convention, which already covers biometric data protection, the 108+ Convention, the GDPR, and the LED. These documents conceptualize data processing principles such as processing lawfully and fairly, collecting for specified, explicit, and legitimate purposes, minimising data, keeping data up to date, adhering to the time limits principle, and implementing other appropriate safeguards unique to the special categories of personal data, including biometric and genetic data. Following safeguards in data processing can tame the state's tendency towards function creep.

CONCLUSION

Public surveillance and facial recognition systems, which have become a part of our lives, process biometric data of individuals at any time. These technologies enable rapid identification and arrest of criminals, thereby enhancing the efficiency of law enforcement and criminal justice mechanisms worldwide. Furthermore, these systems aim to deter individuals from committing crimes by making them aware of the ease of police capture, thereby providing long-term deterrence. However, evaluating the effectiveness of these systems in terms of deterrence is difficult due to the lack of criminological studies specifically focused on crime prevention. In such a way that it risks that the governments disguise their repressive purposes behind this apparent purpose of preventing crime, and the world turns into a panopticon, or even worse for both guilty and innocent people.

To mitigate the risks and concerns of privacy, discrimination, and function creep, several states and human rights activists have tackled the issue by prohibiting FRT. However, a complete ban is unfeasible, as it would deprive the prohibited areas of the opportunity to apprehend criminals. Rather than completely prohibiting the use of these systems, the ECtHR's stance on procedural safeguards and its outline of the principles of processing personal data could be an option for states to apply, including data minimization, processing for specific, explicit, and legitimate purposes, setting time limits, and providing guarantees to data subjects. Given that the age and race of an individual significantly influence the correct match rate of the FRTs algorithm, and that the images of children and adolescents may undergo significant changes as they mature, it is advisable to

[64] Mayorga et al (n 42) 24.

retain the data processed for these groups of people for a shorter period of time, in accordance with the principles of time limit and proportionality.

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ZUR RECHTSNATUR DES KAUTIONSVERSICHERUNGSVERTRAGES*

Kefalet Sigortası Sözleşmesinin Hukuki Niteliği Üzerine

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Die Zusammenfassung

Die Debatte über die Rechtsnatur des Kautionsversicherungsvertrags kann nicht als abgeschlossen betrachtet werden. Im Rahmen dieser Studie wird der Leser über die Meinungen informiert, dass der Kautionsversicherungsvertrag ein gemischter Typenverschmelzungsvertrag zugunsten eines Dritten ist, der die Merkmale eines Sicherungsvertrages aufweist.

Schlüsselbegriffe: Der Kautionsversicherungsvertrag, Der Sicherheitsvertrag, Der gemischter Typenverschmelzungsvertrag, Der Versicherungsvertrag

Özet

Kefalet sigortası sözleşmesinin hukuki niteliğine ilişkin tartışmalar son bulmuş sayılamaz. Bu çalışma kapsamında, kefalet sigortası sözleşmesinin teminat sözleşmesi özelliği gösteren, tam üçüncü kişi lehine, bileşik tipli karma teminat sözleşmesi olduğu yönündeki görüşler okuyucunun bilgisine sunulmuştur.

Anahtar Kelimler: Kefalet Sigortası Sözleşmesi, Teminat Sözleşmesi, Bileşik Tipli Karma Sözleşme, Sigorta Sözleşmesi

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

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I. Einleitung

Unter einem Kautionsversicherungsvertrag ist ein Vertrag zu verstehen, bei dem der Kautionsversicherer im Fall des Risikoeintritts die gesicherte Leistung an den Gläubiger erbringt und anschließend ein Regressrecht gegenüber der eigenen Klientel hat – in diesem Fall gegenüber dem Schuldner der gesicherten Verbindlichkeit.

Die Kautionsversicherung bietet in erster Linie dem Gläubiger eine Sicherheit gegen Risiken, die aus der Nichterfüllung einer geschuldeten Leistung resultieren. Das heißt, die Sicherungsfunktion des Vertrages steht im Vordergrund.

Darüber hinaus besteht eine weitere wirtschaftliche Funktion des Vertrages darin, dem Schuldner durch Kostenvorteile[1] beim Zugang zur Sicherheit die Möglichkeit zu geben, seine Kreditlinie bei Banken zu wahren und seine Eigenmittel nicht für Sicherheiten zu verbrauchen. Dadurch kann der Schuldner sowohl seine Kreditlinie als auch seine Eigenmittel entsprechend seinen unternehmerischen Zielen nutzen.[2]

Weitere Vorteile der Kautionsversicherung sind die Risikokontrolle durch eine breite Streuung des Risikos über Rückversicherer sowie die Möglichkeit zur branchenspezifischen Spezialisierung.[3]

II. Vertragsstruktur

Die Kautionsversicherung bedeutet ihrem Wesen nach die Absicherung der Erfüllung der vom Schuldner übernommenen Leistung oder den Ersatz des Schadens, der aus der Nichterfüllung der Leistung entsteht, durch den Kautionsversicherer.

Zweck der Kautionsversicherung ist die Sicherung der Schuld ihres Auftraggebers. Dafür wird zwischen dem Schuldner und dem Kautionsversicherer ein Kautionsversicherungsvertrag geschlossen. Durch diesen Vertrag verpflichtet sich der Kautionsversicherer, dem Schuldner Sicherheiten im Rahmen vertraglich festgelegter Deckungssummen zu gewähren. Der Schuldner verpflichtet sich seinerseits, dem Kautionsversicherer die vereinbarte Prämie zu zahlen. Für den Fall, dass der Schuldner die Erfüllung der Schuld von Kautionsversicherer in Anspruch nimmt oder – nach anderer Auffassung im Schrifttum[4] – der Schuldner seine Leistungsfähigkeit verliert, übernimmt der Kautionsversicherer die Haftung für die Erfüllung der gesicherten Leistung gegenüber dem Gläubiger. Je nach

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1 Thönissen S. F., *Versicherung von Bonitätsrisiken*, Mohr Siebeck Verlag, 2018, 53.

2 Kossen K, *Die Kautionsversicherung*, Peter Lang Verlag, 1996, 33.

3 Bodendiek C., *Die Kautionsversicherung*, 29–30, in: Hirschmann S. und Romeike F., Kreditversicherungen, Bank-Verlag Medien GmbH, 2005, 27–30.

4 Thomas S. und Dreher M., Der Kautionsversicherungsvertrag im System des Privatversicherungsrechts, 2007, VersR-Heft 16, 731-738, 732.

Vertragsinhalt kann der Kautionsversicherer persönlich für die Erfüllung der Leistung haften oder gegenüber dem Gläubiger im Rahmen einer Bürgschaft, Garantie oder sonstigen Haftung in Anspruch genommen werden.[5] Im Rahmen des Kautionsversicherungsvertrages behält sich der Kautionsversicherer das Rückgriffsrecht gegen den Schuldner vor.[6]

Wesentliche Bestandteile eines Kautionsversicherungsvertrages sind die Art und der Umfang der Deckung, zu der sich der Kautionsversicherer zugunsten des Gläubigers verpflichtet, sowie das rechtliche Ereignis, das die Haftung des Kautionsversicherers verursacht. Zu den zentralen Vertragsbestandteilen zählen ebenfalls die Höhe des Preises, den der Versicherungskunde bzw. die -kundin zu zahlen hat, und das Rückgriffsrecht des Kautionsversicherers gegen die ihn beauftragende Person.

III. Gerichtsentscheidungen und Literatur zum Thema

Die Kautionsversicherung ist hinsichtlich ihrer Rechtsnatur ein umstrittener Vertragstyp. Insbesondere in der deutschen Rechtsehre[7] wird diskutiert, ob es sich bei einem solchen Kontrakt um einen Versicherungsvertrag handelt. Diese Frage war ebenfalls in der angloamerikanischen Doktrin disputabel[8], doch hat die angloamerikanische Rechtsprechung[9] einen Konsens darüber erzielt, dass es sich nicht um einen Versicherungsvertrag handelt.

Hauptgrund für die Diskussionen über die Rechtsnatur des Vertrages in Lehre und Praxis ist das Rückgriffsrecht. Dieses beansprucht der Kautionsversicherer gegen die ihn beauftragende Person – nach Leistungserfüllung gegenüber dem Begünstigten im Fall der Risikoverwirklichung aus dem Kautionsversicherungsvertrag.

Von Relevanz ist, dass der deutsche Bundesgerichtshof (BGH) in einer seiner Entscheidungen[10] zu diesem Thema festgestellt hat, dass der

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5 Kemper Ulf G., *Die Rechtliche Natur der privaten Kredit- und Kautionsversicherungsverträge*, Shaker Verlag, 2020, 232.

6 Thomas S. und Dreher M., VersR 2007, 732.

7 Bei dem Vertrag handelt es sich um einen Versicherungsvertrag: v. Ammon G., Zur Rechtsnatur der Kautionsversicherung, 1966, ZVersWiss, 401-424, 414 ff.; Schneider S., Münchener Anwaltshandbuch Versicherungsrecht, C.H. Beck Verlag, 5. Aufl., 2022, § 29 Rn 8-9.; dass der Vertrag kein Versicherungsvertrag ist: Proske S., Die Kautionsversicherung in der Insolvenz des Unternehmers, 2006, ZIP, 1035-1041, 1036 ff.; Diskussionen sind zu finden unter Thönissen S.F., 210 ff.; Kossen, 65 ff.; Gärtner R., Die Zivilrechtliche Behandlung der Kautionsversicherung,1967, VersR-Heft 5 (A), 118-121, S. 118 ff.; Kemper Ulf G., 777 ff.

8 Morgan W.D., The History and Economics of Suretyship, Cornell Law Review (12-4), 1927, 496 ff.

9 Weil J.G. and Fritzinger A.P., Are Surety Agreements Insurance?, 26.03.2024, Cozen.com, <https://www.cozen.com/templates/media/files/weil_fritzinger_112713.pdf>.

10 BGH 6.7.2006 – IX ZR 121/05, VersR 2006.

Kautionsversicherungsvertrag eine Art Geschäftsbesorgungsvertrag (§§ 675 ff. BGB) im Rahmen des Insolvenzrechts ist. Andrerseits qualifizieren einige Forschende Kautionsverträge als Versicherungsverträge.[11]

A. Überprüfung im Rahmen des Versicherungsvertrages

Insbesondere in der deutschen Rechtslehre werden Kautionsversicherungsverträge in der Regel als Versicherungsverträge eingestuft.[12] Nach dieser Einordnung ist die Kautionsversicherung eine Schadenversicherung, die eintretende Sachschäden für den Fall einer Risikoverwirklichung versichert. Nach dieser Auffassung verpflichtet sich der Kautionsversicherer vertraglich, den spezifischen Geldbetrag zu zahlen, den der Versicherungsnehmer aufgrund seiner Zahlungsunfähigkeit seinem Geschäftspartner nicht bieten kann. Die Leistung aus der Kautionsversicherung anstelle der Zahlung des Versicherungsnehmers ist somit nicht die Erfüllung einer Hauptleistung. Vielmehr handelt es sich um eine monetäre Leistung, die auf den Grundlagen des Versicherungsvertragsrechts basiert.[13]

Nach der Auffassung, dass der Kautionsversicherungsvertrag ein Versicherungsvertrag sui generis ist, hat er zwei grundlegende Funktionen.[14] Die erste besteht darin, die Sicherheitsforderung des Versicherers durch Übernahme einer Sekurität zu erfüllen. Die zweite Funktion sieht vor, die versprochene Leistung im Fall des Risikoeintritts zu erbringen. In diesem Zusammenhang wird festgestellt, dass der Kautionsversicherungsvertrag das Ergebnis einer Kombination von Sicherheits- und Versicherungsverträgen ist.

Nach dieser Betrachtungsweise beinhaltet die Kautionsversicherung die Elemente, die ein Versicherungsvertrag enthalten sollte.[15] Im Rahmen des Kautionsversicherungsvertrages wird die Verpflichtung des Kautionsversicherers, die auf Bürgschaft gerichtet ist, nicht in eine Geschäftsbesorgung umgewandelt, sondern sie wirkt sich auf die Art der Leistung aus, die der Kautionsversicherer bei Eintritt des Risikos zu erbringen hat. Daher verleiht die Verpflichtung des Kautionsversicherers gegenüber der Bürgschaft dem Kautionsversicherungsvertrag den Charakter eines Geschäftsbesorgungsvertrages; der Vertrag sollte jedoch als Versicherungsvertrag eingestuft werden.[16] Demnach hat der Kautionsversicherer zwei Pflichten zu erfüllen: erstens die Hauptleistungspflicht des Versicherers zur

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11 Bodendiek C., 28; v. Ammon G., 433 ff.

12 Muschner J., HK-VVG, VVG § 16, 5. Aufl., Nomos Verlag, 2025, Rn. 13; Thomas S. und Dreher M, VersR 2007, 731.

13 Muschner J., HK-VVG, VVG § 16 Rn. 13.

14 Thomas S. und Dreher M, VersR 2007, 734; ausführliche Informationen zu dieser Stellungnahme sind zu finden unter Kemper Ulf G., 435 ff.

15 Thomas S. und Dreher M, VersR 2007, 734 ff.; Muschner J., HK-VVG, VVG § 16 Rn. 13.

16 Thomas S. und Dreher M, VersR 2007, 738.; ausführliche Informationen zu dieser Stellungnahme sind zu finden unter Kemper Ulf G., 436–437.

statischen Risikotragung im Rahmen von Versicherungsverträgen; zweitens die Hauptleistungspflicht, die bei Eintritt des Risikos zu erfüllen ist. Diese beiden Hauptleistungspflichten verleihen dem Kautionsversicherungsvertrag den Charakter eines Versicherungsvertrages. Da der Kautionsversicherungsvertrag ebenfalls das Element der Sicherheitsleistung enthält, wird festgestellt, dass gleichzeitig Aspekte eines Geschäftsbesorgungsvertrages gelten.

Durch die Bewertung des Risikos nach dem Gesetz der großen Zahlen steht nach vorgenannter Anschauung das Recht des Kautionsversicherers auf Forderungsübergang nicht der Bestimmung des Versicherungsbeitrages entgegen. Hinzu kommt, dass sich das Risiko durch einen Verlust der Leistungsfähigkeit des Versicherten realisiert und der Kautionsversicherer somit seine Verpflichtung erfüllt. Infolgedessen besteht das Rückgriffsrecht des Versicherers häufig nur auf theoretischer Ebene.[17]

Befürwortende der gegenteiligen Auffassung argumentieren, dass die für den Kautionsversicherungsvertrag gezahlte Summe nicht den Zweck hat, den Versicherungsschutz zu sichern. Dies begründen sie damit, dass der Kautionsversicherer nach der Erfüllung seiner Verpflichtung aus dem Kautionsversicherungsvertrag ein Rückgriffsrecht gegen seinen Kunden hat – im Gegensatz zur im Versicherungsvertrag erhobenen Prämie. Der Zweck der Prämie ist in erster Linie eine Zahlung für die Erbringung einer besonderen Dienstleistung.[18]

Im Rahmen des Kautionsversicherungsvertrages ist nach Leistungserfüllung das Rückgriffsrecht des Kautionsversicherers gegen seinen Kunden (Schuldner) dem Begriff der Versicherung fremd. Das Rückgriffsrecht des Kautionsversicherers gegen seinen Kunden und das Fehlen eines Risikotransfers im wirtschaftlichen Sinn[19] verhindern, dass der Kautionsversicherungsvertrag als Versicherungsvertrag qualifiziert werden kann.[20]

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17 Thomas S. und Dreher M, VersR 2007, 735.

18 Proske S., ZIP 2006, 1036.

19 Wirtschaftlich gesehen bedeutet das Fehlen eines Risikotransfers, dass der Versicherungsnehmer im Fall des Risikoeintritts weiterhin die finanzielle Last trägt. Bei klassischen Versicherungsverträgen überträgt der Versicherungsnehmer den bei Risikoeintritt entstehenden Schaden auf die Versicherungsgesellschaft – ein Risikotransfer findet statt. Das Risiko wird vom Versicherungsnehmer auf den Versicherer übertragen, und der Versicherer hat als Gegenleistung für die Übertragung dieses Risikos Anspruch auf eine Prämie. Im Rahmen des Kautionsversicherungsvertrages hat der Kautionsversicherer im Fall der Verwirklichung des Risikos ein Rückgriffsrecht gegen den Schuldner (der den Versicherer beauftragte) für die Aufwendungen, die für die Erfüllung der genannten Leistung nach Erfüllung der Leistung des Versicherers entstanden sind. Aufgrund dieses Rückgriffsrechts trägt der Schuldner im Fall des Risikoeintritts weiterhin die finanzielle Last. Von einem wirtschaftlichen Risikotransfer im Rahmen des Kautionsversicherungsvertrages kann daher nicht gesprochen werden.

20 Gärtner R., VersR 1967, 121; Proske S., ZIP 2006, 1036.

Nach einer anderen Auffassung wird davon ausgegangen, dass das durch den Kautionsversicherungsvertrag gedeckte Risiko der Interessensverlust des Gläubigers ist. In dieser Hinsicht sollte der Vertrag als Versicherung zugunsten einer anderen Person betrachtet werden – damit wird versucht, das Rückgriffsrecht des Kautionsversicherers gegen seinen Kunden mit dem Versicherungsvertrag in Übereinstimmung zu bringen.[21] Der Kautionsversicherungsvertrag wird jedoch nicht als Versicherungsvertrag eingestuft, da das Rückgriffsrecht des Kautionsversicherers gegen den Versicherungsnehmer im Versicherungsvertrag nicht existent ist.[22]

B. Überprüfung im Rahmen des Geschäftsbesorgungsvertrags

Nach einer Minderheitsmeinung in der deutschen Rechtslehre[23] ist ein Kautionsversicherungsvertrag als Geschäftsbesorgungsvertrag zu qualifizieren. Nach der herrschenden Meinung handelt es sich um einen Geschäftsbesorgungsvertrag, wenn eine „*selbständige Tätigkeit wirtschaftlichen Charakters im Interesse eines anderen innerhalb einer fremden wirtschaftlichen Interessensphäre vorgenommen wird*“.[24] Im Rahmen des Geschäftsbesorgungsvertrages besteht keine Verpflichtung, die Leistung ergebnisorientiert zu erbringen. Es ist notwendig und ausreichend, bei der Ausführung der Leistung Sorgfalt und Gewissenhaftigkeit walten zu lassen.[25]

Nach der Betrachtungsweise, die den Kautionsversicherungsvertrag als Geschäftsbesorgungsvertrag einstuft, ist die Leistung des Kautionsversicherers an den Gläubiger als Erbringung einer Leistung im Sinne eines Geschäftsbesorgungsvertrages anzusehen.[26]

Gegenstand der gegenüber dem Begünstigten im Rahmen des Kautionsversicherungsvertrages übernommenen Sicherheit ist nicht die Erbringung der Leistung des Auftraggebers, sondern die Erbringung der Leistung im Fall eines Risikoeintritts. Ebenso bestimmt sich die Art des Anspruchs des Begünstigten gegen den Kautionsversicherer nach der Art der vom Kautionsversicherer übernommenen Sekurität und dem Inhalt des gesicherten Schuldverhältnisses. Die übernommene Sicherheit kann der Art nach eine Bürgschaft sein, oder es

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21 Habicht H., *50 Jahre Hermes Kreditversicherungs-Aktiengesellschaft: ein Beitrag zur Geschichte der Kreditversicherung in Deutschland* 1917-1967, Privatdruck, 1967, 12. in Kemper, 438.

22 Ausführliche Informationen zum gleichen Thema sind zu finden unter Kemper Ulf G., 926–927.

23 Proske S., ZIP 2006, 1036 ff.

24 Brox H. und Walker H.D., SchuldR BT/Brox/Walker, 48. Aufl., C.H. Beck Verlag, 2024, § 29. Rn. 43.

25 Mansel H.P., *BGB § 675*, 19. Aufl., C.H. Beck Verlag, 2023 Rn. 9.

26 Kemper Ulf G., 778.

kann sich um die Ausführung eines vom Schuldner übernommenen Werkes handeln. Im erstgenannten Fall stellt das Forderungsrecht des Begünstigten eine Geldforderung im Rahmen der übernommenen Bürgschaft dar, während im letzten Fall das Forderungsrecht in der Fertigstellung des Werkes gemäß einem Werkvertrag besteht. Daher kann die Art der vom Kautionsversicherer gegenüber dem Begünstigten übernommenen Sicherheit nicht als Erbringung einer Leistung im Sinne des Geschäftsbesorgungsvertrages angesehen werden.

Nach der Auffassung, die den Kautionsversicherungsvertrag als Geschäftsbesorgungsvertrag einstuft, sollte die Leistung des Kautionsversicherers an den Begünstigten als Handeln im Interesse des Schuldners betrachtet werden, da dem Gläubiger eine Sicherheit geleistet wird.[27]

Bei einem Kautionsversicherungsvertrag stellt der Kautionsversicherer dem Gläubiger eine Sicherheit zur Verfügung. Die Sicherheit dient in erster Linie dem Schutz der Interessen des Gläubigers, dessen Forderungen gefährdet sind. Im Hinblick auf den Schuldner, der durch die Erbringung der Leistung an den Gläubiger von seiner Verpflichtung befreit wird, kann gesagt werden, dass das Element des Interesses indirekt realisiert wird. Im Rahmen der Kautionsversicherung kann jedoch aufgrund des Rückgriffsrechts des Kautionsversicherers gegen seinen Kunden (Schuldner) als Rekompens für die geleistete Sicherheit nicht von einem mittelbaren Vorteil für den Schuldner gesprochen werden.

Nach der Anschauung, die den Kautionsversicherungsvertrag als Geschäftsbesorgungsvertrag betrachtet, ist der Kautionsversicherungsvertrag seiner Natur nach mit der Bankbürgschaft identisch. Da die Lehre[28] die Bankbürgschaft als Geschäftsbesorgungsvertrag einstuft, sollte auch der Kautionsversicherungsvertrag, der wirtschaftlich demselben Zweck dient, als Geschäftsbesorgungsvertrag klassifiziert werden.[29]

Da der Kautionsversicherungsvertrag jedoch nicht die Erbringung einer Leistung zugunsten des Auftraggebers umfasst, kann der Kautionsversicherungsvertrag nicht als Geschäftsbesorgungsvertrag bewertet werden.

C. Gerichtsentscheidungen zum Thema

Gerichtsentscheidungen machen unterschiedliche Auffassungen zum Thema ‚Kautionsversicherungsvertrag' deutlich.[30]

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27 Kemper Ulf G., 778.

28 Heermann P., *MüKoBGB, BGB § 675*, 9. Aufl., C.H. Beck Verlag, 2023, Rn. 84.

29 Kemper Ulf G., 275.

30 BGH 6.7.2006 – IX ZR 121/05, VersR 2006 = ZIP 2006, 1781 = NZI 2006, 637; BGH 18.1.2007 – IX ZR 202/05, VersR 2007 = ZIP 2007, 543 = NZI 2007, 234; KG 4.6.2004 – 7 U 363/03, ZInsO 2004, 979 = KGR 2006, 871; BGH 25.4.1966 – II ZR 120/64, BGHZ 45, 223 (228 f.); BGH 8.4.2004 – III ZR 432/02, WM 2004, 2398 ff.; BGH 19.9.1985 – IX ZR 16/85, BGHZ 95, 375 (380 f.).

In einem seiner Urteile hat der BGH einen Kautionsversicherungsvertrag als Geschäftsbesorgungsvertrag eingestuft. In diesem Fall ging es um die Forderung eines Kautionsversicherers gegenüber der Insolvenzverwaltung für die nach dem Konkurs seines Kunden fälligen Prämien. Das Hauptproblem, mit dem sich der Gerichtshof befasste, war die Bestimmung der Rechtsnatur des Vertrages und der auf den Vertrag anwendbaren Rechtsnormen. Der Gerichtshof prüfte die Angelegenheit im Rahmen der Vorschriften des Insolvenzrechts.

In einem seiner Urteile[31] hat der BGH einen Kautionsversicherungsvertrag als Geschäftsbesorgungsvertrag eingestuft. In dem dem BGH vorliegenden Fall geht es um die Forderung eines Kautionsversicherers gegenüber der Insolvenzverwaltung für die nach dem Konkurs seines Kunden fälligen Prämien. Das Hauptproblem, mit dem sich der Gerichtshof befasst, ist die Bestimmung der Rechtsnatur des Vertrags und der auf den Vertrag anwendbaren Rechtsnormen. Der Gerichtshof prüfte die Angelegenheit im Rahmen der Vorschriften des Insolvenzrechts.

Festgestellt wurde, dass der Geschäftsbesorgungsvertrag mit der Eröffnung des Konkursverfahrens endete. Der Kautionsversicherer hatte demnach keinen Anspruch auf die Prämien, die nach Eröffnung des Konkursverfahrens aufgrund der Beendigung des Vertrages fällig wurden.

Der Gerichtshof merkte an, dass bei der Stellung von Sicherheiten für die Schulden des Kautionsversicherungskunden im Rahmen des Kautionsversicherungsvertrages der Schutz der Sicherheitenlimits des Schuldners bei den Banken und die Ausrichtung der Banksicherheitenlimits auf die kommerziellen Aktivitäten des Schuldners gewährleistet sind. Auf diese Weise wird das Element des Nutzens verwirklicht. Darüber hinaus ist die wirtschaftliche Funktion des Kautionsversicherungsvertrages und des Bankbürgschaftsvertrages ähnlich, weshalb der Kautionsversicherungsvertrag als Geschäftsbesorgungsvertrag eingestuft werden sollte.

Aufgrund des Rückgriffsrechts des Kautionsversicherers gegen seinen Kunden wurde in der Gerichtsentscheidung festgestellt, dass der Kautionsversicherer nicht auf die Verpflichtung des Kautionsversicherers zur Übernahme des Risikos hingewiesen werden kann, sodass der Vertrag nicht als Versicherungsvertrag eingestuft werden kann.

IV. Beurteilung des Vertrages im Rahmen des Privatrechtssystems

A. Einordnung als Sicherheitenvertrag

Der Begriff der Sicherheit kann als ein absolutes oder persönliches Recht definiert werden, das sich aus dem Misstrauen des Gläubigers in die Zahlungsfähigkeit und den Erfüllungswillen des Schuldners ergibt und dem Gläubiger für den Fall

[31] BGH 6.7.2006 – IX ZR 121/05, VersR 2006.

zur Verfügung gestellt wird, dass der Schuldner seinen Verpflichtungen nicht ordnungsgemäß nachkommt.

Unter einem Sicherheitenvertrag sind sämtliche Vereinbarungen zu verstehen, die eine Sicherungsfunktion darstellen. Bei einem Sicherheitenvertrag verpflichtet sich der Sicherheitengeber gegenüber dem Sicherheitennehmer zur Vornahme einer bestimmten Leistung oder zur Übertragung einer Sache.[32]

Bei der Kautionsversicherung handelt es sich um die Sicherung der sich aus dem Rechtsverhältnis zwischen Gläubiger und Schuldner ergebenden Schuld durch den Kautionsversicherer. In diesem Zusammenhang sollte der Kautionsversicherungsvertrag im Rahmen des Begriffs ‚Sicherheit' betrachtet werden.

Bei Sicherheitenverträgen wird der Vertrag im Wesentlichen zwischen dem Sicherheitengeber und dem Sicherheitennehmer geschlossen. Im Rahmen eines Kautionsversicherungsvertrages wird der Vertrag zwischen dem Kautionsversicherer und seinem Kunden (Schuldner) geschlossen. Der Gläubiger ist nicht Partei des Kautionsversicherungsvertrags. Das Element der Parteistellung, das dem Gläubiger ein Forderungsrecht im Sinne anderer Sicherheitenverträge einräumt, ist im Kautionsversicherungsvertrag nicht vorhanden. Das Recht des Gläubigers, den Kautionsversicherer in Anspruch zu nehmen, ergibt sich hingegen aus der Tatsache, dass der Kautionsversicherungsvertrag ein Vertrag zugunsten eines Dritten ist. Daher ist festzustellen, dass sich der Kautionsversicherungsvertrag in Bezug auf die Vertragsparteien von den klassischen Sicherheitenverträgen unterscheidet, das Recht des Schuldners auf Inanspruchnahme des Sicherheitengebers jedoch aufgrund der Tatsache, dass der Vertrag zugunsten eines Dritten geschlossen wird, erhalten bleibt.

B. Einstufung als vollständigen Vertrag zugunsten eines Dritten

In der Regel hat das Schuldverhältnis einen relativen Charakter. Bei Verträgen zugunsten Dritter verliert das Schuldverhältnis jedoch seinen relativen Charakter und es entsteht ein Schuldverhältnis mit Wirkung gegenüber dem Dritten.[33] Hat die Person, zu deren Gunsten der Vertrag geschlossen wird, die Befugnis, die Erfüllung der versprochenen Leistung zu verlangen, handelt es sich um einen Vertrag zugunsten eines Dritten.[34]

Das zugunsten einer dritten Partei errichtete Rechtsgeschäft hat Vertragscharakter, und der betreffende Vertrag ist kein dispositives, sondern ein obligatorisches Rechtsgeschäft. Jeder Vertrag kann als Vertrag zugunsten eines Dritten aufgesetzt

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32 Lieder J., *MüKoBGB, BGB § 1191*, 9. Aufl., C.H. Beck Verlag, 2023, Rn. 20.

33 Gottwald P., MüKoBGB, BGB § 328, 9. Aufl., C.H. Beck Verlag, 2022, Rn. 1.

34 Stadler A., BGB § 328, 19. Aufl., C.H. Beck Verlag, 2023, Rn. 12–13.

werden.[35] Bei einem solchen Vertrag hat der Begünstigte (Dritte) ein eigenständiges Forderungsrecht gegenüber dem Versprechenden.

Im Rahmen des Kautionsversicherungsvertrages wird die Verpflichtung des Schuldners abgesichert. Die Vertragsparteien – der Kautionsversicherer und sein Kunde – vereinbaren, dass der Kautionsversicherer die vertraglich vereinbarte Leistung an den Begünstigten im Fall der Verwirklichung des im Vertrag vereinbarten Rechtsfalles (Risikos) erbringt. Dabei ist der Begünstigte berechtigt, die Leistung unmittelbar zu verlangen.

Für ein besseres Verständnis dieser Angelegenheit ist es sinnvoll, sämtliche Parteien und die Beziehung zwischen ihnen aus dem gesicherten Schuldverhältnis zu identifizieren. Die Person, die in Bezug auf das gesicherte Schuldverhältnis den Titel des Gläubigers innehat, ist der Begünstigte in Bezug auf den Vertrag zugunsten eines vollwertigen Dritten und des Kautionsversicherungsvertrages. Die Person, die in Bezug auf das gesicherte Schuldverhältnis den Titel des Schuldners innehat, ist der Versprechensempfänger im Sinne des Vertrages zugunsten Dritter und Vertragspartei des Kautionsversicherungsvertrages. Die Person, die nicht Partei des gesicherten Schuldverhältnisses ist, doch den Titel des Versprechenden im Rahmen des Vertrages zugunsten eines Dritten hat, ist Vertragspartei im Rahmen des Kautionsversicherungsvertrages und trägt den Titel des Kautionsversicherers.

C. Einstufung als Mischvertrag

Das Schuldrecht unterwirft Verträge weder dem Grundsatz der begrenzten Anzahl noch dem Typenzwang. Verträge können innerhalb der Grenzen der Rechtsordnung beliebig geregelt werden.[36]

Dadurch können Vertragsgestaltungen entstehen, die in erheblichem Maß von gesetzlich geregelten Vertragstypen abweichen. Es gilt, zwischen atypischen und gemischten Verträgen zu differenzieren: Gemischte Verträge entstehen, wenn Vertragsparteien in ihrem Kontrakt Elemente verschiedener gesetzlich geregelter Verträge kombinieren, während atypische Verträge solche sind, die nicht einmal teilweise unter einen der gesetzlich geregelten Verträge subsumiert werden können.[37]

Eine spezielle Form stellen sogenannte Typenverschmelzungsverträge (gemischte Verträge) dar, bei denen die vertragliche Hauptleistung zugleich Eigenschaften mehrerer Vertragstypen aufweist.[38] Beim Typenverschmelzungsvertrag ist zu klären, ob eine Partei die entscheidende Leistung liefert, während die andere lediglich eine neutrale Geldleistung erbringt. Der Typenverschmelzungsvertrag

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35 Gottwald P., MüKoBGB, BGB § 328, Rn. 4.

36 Gehrlein M., *BeckOK BGB, BGB § 311*, 73. Ed., C.H. Beck Verlag, 2025, Rn. 18.

37 Emmerich V., *MüKoBGB, BGB § 311*, 9. Aufl., C.H. Beck Verlag, 2022, Rn. 25.

38 Emmerich V., *MüKoBGB BGB § 311,* Rn. 31.

trifft häufig auf Dienstleistungen zu, wobei das Recht des Dienstleistungserbringers Anwendung findet.[39]

Wesentliche Bestandteile eines Kautionsversicherungsvertrages sind die Art und der Umfang der Deckung, zu der sich der Kautionsversicherer zugunsten des Gläubigers verpflichtet, das rechtliche Ereignis, das die Haftung des Kautionsversicherers verursacht, die Höhe des von seinem Kunden zu zahlenden Preises sowie das Rückgriffsrecht des Kautionsversicherers gegen seinen Kunden. Durch diesen Vertrag verpflichtet sich der Kautionsversicherer, dem Schuldner, der sein Kunde ist, im Rahmen der vertraglich festgelegten Deckungssummen Sicherheiten zu gewähren. Der Schuldner verpflichtet sich seinerseits, dem Kautionsversicherer die vereinbarte Prämie zu zahlen. Im Rahmen des Kautionsversicherungsvertrages behält sich der Kautionsversicherer das Rückgriffsrecht gegen den Schuldner, der Kunde des Kautionsversicherers ist, vor.[40]

Die juristische Einordnung von verschiedenen Formen gemischter Verträge bringt erhebliche Schwierigkeiten mit sich. Besonders erwähnenswert sind die Absorptionsmethode, bei der das Recht des dominierenden Vertragstyps die Regelungen anderer potenziell relevanter Vertragstypen verdrängt, und die Kombinationsmethode, nach der für die einzelnen Vertragsbestandteile die jeweils einschlägigen Vorschriften gelten. Inzwischen herrscht jedoch Einigkeit darüber, dass keine dieser Methoden allein ausreicht, um die komplexen Fragen zu lösen, die durch gemischte Verträge entstehen. Vielmehr muss die Lösung fallbezogen erfolgen und sich am Sinn und Zweck des jeweiligen Vertrages orientieren.[41]

V. Rechtsnatur des Kautionsversicherungsvertrages

Ein Kautionsversicherungsvertrag kann definiert werden als ein Vertrag, mit dem der Schuldner die Erfüllung der von ihm geschuldeten Leistung oder den Ersatz des aus der Nichterfüllung entstehenden Schadens vertraglich sichert zugunsten der leistungsbeanspruchenden Person.

Damit ein Kautionsversicherungsvertrag zwischen den Parteien zustande kommt, müssen die Willenserklärungen über wesentliche Elemente miteinander vereinbar sein: über die Art der Deckung, zu der sich der Kautionsversicherer zugunsten des Gläubigers verpflichtet; über das Rechtsereignis, das die Haftung des Kautionsversicherers auslöst; über die Höhe des von seinem Kunden zu zahlenden Preises sowie über das Rückgriffsrecht des Kautionsversicherers gegen seinen Kunden.

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39 Martiny D., *MüKoBGB, Rom I-VO Art. 4*, 9. Aufl., C.H. Beck Verlag, 2025, Rn. 15.

40 Für die Ansichten, dass der Kautionsversicherungsvertrag ein gemischter Vertrag ist, der Elemente eines Geschäftsbesorgungsvertrages und eines Versicherungsvertrages enthält. Langheid T., Wandt M. und Looschelders D., *VVG § 1, 3. Aufl.*, C.H. Beck Verlag, 2022, Rn. 105.; Thomas S. und Dreher M, VersR 2007, 738.

41 Emmerich V., *MüKoBGB BGB § 311*, Rn. 29.

Die Hauptleistungspflicht desjenigen, der für seine Schuld aus dem Kautionsversicherungsvertrag Sicherheit leisten will, ist die Verpflichtung, eine vereinbarte Summe zu zahlen. Diese Preiszahlungspflicht wird im Rahmen von Versicherungsverträgen als Prämienzahlungspflicht bezeichnet. Die Partei, die diese Pflicht übernimmt, wird als Versicherungsnehmer bezeichnet.

Als Gegenleistung für die Verpflichtung des Versicherungsnehmers, den vereinbarten Preis zu zahlen, ist die Hauptleistungspflicht des Kautionsversicheres, das Risiko zu tragen. Dieses Verhältnis kommt dem Wesen von Versicherungsverträgen gleich. Daher entspricht die Verpflichtung zur Zahlung der Gegenleistung aus dem Kautionsversicherungsvertrag der Hauptleistungspflicht zur Zahlung der Prämie aus dem Versicherungsvertrag, der ein gesetzlich geregelter Vertragstyp ist.

Im Gegenzug zur Verpflichtung des Versicherungsnehmers, den vereinbarten Preis zu zahlen, hat der Versicherer das Risiko zu tragen. Die primäre Leistungspflicht, das Risiko zu tragen, setzt voraus, dass als Dauerleistung der Versicherer in der Lage ist, die von ihm übernommene Deckung im Fall des Risikoeintritts zu erfüllen und seine Tätigkeit zu diesem Zweck sorgfältig auszuführen.[42] Die Verpflichtung des Kautionsversicherers zur Risikotragung aus dem Kautionsversicherungsvertrag entspricht der primären Leistungspflicht zur Risikotragung aus dem Versicherungsvertrag.

Das Bestehen des Rückgriffsrechts des Kautionsversicherers gegen seinen Kunden im Rahmen des Kautionsversicherungsvertrages bedeutet, dass es keinen Risikotransfer im wirtschaftlichen Sinn gibt. Das Fehlen des Risikotransfers ist der Hauptgrund dafür, dass der Kautionsversicherungsvertrag nicht als Versicherungsvertrag anerkannt wird.

Ein nicht vorhandener Risikotransfer bedeutet jedoch nicht, dass der Kautionsversicherer keiner primären Leistungspflicht zur Risikotragung unterliegt. Diese Pflicht bezieht sich im Rahmen des Kautionsversicherungsvertrages auf die Bereitschaft des Kautionsversicherers, die zugesagte Leistung bei Risikoeintritt und auf Antrag des Begünstigten zu erbringen. Das heißt: Obwohl im Rahmen des Kautionsversicherungsvertrages kein wirtschaftlicher Risikotransfer stattfindet, besteht eine Risikotragungspflicht des Kautionsversicherers.

Der Kautionsversicherer verpflichtet den Begünstigten bei Eintritt des im Kautionsversicherungsvertrag genannten Risikos – im Rahmen von Art und Umfang der vertraglich übernommenen Haftung und des Schuldverhältnisses zwischen Gläubiger und Schuldner – zu einer Leistung. Als Risiko kann Zahlungsunfähigkeit oder der Konkurs des Versicherers und seine Unfähigkeit, die geschuldete Leistung überhaupt oder wie vorgeschrieben zu erbringen,

[42] Reichert-Facilides F., *Vertrag der Schule für Rechnungslegung des Versicherers*, S. 428, in Baumann H., Schirmer H. und Schmidt R., Festschrift Für Karl Sieg, 1976, S. 421–434, Verlag Versicherungswirtschaft E.V.

bezeichnet werden. Die Art der vom Kautionsversicherer übernommenen Leistung kann eine Sachleistung sein oder die Verpflichtung zur Zahlung eines Geldbetrages im Rahmen des Kautionsvertrages, die Verpflichtung zur Erstellung eines Werkes im Rahmen des Werkvertrages oder die Verpflichtung zum Ersatz eines Schadens, der durch Nichterfüllung einer Leistung entsteht.

In diesem Fall bestimmt sich die Hauptleistungspflicht des Kautionsversicherers für die von ihm im Rahmen des Kautionsversicherungsvertrages übernommene Sicherheit nach dem benannten oder unbenannten Vertrag zwischen dem Begünstigten und dem Verpflichteten – je nach Art der Sicherheit.

Verpflichtet sich der Kautionsversicherer anstelle des Verpflichteten, ein Werk zu schaffen, so entspricht die Hauptleistungspflicht des Kautionsversicherers der Hauptleistungspflicht, ein Werk im Rahmen des Werkvertrages zu erbringen. Verpflichtet sich der Kautionsversicherer in Form einer Bürgschaft zur Zahlung eines Geldbetrages, so entspricht die Hauptleistungspflicht des Versicherungsunternehmens der Haftung des Kautionsversicherers gegenüber dem Gläubiger aus dem Bürgschaftsvertrag.

Beim Typenverschmelzungsvertrag ist zu klären, ob eine Partei die entscheidende Leistung erbringt, während die andere lediglich eine neutrale Geldleistung liefert. Die primäre Leistungspflicht des Kautionsversicherers zur Übernahme des Risikos wird im Kautionsversicherungsvertrag bestimmt. Die primäre Leistungspflicht für die zugesagte Sekurität wird je nach Sicherheit vertraglich zwischen dem Begünstigten und dem Schuldner bestimmt. Die Verpflichtung zur Zahlung des vereinbarten Preises – in Versicherungsverträgen als Prämienzahlungsverpflichtung bezeichnet – ist hingegen die primäre Leistungspflicht der anderen Vertragspartei, des Kunden.

Fazit

1- Das Fehlen eines Risikotransfers im wirtschaftlichen Sinn verhindern, dass der Kautionsversicherungsvertrag als Versicherungsvertrag qualifiziert werden kann.

2- Ein Kautionsversicherungsvertrag beinhaltet jedoch nicht die Erbringung einer Leistung zugunsten des Auftraggebers. Daher kann er nicht als Geschäftsbesorgungsvertrag bewertet werden.

3- Ein Kautionsversicherungsvertrag ist somit ein gemischter Typenverschmelzungsvertrag zugunsten eines Dritten, der die Merkmale eines Sicherungsvertrags aufweist, bei dem der Kautionsversicherer die primäre Leistungsverpflichtung übernimmt, das Risiko bis zu dessen Eintritt zu tragen, und im Fall eines solchen Eintritts die primäre Leistungsverpflichtung, die sich aus der Art der übernommenen Sicherheit ergibt, zu erfüllen. Gleichzeitig besteht bei Risikoeintritt ein Rückgriffsrecht gegen den Kunden, der die Verpflichtung zur Zahlung eines vereinbarten Preises eingeht.

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THE PALESTINIAN REFUGEES' RIGHT OF RETURN AS A CONDITIO SINE QUA NON FOR ISRAEL'S UNITED NATIONS MEMBERSHIP: A LEGAL ANALYSIS*

Filistinli Mültecilerin Geri Dönüş Hakkı, İsrail'in Birleşmiş Milletler Üyeliği için Conditio sine qua non Olarak: Hukuki Bir Analiz

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Abstract

The Palestinian Right of Return is a fundamental human right that affirms the entitlement of Palestinian refugees and their descendants—estimated at over seven million people—to return to their original homes and properties from which they were expelled by Zionist militias that later formed the state of Israel. This paper explores the legal foundations of this right, which was first articulated by United Nations mediator Count Folke Bernadotte in June 1948. It is widely recognized as a human right protected under international law and embedded in customary international law. The study also examines Israel's admission to the United Nations, which was pursued shortly after its declaration of independence in May 1948. Following initial rejections, Israel's membership was recommended by the Security Council through Resolution 69 and was explicitly conditioned on its "unreserved acceptance" of the obligations of the UN Charter. General Assembly Resolution 273, which granted Israel membership, specifically referenced Resolutions 181 (the Partition Plan) and 194 (concerning the return of Palestinian refugees). The paper further highlights Israel's ongoing non-compliance with these resolutions and its obligations under the UN Charter. Although Israel formally accepted these obligations during its admission process, its subsequent actions have consistently demonstrated a denial of the Palestinian Right of Return. Finally, the paper analyzes the legal implications of Israel's non-compliance with UN resolutions and considers its impact on the legitimacy of Israel's continued membership in the United Nations.

Keywords: Right of return, Palestinian refugees, Israel UN membership, conditio sine qua non, UN resolution 194, international law

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

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Özet

Filistinlilerin Geri Dönüş Hakkı, Filistinli mülteciler ve onların yedi milyonu aşkın torunlarının, Siyonist milisler tarafından zorla çıkarıldıkları ve daha sonra İsrail devletini oluşturan topraklara geri dönme hakkını savunan temel bir insan hakkıdır. Bu çalışma, Haziran 1948'de Birleşmiş Milletler arabulucusu Kont Folke Bernadotte tarafından ilk kez dile getirilen bu hakkın hukuki temellerini incelemektedir. Bu hak, uluslararası hukuk tarafından korunan ve örfî hukukta yer alan bir insan hakkı olarak geniş çapta kabul görmektedir. Çalışma ayrıca, İsrail'in Mayıs 1948'teki bağımsızlık ilanından kısa bir süre sonra başvurduğu Birleşmiş Milletler üyeliğini ele almaktadır. İlk reddedilmelerin ardından, İsrail'in üyeliği Güvenlik Konseyi'nin 69 No'lu Kararı ile tavsiye edilmiş ve BM Şartı'ndaki yükümlülükleri "kayıtsız şartsız kabul etmesi" şartına bağlanmıştır. İsrail'in üyeliğini kabul eden Genel Kurul'un 273 No'lu Kararı, özellikle 181 No'lu (Bölünme Planı) ve 194 No'lu (Filistinli mültecilerin geri dönüşü) kararları hatırlatmıştır. Bu çalışma, İsrail'in söz konusu kararlar ve BM Şartı kapsamındaki yükümlülüklerine uymadığını ve bu yükümlülükleri yerine getirmeye istekli olmadığını ortaya koymaktadır. İsrail, üyelik sürecinde bu yükümlülükleri resmi olarak kabul etmiş olsa da, sonraki eylemleri Filistinlilerin geri dönüş hakkını sürekli olarak inkâr ettiğini göstermektedir. Son olarak, çalışmada İsrail'in BM kararlarına uymamasının hukuki sonuçları ve bu durumun İsrail'in BM üyeliğinin meşruiyeti üzerindeki etkisi analiz edilmektedir.

Anahtar Kelimeler: Geri dönüş hakkı, Filistinli mülteciler, conditio sine qua non, İsrail'in BM üyeliği, BM kararı 194, uluslararası hukuk

INTRODUCTION

The issue of whether the Israeli membership in the United Nations was, or continues to be, subject to conditions under international law remains a persistent topic of legal and political discussion. This examination touches on core elements of international legal frameworks, such as the criteria for admitting states into global organizations, the interpretive scope of the UN Charter, and the binding nature of General Assembly decisions. The importance of studying the legality of Israel's membership in the UN comes from its direct connection to the adherence of the UN resolutions, especially UNGA 194 resolution, and the lack of implementation through the historical and ongoing Israeli denial of the Palestinian refugees' right of return. The main objectives of the paper are to understand the legal analysis and background of the conditional membership of Israel in the UN through exploring the legal standards highlighted in the UN Charter for the states' admission to the organization. Moreover, to examine the historical context of the Israeli admission to the UN in 1949 and its linkage to the implementation of the UN resolutions concerning the Palestinian refugees' right of return and study the related legal aspects. The paper aims to distinguish

the formal prerequisites for joining the UN from the continuing responsibilities that apply to all member states within the framework of international law[1].

The UN was Founded in 1945 as the successor to the League of Nations, as highlighted in article 1 of the UN Charter[2], the United Nations was created with a broader mission to uphold global peace and security, encourage cooperation among countries, and build friendly international relations. The UN's membership principles, highlighted in the UN Charter, reflect a balance between the aim to encourage more states to join the organization and the prerequisites that states should uphold to be accepted as members. In its early years, and due to geopolitical developments after World War II, the admission process to the UN was subject to a more selective approach. This approach changed and shifted to a more flexible and less selective one during the period between 1955 and 1966, reflecting the organization's universal outlook by including more states and involving them in implementing the joint goals of maintaining global peace and security.[3] A fundamental tenet of Palestinian identity is the Palestinian Right of Return (PROR), which upholds the right of refugees and their descendants to reclaim their ancestral homes and properties in what is now called Israel and the Palestinian territories. Following the occupation of Palestine in 1947 (Nakba Day)[4], 78% of historic Palestine was occupied by Zionist militias, and as a result, 750,000 Palestinians became refugees in the neighboring countries, and until today, most of them and their descendants live in the host countries (mainly Syria, Jordan, and Lebanon) in which their ancestors sought asylum in 1948.[5] Currently, among the 13 million Palestinians worldwide, approximately 8 million are displaced, and around 5.5 million are officially registered as refugees with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) across Syria, Lebanon, and Jordan, as well as the West Bank and Gaza Strip.[6]

Between 1949 and 1956, approximately 3,000 Palestinian refugees were killed while attempting to cross into Palestine from neighboring countries. These fatal incidents were carried out by Unit 101, a specialized Israeli military

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1 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI <https://www.un.org/en/about-us/un-charter> accessed 8 October 2025.

2 United Nations, Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 1 <https://www.un.org/en/about-us/un-charter/chapter-1> accessed 23 September 2025.

3 Thomas Grant, 'Admission to the United Nations, Charter Article 4 and the Rise of Universal Organization' (2010) 21 EJIL 791.

4 'Nakba' (Arabic term meaning 'the catastrophe').

5 Francesca P Albanese and Lex Takkenberg, *Palestinian Refugees in International Law* (OUP 2020) 56.

6 Ibid.

force commanded by Ariel Sharon.[7] Over decades, Palestinian refugees have been impacted by a series of political events and developments, beginning with the Oslo Accords (1993–1995), followed by the Arab Spring, the subsequent counterrevolutions across the region, and culminating in the unfavorable policies of the administration of U.S. President Donald Trump. These included cutting financial support to UNRWA[8], officially recognizing Jerusalem as Israel's capital, and relocating the U.S. embassy from Tel Aviv to Jerusalem.[9] In recent years, Palestinians have made repeated efforts to draw international attention to the unresolved refugee issue. Notably, in 2011, they organized demonstrations near the borders of Syria and Lebanon with occupied Palestine, demanding their right of return[10]. Another major mobilization occurred during the Great March of Return (GMR) in Gaza, where hundreds of thousands peacefully protested near the border fence, calling for their right to return. Throughout the March, which lasted for one year, approximately 30,000 Palestinians were injured, and around 266 were killed by Israeli forces[11].

The 1967 Six-Day War, referred to in Arabic as *the Naksa*[12], resulted in the forced displacement of approximately 325,000 Palestinians from the West Bank and Gaza Strip.[13] Following that, Israel implemented Military Order 58, which bans the return of displaced Palestinians and authorizes the confiscation of their properties.[14] The forcible displacement of Palestinians has increased dramatically, particularly following Israel's aggression on Gaza on October 8, 2023. This resulted in the forcible displacement and transfer of over two million

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7 'Majzarat Kafr Qasim, Sittat 'Uqud min al-Faji'a' (Al Jazeera, 29 October 2016) <https://www.aljazeera.net/encyclopedia/2016/10/29/مجزرة-كفر-قاسم-ستة-عقود-من-الفجيعة> accessed 23 September 2025.

8 The White House, 'Withdrawing the United States from and Ending Funding to Certain United Nations Organizations and Reviewing United States Support to All International Organizations' (4 February 2025) <https://www.whitehouse.gov/presidential-actions/2025/02/withdrawing-the-united-states-from-and-ending-funding-to-certain-united-nations-organizations-and-reviewing-united-states-support-to-all-international-organizations/> accessed 23 September 2025.

9 US Department of State, 'President Trump's Decision to Recognize Jerusalem as Israel's Capital' (6 December 2017) <https://2017-2021.state.gov/president-trumps-decision-to-recognize-jerusalem-as-israels-capital/> accessed 23 September 2025.

10 Ethan Bronner, 'Israeli Troops Fire as Marchers Breach Borders' *The New York Times* (New York, 15 May 2011) <https://www.nytimes.com/2011/05/16/world/middleeast/16mideast.html> accessed 23 September 2025.

11 Hala Fayyad, 'Gaza's Great March of Return Protests Explained' (Al Jazeera, 2024) <https://aje.io/x8chq> accessed 23 September 2025.

12 'Naksa' (Arabic term meaning 'setback').

13 Robert Bowker, *Palestinian Refugees: Mythology, Identity, and the Search for Peace (Lynne Rienner Publishers 2003) 81.*

14 Francesca P Albanese and Lex Takkenberg, *Palestinian Refugees in International Law (OUP 2020) 88.*

Palestinians, equal to the 90% of Gaza's population.[15]Amnesty, in its report " *you fell like you are subhuman: Israel's genocide against Palestinians in Gaza*", indicated that 90% of the population of Gaza have been forcibly displaced more than ten times within a year by the Israeli forces.[16]

The continuous forcible displacement of Palestinians and the ongoing denial of their right of return by Israel highlight the international community's failure to resolve what has become the longest-standing refugee crisis in modern history. It's necessary from an international law perspective to shed light on Israel's UN membership, which is conditional upon its commitment to uphold UN General Assembly Resolutions 181 and 194. This is essential for achieving a just and lasting resolution to the suffering endured by Palestinian refugees and their descendants over the past 76 years.

I. The Palestinians' right of return in international law

The Palestinian refugee issue is one of the longest-standing and most significant problems on a global scale. As a result of the mass forcible displacement of Palestinians during the year of the Nakba in 1948, hundreds of thousands of them had sought asylum and protection in the neighboring countries, and a major part of them became refugees. This year marks the 77th anniversary of Nakba, with millions of Palestinians and their descendants continuing to be refugees in the host countries. Here, the term "Palestinian refugee" refers to the indigenous people of historic Palestine who were forcibly displaced by Zionist militias between 1947 and the 1948 Nakba, as well as their descendants.17 It also includes Palestinians displaced during and after the 1967 Six-Day War (Naksa) and those forcibly displaced individually or collectively in the following incident to the present due to Israeli crimes, policies, regulations, or attacks on them and their lands. Since the occupation of Palestine in 1948 until today, Israel has denied Palestinian refugees their right of return, justifying this with reasons such as the small space of the historic Palestine's territories, maintaining the national security, which can only be achieved through a community with a Jewish majority, and challenging the applicability of the international law over the Palestinian refugees and the occupied Palestinian territories.[18] The right of

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15 Al Jazeera Staff, 'Israel Has Turned 70% of Gaza into No-Go Zones, in Maps' (Al Jazeera, 6 May 2025) <https://www.aljazeera.com/news/2025/5/6/israel-has-turned-70-of-gaza-into-no-go-zones-in-maps> accessed 23 September 2025.

16 Amnesty International, "You Feel Like You Are Subhuman': Israel's Genocide against Palestinians in Gaza' (Report, MDE 15/8668/2024, 5 December 2024) 25 <https://www.amnesty.org/en/documents/mde15/8668/2024/en/> accessed 23 September 2025.

17 Tania Kramer, 'The Controversy of a Palestinian Right of Return to Israel' (2001) 18 Ariz J Int'l & Comp L 979.

18 Gail J Boling, 'Palestinian Refugees and the Right of Return: An International Law Analysis' (BADIL Resource Center 2001) 1–21.

return has strong foundations and is deeply rooted in customary international law; as a customary rule, it applies to Palestinians and their descendants, who were forcibly displaced during the Nakba in 1948 and subsequent events. The political developments, negotiations, agreements, or the conflicts and their consequences can't affect the Palestinians' inalienable right of return to their homes of origin.[19]

The Universal Declaration of Human Rights (UDHR), along with the International Covenant on Civil and Political Rights (ICCPR), together forms the cornerstone of the legal framework supporting the right of return as a codification of customary international law. Article 13(2) of the UDHR states, "*Everyone has the right to leave any country, including his own, and to return to his country*"[20]. While article 12(4) of ICCPR indicates that: *"No one shall be arbitrarily deprived of the right to enter his own country"*.[21] Palestinians have witnessed shifts in sovereignty over Palestine after the Israeli occupation. Israel has stripped Palestinian refugees of their nationality, making them stateless. Four million of the Palestinian refugees are *de jure* stateless persons.[22] However, being stateless doesn't change anything when it comes to the right of return. The ICJ, in its ruling in 1955 in the *Nottebohm* case, stated that a "genuine link", which reflects one's personal and cultural connection to the homeland, is enough to establish the connection between a person and his/her homeland.[23] Obtaining new citizenship after the shift in sovereignty or maintaining the nationality of the country of origin is not required to claim the right of return. Amnesty International supports this interpretation, stating that Palestinians who have a strong connection to their homeland should be allowed to practice their right of return. It states in its policy statement on the Palestinians' right of return the following: "*Palestinians who have genuine links to "Israel" the West Bank, or Gaza Strip, but who are currently living in other host states, may also have genuine links to their host state. This should not diminish or reduce their right*

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19 UNGA Res 3236 (XXIX) (22 November 1974) UN Doc A/RES/3236. <https://www.un.org/en/ga/documents/resolutions.shtml> accessed 23 September 2025.

20 United Nations, Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III), art 13 <https://www.un.org/sites/un2.un.org/files/2021/03/udhr.pdf> accessed 23 September 2025.

21 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 12 <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> accessed 23 September 2025.

22 Abbas Shiblak, 'Stateless Palestinians' (2009) 32 Forced Migration Review 24 <https://www.fmreview.org/shiblak-2> accessed 23 September 2025.

23 *Nottebohm Case (Liechtenstein v Guatemala) [1955] ICJ Rep 4 <https://www.icj-cij.org/sites/default/files/case-related/18/018-19550406-JUD-01-00-EN.pdf> accessed 23 September 2025.*

to return to Israel, the West Bank or Gaza Strip"[24]

The Palestinian refugees' right of return encompasses their descendants who maintain cultural and personal connections to their homelands as highlighted in paragraph 19 from the general comment 27 of the human rights committee, it states: "*the right of a person to enter his or her own country recognizes the existing strong affiliation of a person with that State. The right to enter not only entitles him to return, but to come to his own country for the first time, if he has been born or lived outside his State of nationality. The right to enter their country is of the utmost importance for refugees seeking voluntary repatriation*".[25] This position is supported by Amnesty in the context of displacement, highlighting the right of return for descendants who preserve "close and *enduring connections*" as mentioned by the Human rights committee.[26] Although the right of return is often classified as an individual right, it also carries a collective aspect, particularly in the situation of widespread displacement. The forced displacement of Palestinians can be examined individually or collectively.[27] Denying a large population the right to exercise this right not only infringes upon individual freedoms but also undermines their shared right to self-determination.[28]

The right of return has strong foundations in international humanitarian law (IHL). The core instruments of IHL, customary international humanitarian rules, the Hague Regulations of 1907, and the 1949 Geneva Conventions affirm the right of return for displaced individuals once hostilities cease, particularly in the context of protecting civilians during armed conflict. Rule 132 of the customary international humanitarian rules[29], and Article 49 of the Fourth Geneva Convention[30] emphasize the right of displaced individuals to return. While Article

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24 Amnesty International, 'Israel and the Occupied Territories/Palestinian Authority: The Right to Return: The Case of the Palestinians' (Report, MDE 15/013/2001, 2001) para 16 <https://www.amnesty.org/en/wp-content/uploads/2021/06/mde150132001en.pdf> accessed 23 September 2025.

25 UN Human Rights Committee, 'Human Rights Committee Begins Discussion of Draft General Comment on Freedom of Movement' (Press Release, 23 March 1999) <https://press.un.org/en/1999/19990323.hrct525.html> accessed 23 September 2025.

26 Amnesty International, 'Israel and the Occupied Territories/Palestinian Authority: The Right to Return: The Case of the Palestinians' (Report, MDE 15/013/2001, 2001) para 6 <https://www.amnesty.org/en/wp-content/uploads/2021/06/mde150132001en.pdf> accessed 23 September 2025.

27 Susan M Akram, 'Palestinian Refugee Rights under International Law' (2002) 31(2) J Palestine Stud 36.

28 UNSC Res 237 (14 June 1967) UN Doc S/RES/237 <https://undocs.org/S/RES/237(1967)> accessed 23 September 2025.

29 International Committee of the Red Cross, *Customary International Humanitarian Law Database, Rule 132: Return of Displaced Persons <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule132> accessed 6 October 2025.*

30 International Committee of the Red Cross, *Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, art 49 <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/article-49> accessed 6 October 2025.*

43 of the Hague Regulations (part of the 1907 Hague Convention on the Laws and Customs of War on Land) obligates the occupying power to respect the laws in force in the occupied territory, this obligation includes recognition of the right of return as a fundamental human right[31]. Although Israel is not a state party to the 1907 Hague Regulations, it is a state party to the Fourth Geneva Convention, having ratified it on 6 July 1951[32].Israel is obligated to adhere to the Hague Regulations and the Fourth Geneva Convention, as they are part of customary international law[33]. The Supreme Court of Israel, represented by Judge J.A. Vitkon in his judgment on the case *HCJ 606/78, HCJ 610/78 – Ayub et al. v. Minister of Defense et al*., concluded that the 1907 Hague Regulations are customary rules. Therefore, they are applicable to all states, including Israel, regardless of whether they have signed or ratified them. He stated that*: "I am now satisfied that the Hague Convention constitutes part of international customary law based on which claims may submitted to a municipal court*."[34] In its 2004 advisory opinion on the legal implications of the construction of a wall in the occupied Palestinian territories, the ICJ concluded in paragraph 89 that the Hague Regulations are part of customary international law[35]. Successive Israeli governments have refused to apply the Fourth Geneva Convention to the Occupied Palestinian Territories, arguing that Israel does not consider itself an occupying power. This position is based on the claim that these territories were not under the sovereignty of any state prior to Israeli control and, therefore, cannot be classified as occupied territories. This position was addressed by Israel's representative to the UN during the General Assembly meeting on 26 October 1977[36]. Israel's narrow interpretation of the Fourth Geneva Convention's applicability to the Occupied Palestinian Territories (OPT) has been disputed by various international organizations. The International Committee of the Red

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31 International Committee of the Red Cross, *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, art 43 <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907/regulations-art-43> accessed 6 October 2025.*

32 Human Rights Watch, 'Israel ratified the Geneva Conventions on July 6, 1951' (13 April 2001) <https://www.hrw.org/reports/2001/israel/hebron6-04.htm> accessed 6 October 2025.

33 International Committee of the Red Cross, 'Who is bound by IHL?' (ICRC, 13 August 2017) <https://blogs.icrc.org/ilot/2017/08/13/who-is-bound-by-ihl/> accessed 6 October 2025.

34 *HCJ 606/78, HCJ 610/78 Ayub et al v Minister of Defense et al (15 March 1979) judgment, Supreme Court (sitting as High Court of Justice) <https://hamoked.org/Document.aspx?dID=3860> accessed 6 October 2025.*

35 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136 <https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf> accessed 6 October 2025.*

36 United Nations, *Question of the Observance of the Fourth Geneva Convention of 1949 in Gaza and the West Bank, including Jerusalem, occupied by Israel in June 1967 (UNISPAL) <https://www.un.org/unispal/document/auto-insert-200116/> accessed 6 October 2025.*

Cross (ICRC), in its 1973 report[37], the International Commission of Jurists on the application of the Fourth Geneva Convention in 1977[38], the UN General Assembly in its December 1978 resolution[39], the UN Security Council in a consensus statement in 1976[40], the Commission on Human Rights in its 1979 resolution[41], and the 2023 report of the UN Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories[42] have all rejected Israel's non-adherence to the Fourth Geneva Convention. This means that the Fourth Geneva Convention is binding on Israel regardless of its position on it or its interpretation of it, which obligates Israel, as an occupying power, to allow Palestinians to exercise their right of return.

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) emphasizes the right of return in Article 5(d)(ii)[43]. Israel has signed and ratified CERD without making any reservations or conditions on any of its articles, including Article 5(d)(ii)[44]. Moreover, in the opening paragraph of Article 5, CERD calls on State Parties to eliminate racial discrimination in all its forms and to ensure equality before the law for everyone, regardless of race, color, or national or ethnic origin.

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37 International Committee of the Red Cross, *Annual Report 1973 (International Review of the Red Cross, September 1974) 6 <https://international-review.icrc.org/articles/annual-report-1973> accessed 6 October 2025.*

38 International Commission of Jurists, 'Israeli Settlements in Occupied Territories' (1977) 19 *The Review of the International Commission of Jurists <https://www.icj.org/wp-content/uploads/2013/07/ICJ-Review-19-1977-eng.pdf> accessed 6 October 2025.*

39 United Nations General Assembly, *Resolution 33/112: Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including Jerusalem, and other Arab territories occupied by Israel since 1967 (19 December 1978) UN Doc A/RES/33/112 <https://docs.un.org/en/A/RES/33/112> accessed 6 October 2025.*

40 United Nations Security Council, *Statement by the President of the Security Council (11 November 1976) UN Doc S/12218 <https://www.un.org/unispal/document/auto-insert-184855/> accessed 6 October 2025.*

41 United Nations, *Report of the 35th Session of the Commission on Human Rights, 12 February–16 March 1979 (1979) UN Doc E/CN.4/1295 <https://digitallibrary.un.org/record/220210> accessed 6 October 2025.*

42 United Nations General Assembly, *Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories (2023) UN Doc A/78/553 <https://docs.un.org/en/A/78/553> accessed 6 October 2025.*

43 *International Convention on the Elimination of All Forms of Racial Discrimination (opened for signature 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, art 5 <https://treaties.un.org/doc/Publication/UNTS/Volume%20660/volume-660-I-9464-English.pdf> accessed 7 October 2025.*

44 Adalah, '*International Convention on the Elimination of All Forms of Racial Discrimination (CERD)' <https://www.adalah.org/en/content/view/7515> accessed 7 October 2025.*

In its report from March 1998, CERD highlighted Israel's denial of the Palestinians' right of return, calling on Israel to give high priority to this issue and to compensate those who cannot repossess their homes, stating the following: "*The right of many Palestinians to return and possess their homes in Israel is currently denied. The State party should give high priority to remedying this situation. Those who cannot repossess their homes should be entitled to compensation. "*[45]

The Convention on the Rights of the Child (CRC), adopted by the United Nations General Assembly on 20 November 1989, in Article 10 supports the right of children and their parents to enter or leave a country for family reunification, which may include returning to their own country[46]. Article 8 of The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) highlights the right of migrant workers and their families to return and remain at their country of origins at any time[47]. The right of return has been emphasized by various UN bodies. The UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities[48], as well as the UN Commission on Human Rights[49], have addressed and reaffirmed the right of return and the prohibition of the forcible transfer of populations. In its Resolution 1982/18, the Economic and Social Council raised serious concerns regarding Israel's denial of the Palestinians' right of return, calling upon states and international organizations to support Palestinian refugees in reclaiming this right.[50] Refugee law gives significant importance to the right of return for all refugees, displaced individuals and stateless persons to their habitual places of residence its core legal instruments: the 1951 Geneva Convention and the 1967 New York Protocol[51]. The United Nations High Commissioner for

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45 UN Committee on the Elimination of Racial Discrimination, *Concluding Observations: Israel, CERD/C/304/Add.45 (30 March 1998) <https://www.refworld.org/policy/polrec/cerd/1998/en/11465> accessed 7 October 2025.*

46 Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> accessed 8 October 2025.

47 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3 <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-rights-all-migrant-workers> accessed 8 October 2025.

48 United Nations, *Report of the Special Rapporteur on the right to freedom of movement, UN Doc E/CN.4/Sub.2/1997/23 (1997) para 17 <https://digitallibrary.un.org/record/190726?ln=en&v=pdf> accessed 7 October 2025.*

49 UN Commission on Human Rights, Res 1 A (XXXVI) (13 February 1980); Res 1983/1 (15 February 1983); Res 1984/1 A (20 February 1984) <https://digitallibrary.un.org> accessed 7 October 2025.

50 United Nations, *Situation of and assistance to Palestinian women and children: Report of the Secretary-General (1982) <https://www.un.org/unispal/document/auto-insert-188264/> accessed 7 October 2025.*

51 UNHCR, *Convention Relating to the Status of Refugees and Protocol Relating to the Status of Refugees (1951 and 1967) <https://www.unhcr.org/sites/default/files/2025-02/1951-refugee-convention-1967-protocol.pdf> accessed 7 October 2025.*

Refugees (UNHCR) recognizes the right of return—i.e., voluntary repatriation (VolRep)—as one of the main durable solutions within the framework of the 1951 Convention and the 1967 Protocol. Article 1 of the 1950 UNHCR Statute calls on governments and organizations to cooperate with UNHCR to facilitate the voluntary repatriation of refugees, stating that: "*within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities."*[52]

The Executive Committee of the High Commissioner's Programme (ExCom)[53], and UNHCR's former High Commissioner *Sadako Ogata* view voluntary repatriation as the most suitable solution, one that should allow refugees and displaced persons to return to their places of origin in safety and dignity. Israel bears an international legal obligation to implement the provisions of the following conventions by facilitating the exercise of the right of return for Palestinian individuals. This obligation arises from its accession to and ratification of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, as well as the 1954 Convention Relating to the Status of Stateless Persons, which it ratified in 1958.[54]

State practice (*opinio juris)* shows that states consider themselves obligated under customary international law to allow displaced individuals and refugees to exercise their right of return to their habitual place of residence[55].

The UN Human Rights Committee (HRC) as a body overseeing the implementation of the ICCPR, has dealt in its jurisprudence with cases involving violations of the right to return under ICCPR Article 12(4), prohibiting arbitrary denials of entry to one's "own country." Key cases include *Nabil Sayadi and Patricia Vinck v. Belgium (2008*), finding arbitrary travel bans violated Article 12(4)[56]; *Mahmoud Abdul Majid Karaji v. Sweden (2004*), protecting permanent residents' return rights[57]; and *Bachir El Bouaradi v. Bahrain* (2008), ruling against

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52 UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Res 428(V) (14 December 1950) <https://www.refworld.org/legal/constinstr/unga/1950/en/72586> accessed 7 October 2025.*

53 Executive Committee of the High Commissioner's Programme, *Conclusion No. 40 (XXXVI): Voluntary Repatriation (18 October 1985) <https://www.refworld.org/policy/exconc/excom/1985/en/41925> accessed 7 October 2025.*

54 UNHCR, *Israel | Rights Mapping and Analysis Platform <https://rimap.unhcr.org/countries/israel> accessed 7 October 2025.*

55 Eric Rosand, 'The Right to Return under International Law Following Mass Dislocation: The Bosnia Precedent' (1997) *Michigan Journal of International Law 1091.*

56 Nabil Sayadi and Patricia Vinck v Belgium, CCPR/C/94/D/1472/2006 (22 October 2008) UN Doc CCPR/C/94/D/1472/2006 <https://juris.ohchr.org/Search/Details/1514> accessed 8 October 2025.

57 Mahmoud Abdul Majid Karaji v Sweden, CCPR/C/81/D/1324/2004 (2 August 2004) UN Doc CCPR/C/81/D/1324/2004 <https://juris.ohchr.org/Search/Details/1394> accessed 8 October 2025.

politically motivated entry denials[58]. General Comment No. 27 (1999) states that restrictions have to be lawful, proportionate, and non-discriminatory[59]. The HRC jurisprudence shows that states cannot arbitrarily prevent those who have genuine links to their former places of residence from exercising their right of return. The UN Security Council, in its Resolution 1145 (1997), adopted in the context of the conflicts in Bosnia and Croatia, reaffirmed the right of all displaced persons and refugees to return to their homes of origin in the Republic of Croatia[60]. UNSC Resolution 820 (1993) appears to be similar to the issue of Palestinian refugees, as it prohibits the occupation of territories through ethnic cleansing and affirms the right of displaced persons to return to their former homes[61]. The situation in Namibia represents a precedent that may be relevant to the case of Palestinian refugees' right of return and Israel's arguments, which link the implementation of UNGA Resolution 194(III) to political reason and peace conditions with neighboring countries. UNSC Resolution 385 (1976) calls on South Africa to allow all Namibians in exile to unconditionally exercise their right of return[62]. The same language was used by UNSC in the context of Georgia and Abkhazia Resolution 1065 (1996) reaffirms that the right of return is independent and cannot be linked to the political status of Abkhazia and Georgia[63]. In the case of *Sargsyan v. Azerbaijan*, the European Court of Human Rights, in its decision on June 16, 2025, concluded that the denial of the applicant's right to return to his village in Gulistan constituted a breach of Article 8 of the Convention[64]. The International Criminal Tribunal for the former Yugoslavia (ICTY), in the *Prlić* case, concluded that preventing displaced persons from returning to their homes and communities constitutes a crime against humanity, as it is a key factor in establishing the crimes of deportation and forcible transfer[65].The Pre-Trial Chamber I of the International Criminal Court (ICC), in its decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute," concluded that preventing Rohingya refugees from returning to

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58 Bachir El Bouaradi v Bahrain, CCPR/C/94/D/1731/2007 (29 October 2008) UN Doc CCPR/C/94/D/1731/2007 <https://juris.ohchr.org/Search/Details/1537> accessed 8 October 2025.

59 UN Human Rights Committee, General Comment No 27: Article 12 (Freedom of Movement) (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9 <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F21%2FRev.1%2FAdd.9> accessed 8 October 2025.

60 UNSC Res 1145 (1997), UN Doc S/RES/1145 (1997).

61 UNSC Res 820 (17 April 1993) UN Doc S/RES/820 (1993).

62 UNSC Res 1065 (12 July 1996) UN Doc S/RES/1065 (1996).

63 UNSC Res 1065 (12 July 1996) UN Doc S/RES/1065 (1996).

64 *Sargsyan v Azerbaijan App no 40167/06 (ECtHR, 16 June 2015) <https://hudoc.echr.coe.int/fre?i=001-155662> accessed 8 October 2025.*

65 *Prosecutor v Prlić et al Case No IT-04-74-T (ICTY, Trial Chamber, 29 May 2013) vol 1 <https://www.icty.org/x/cases/prlic/tjug/en/130529-1.pdf> paras 49, 55* [www.icty.org].

their homes constitutes a crime against humanity[66]. The UN Committee on the Exercise of the Inalienable Rights of the Palestinian People found that Israel committed crimes against humanity through the forcible transfer of Palestinians and the denial of their right of return.[67] In its 2024 advisory opinion on the legality of the Israeli occupation of the occupied Palestinian territories, the ICJ concluded that Israel is obligated to allow all displaced Palestinians to return to their homes of origin[68].

II. The UN General Assembly Resolution 194 (III) and the Palestinian refugees' right of return

UN General Assembly Resolution (UNGA) 194 (III) was adopted on December 11, 1948, following the end of the incidents of the Nakba in the same year.[69] This resolution was inspired by the proposals of UN mediator *Folke Bernadotte*. Bernadotte had first raised the concept of the right of return for Palestinian refugees on June 27, 1948.[70] In his progress report submitted on September 16, 1948, one day before his assassination[71] Bernadotte explicitly stated that "*the right of Arab refugees to return to their homes in Jewish-controlled territory as soon as possible should be recognized by the United Nations*."[72] The UNGA 194 (III) resolution was adopted by a majority of 35 out of 58 UN member states at the time, with 15 countries voting against and 8 abstaining.[73] At the time the resolution was adopted, Israel was not yet a member of the United Nations and

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66 *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" ICC-RoC46(3)-01/18 (ICC, Pre-Trial Chamber I, 6 September 2018) <https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_04203.PDF> para 77.*

67 *United Nations General Assembly Committee on the Exercise of the Inalienable Rights of the Palestinian People, Study on the Legality of the Israeli Occupation of the Occupied Palestinian Territory, Including East Jerusalem (2023) <https://www.un.org/unispal/document/ceirpp-legal-study2023/> p 14.*

68 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, para 270,accessed 8 October 2025.

69 UNGA Res 194 (III) (11 December 1948) UN Doc A/RES/194 <https://www.refworld.org/legal/resolution/unga/1948/en/86836> accessed 23 September 2025.

70 Howard Adelman and Elazar Barkan, *No Return, No Refuge: Rites and Rights in Minority Repatriation (Columbia University Press 2011) 203.*

71 Folke Bernadotte was assassinated in Jerusalem on 17 September 1948 by members of the Zionist paramilitary militant organization Lehi.

72 United Nations, 'The United Nations and the Question of Palestine' (UNISPAL) <https://unispal.un.org/pdfs/AB14D4AAFC4E1BB985256204004F55FA.pdf> accessed 23 September 2025.

73 BADIL Resource Center for Palestinian Residency and Refugee Rights, 'Al-Majdal: Palestine's Ongoing Nakba' (Autumn 2008/Winter 2009) Issue 39/40 <https://www.badil.org/phocadownload/Badil_docs/publications/al-majdal-39-40.pdf> accessed 23 September 2025.

objected to some of its provisions.[74] Resolution 194 also called for the establishment of the United Nations Commission for the Conciliation in Palestine (UNCCP), tasked with facilitating a final settlement, including the resolution of Palestinian refugees' issues.[75] Article 11 of the 194 UNGA resolution is the cornerstone of the Palestinian refugees' right of return; it states: "*refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or equity, should be made good by the Governments or authorities responsible*".[76]

Despite the non-binding nature of the UN General Assembly resolutions, Resolution 194 (III) UNGA resolution holds significant legal and political value as it represents the first international instrument that recognizes the right of return for Palestinian refugees.[77] UN Resolution 194 (III) may contribute to customary international law, as it represents the collective and global recognition of the Palestinian refugee issue. This position is supported by *J. Quigley*, who argues that Resolution 194 reflects customary international law.[78] The resolution is regularly reaffirmed by the United Nations, calling for Palestinians to exercise their right of return and to receive compensation for the harm and suffering they and their descendants have endured for decades.[79]

The interpretation of UN Resolution 194 (III) has been a point of disagreement among different parties. Initially, Arab states rejected the resolution and voted against It, but by early 1949, they had become some of its strongest supporters[80],.

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74 Center for Israel Education, 'U.N. General Assembly Resolution 194 on Palestinian Refugees, 1948' (IsraelEd) <https://israeled.org/un-general-assembly-resolution-194-concerning-palestinian-refugees/> accessed 23 September 2025.

75 UNGA Res 194 (III) (11 December 1948) UN Doc A/RES/194 <https://www.un.org/unispal/document/auto-insert-184789/> accessed 23 September 2025.

76 Ibid art 11.

77 UNGA Res 194 (III) (11 December 1948) UN Doc A/RES/194, 'Establishment of a Conciliation Commission for Palestine' <https://www.un.org/unispal/document/auto-insert-184789/> accessed 23 September 2025.

78 John Quigley, 'Compensation for Palestinian Refugees: Initial Comments' (Workshop on the Issue of Compensation for Palestinian Refugees, International Development Research Centre, Palestinian Refugee Research Network, Ottawa, 14–15 July 1999) <https://prrn.mcgill.ca/research/papers/quigley.htm> accessed 23 September 2025.

79 UNGA Res 3236 (XXIX) (22 November 1974) UN Doc A/RES/3236 <https://digitallibrary.un.org/record/189835> accessed 23 September 2025.

80 United Nations, 'Historical Background of the Question of Palestine in the United Nations: 1947–1975' (Committee on the Exercise of the Inalienable Rights of the Palestinian People, 1978) UN Doc A/AC.183/L.3 <https://www.un.org/unispal/document/auto-insert-186560/> accessed 23 September 2025.

Palestinian representatives also rejected it at first, believing it implicitly gives a validation of the existence of Israel, which they viewed as illegitimate[81]. They argued that Israel had no authority to deny the return of the native Arab population of Palestine.[82] Over time, however, the Palestine Liberation Organization (PLO) began to embrace Resolution 194 as a key legal foundation for the right of return.[83] The UN, the international community, and Palestinians consider UNGA resolution 194 (III) to be the core instrument in the context of the Palestinian refugee' right of return.[84]

Israel has rejected UN General Assembly Resolution 194 (III), citing reasons such as its non-binding nature, its applicability to individuals rather than groups, and the fact that Palestinian refugees do not hold Israeli nationality.[85] These claims lack support under international law. The right of refugees to return to their homeland is recognized and affirmed by different international law instruments, including customary international law, nationality law, human rights law, and refugee law[86], This right is not limited to binding UN resolutions alone. It may be exercised either individually or collectively, regardless of whether the refugees possess citizenship of the successor state.[87] Many legal scholars and United Nations bodies outlined Resolution 194 (III) as a binding norm, especially due to its repeated reaffirmation and its link to Israel's admission into the UN[88]. This ongoing reaffirmation sheds light on the resolutions' legal weight and global significance within international law. Over 77 years, Israel has consistently denied Palestinian refugees the right to return. Israel's former UN ambassador Gilad Erdan stated in a UN security meeting in 2023 that: "*Let me be clear, there is no right of return. You all know this*,"[89]

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81 Kurt René Radley, 'The Palestinian Refugees: The Right to Return in International Law' (1978) 72 AJIL 586, 600.

82 Ibid.

83 Jonathan D Halevi, 'The Palestinian Refugees on the Day After "Independence"' (Jerusalem Center for Public Affairs 2010) 2 <https://jcpa.org/wp-content/uploads/2012/02/palestinian_refugees_after_independence.pdf> accessed 23 September 2025.

84 United Nations, 'The Right of Return of the Palestinian People' (UNISPAL, 2008) <https://www.un.org/unispal/document/auto-insert-210170/> accessed 23 September 2025.

85 Ibid.

86 Ibid.

87 Ibid.

88 Samer Hammouri, 'A Forgotten Detail: The Right of Return Was a Condition of the Establishment of the State of Israel' (Opinio Juris, 11 March 2024) <https://opiniojuris.org/2024/03/11/a-forgotten-detail-the-right-of-return-was-a-condition-of-the-establishment-of-the-state-of-israel/> accessed 23 September 2025.

89 'Palestinians "Have No Right of Return" Says Israel UN Envoy' (Middle East Monitor, 27 July 2023) <https://www.middleeastmonitor.com/20230727-palestinians-have-no-right-of-return-says-israel-un-envoy/> accessed 23 September 2025.

This ongoing refusal of the return of Palestinians has intensified after *the Al-Aqsa Flood operation* on October 8, with increased forcible displacement of Palestinians, widespread home demolitions in Gaza[90], land confiscations, and further annexation of territories in the West Bank to be under Israeli control[91]. Human Rights Watch has described the current developments as a "*second Nakba*."[92] The violations that began with the mass displacement of Palestinians over 75 years ago continue today, as millions of Palestinians and their descendants internally and transboundary remain barred from returning to their homeland.

The Palestinian refugees' right of return is one of the core issues that must be resolved to achieve a just solution to the Palestinian cause. Without allowing Palestinians to exercise this right, millions of them will remain refugees, stateless and deprived of their fundamental human rights. International law, as represented by the UN, international courts, scholars, NGOs, and the international community, should address the conditional nature of Israel's UN membership in relation to its adherence to UNGA Resolution 194 (III). This should serve as a legal mechanism to exert pressure on Israel to allow Palestinian refugees to practice their inalienable right of return, in accordance with international law and relevant UN resolutions.

III. Israel's Admission to the United Nations: Terms and Obligations

After occupying 77% of the territories of historic Palestine by Zionist military militias, Israel proclaimed its independence on May 14, 1948[93]. The following day, May 15, it submitted its first request to join the United Nations[94]. However, the UN Security Council did not act on this initial application. A second attempt was made on December 17, 1948, but it was rejected as it failed to have the majority of votes (7), 5 voted in favor, 5 abstained, and 1 country opposed

90 Amnesty International, ''You Feel Like You Are Subhuman': Israel's Genocide against Palestinians in Gaza' (Report, MDE 15/8668/2024, 5 December 2024) <https://www.amnesty.org/en/documents/mde15/8668/2024/en/> accessed 23 September 2025.

91 'Israeli Parliament Approves Symbolic Motion on West Bank Annexation' (Al Jazeera, 23 July 2025) <https://www.aljazeera.com/news/2025/7/23/israeli-parliament-approves-symbolic-motion-on-west-bank-annexation> accessed 23 September 2025.

92 Human Rights Watch, 'Hopeless, Starving, and Besieged: Israel's Forced Displacement of Palestinians in Gaza' (Report, MDE 15/8668/2024, 14 November 2024) <https://www.hrw.org/report/2024/11/14/hopeless-starving-and-besieged/israels-forced-displacement-palestinians-gaza> accessed 23 September 2025.

93 United Nations, 'History of the United Nations and the Question of Palestine' (UNISPAL) <https://www.un.org/unispal/history/> accessed 23 September 2025.

94 UNGA Res 273 (III) (11 May 1949) UN Doc A/RES/273 <https://www.un.org/unispal/document/auto-insert-189917/> accessed 23 September 2025.

(Syria).[95] Israel reapplied for UN membership in 1949. On March 4 of that year, the Security Council adopted Resolution 69, recommending Israel's admission with a vote of 9 in favor, 1 against (Egypt), and 1 abstention (Great Britain). Resolution 69 affirmed that Israel was a peace-loving nation capable and willing to fulfill the responsibilities outlined in the UN Charter.[96]

The final step came on May 11, 1949, when the UN General Assembly approved Israel's membership through Resolution 273, deciding that: "*Israel is a peace-loving State which accepts the obligations contained in the Charter and is able and willing to carry out those obligations*"[97]. The vote was 37 in favor, 12 opposed, and 9 abstentions, meeting the two-thirds majority needed. Those voting against included six of the seven Arab League members at the time (Egypt, Iraq, Lebanon, Saudi Arabia, Syria, and Yemen), along with Afghanistan, Burma, Ethiopia, India, Iran, and Pakistan.[98] As a result, UNGA Resolution 273 officially accepted Israel as a UN member, citing Israel's clear acceptance of the Charter's obligations and its commitment to uphold them from the moment of membership. In his letter to the UN Secretary-General dated 29 November 1948, the Minister of Foreign Affairs of the Provisional Government of Israel, *Moshe Shertok*, declared the following: "*On behalf of the State of Israel, Moshe Shertok, Minister for Foreign Affairs, being duly authorized by the State Council of Israel, declare that the State of Israel hereby unreservedly accepts the obligations of the United Nations Charter and undertakes to honor them from the day when it becomes a Member of the United Nations.*"[99] *Shertok* used the term "*Unreservedly"* in his declaration, which means that his government is willing to comply with UN charter and adhere to the UN resolutions without any conditions or reservations.

The preamble of Resolution 273 also states: "*Recalling its resolutions of 29 November 1947 and 11 December 1948 and taking note of the declarations and explanations made by the representatives of the Government of Israel before*

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95 Associated Press, 'Council Rejects U.N. Bid by Israel; 5 Nations Abstain—France, Canada Among Them' *The New York Times (New York, 18 December 1948) <https://www.nytimes.com/1948/12/18/archives/council-rejects-un-bid-by-israel-5-nations-abstain-france-canada.html> accessed 23 September 2025.*

96 UNSC Res 69 (4 March 1949) UN Doc S/RES/69 <https://digitallibrary.un.org/record/112017> accessed 23 September 2025.

97 United Nations General Assembly. (1949, May 11). *Admission of Israel to membership in the United Nations: Resolution 273 (III). United Nations Digital Library.* <https://digitallibrary.un.org/record/210373[1](<https://digitallibrary.un.org/record/210373)> accessed 8 October 2025.

98 United Nations General Assembly. (1949, May 11). *Admission of Israel to membership in the United Nations: Resolution 273 (III). United Nations Digital Library, Voting data.* <https://digitallibrary.un.org/record/671023> accessed 8 October 2025.

99 Israel. (1948, November 29). *Israel's application for UN membership – Declaration – Letter from Israel. United Nations.* <https://www.un.org/unispal/document/auto-insert-211182/> accessed 8 October 2025.

the Ad Hoc Political Committee in respect of the implementation of the said resolutions."[100] Studying the official records of the forty-seventh meeting of the UN's Ad Hoc Political Committee on Israel's admission to the UN on 6 May 1949 shows that allowing Palestinian refugees to exercise their right of return, through the implementation of paragraph 11 of UNGA Resolution 194 (III), was considered a *conditio sine qua non* for granting Israel membership in the United Nations. Several arguments and statements concerning Israel's admission to the UN were made during the meeting, such as Israel's adherence to UN resolutions, especially 181 and 194 (III), the criterion of a peace-loving state, and other technical aspects. The answers of the Israeli representative seemed legally inconsistent, ambiguous, and out of context regarding Israel's commitment to comply with UNGA resolutions on the right of return for Palestinian refugees. Israel's position on UNGA Resolution 194 (III), concerning the repatriation of Palestinian refugees, was questioned by El Salvador's representative. The representative of "Israel" responded to the question as follows:

> *"I can give an unqualified affirmative answer to the second question is whether we shall cooperate with the organs of the United Nations with all the means at our disposal in fulfilling the part of the resolution concerning refugees."*[101]

The Israeli representative, Mr. Eban, gave an inconsistent statement in his reply to the question of the representative of Denmark on the implementation of Article 11 of the UNGA 194 resolution. He argued that the repatriation of the Palestinian refugees wouldn't be implementable, as they won't be able to integrate in the "Israeli community", stating that : "*The question will always arise will be that of finding work, accommodation and a community in which the refugee can be integrated … it perhaps even more difficult to resettle the refugee in Israel because it would be more difficult to integrate them into the economic, social and cultural life of the country.*"[102] The representative of Denmark stated that he would understand the statement of the Israeli representative as a refusal to paragraph 11 of the UNGA resolution of 11 December 1948, which says that "*Refugee who might desire to return to their home and live at peace with their neighbors should be permitted to do so."*[103] The answer of Mr. Eban (Israel) was legally out of context and in contrast to paragraph 11 of the UNGA resolution 194, he stated that : "*it seems that another method of settling the question would be*

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100 UNGA Resolution 273 (III).

101 United Nations General Assembly. (1949). *Israel's membership in the UN – Ad Hoc Political Committee – Summary record (A/AC.24/SR.47). United Nations.* <https://www.un.org/unispal/document/auto-insert-185978. P.276.> accessed 8 October 2025.

102 Ibid. P.281.

103 Ibid. P.282.

resettlement of the refugees in the neighboring countries."[104] The representative of Denmark considered this statement a denial of the individual right (right of return) of the Arab refugees.[105] The response from the Israeli representative was that he was not legally qualified enough to discuss this matter.[106] Ambiguous answers were given by the Israeli representative to the question of the representative of Belgium when he asked: "*if "Israel" were admitted to membership in the UN, it would agree to co-operate subsequently with the General Assembly in settling the question of Jerusalem and the refugee problem*"[107]. The response was that his government would cooperate to find a solution to this problem, without clearly referring to allowing Palestinian refugees to exercise their right of return.[108] He elaborated by declaring that his government would contribute to finding a solution to the refugee problem, considering it a moral obligation rather than a legal one.[109] This statement contrasts with the language used by the UNGA in paragraph 11 of Resolution 194, which stated that "*the refugee wishing to return home should be permitted to do so…*". Even though UNGA resolutions are not legally binding, they have a legal nature that goes beyond being merely moral. Moreover, UNGA Resolution 194 (III) has specifically gained a customary status, as it contains a fundamental human right, there is global consensus on it, and it is annually reaffirmed in UNGA meetings and resolutions.[110] Technical aspects and prerequisite terms were raised by the Iraqi representative to the UN, Mr. Al-Swaidy, concerning the question of Israel's admission to the UN. He argued that the UN's First Committee should have dealt with the admission instead of the Ad Hoc Political Committee, and he was surprised at how short the timeframe for the admission procedure was, stating that : "*The time to consider the admission of Israel to the United Nations was not yet at hand, indeed many other problems of far greater importance were demanding the attention of the United Nations, a fact for which the state requesting admission to membership was mainly responsible*."[111]

Mr. Al-Swaidy further argued that Israel's application for UN membership does not comply with Article 4 of the UN Charter, which requires applicants to be peace-loving states. He elaborated that Israel had done nothing to promote international peace and security; instead, he claimed, it had spread terrorism, committed massacres against Palestinians, and even assassinated the UN

104 Ibid.

105 Ibid.

106 Ibid. P.283.

107 Ibid. p.286.

108 Ibid.

109 Ibid. P.287.

110 Boling, Palestinian refugees and the right of return, p. 85.

111 Israel's membership in the UN – Ad Hoc Political Committee – Summary record. P.289.

mediator himself. He stated: "*These practices prevented the inhabitants of Palestine from returning to their homes. The representative of Israel himself had admitted that political terrorism in Palestine had appeared several years prior to the establishment of Israe land had recognize the fact that it was an extremely difficult disease to eradicate*."[112]

The representative of Saudi Arabia to the UN, during the meeting of the Ad Hoc Political Committee, urged the UN General Assembly to reject Israel's membership request until a final settlement was reached on the Palestine question, including the issue of refugees. He believed that the UN should have prioritized addressing the question of Palestinian refugees over considering Israel's admission to the organization.[113] The Committee on the Exercise of the Inalienable Rights of the Palestinian People concluded in its May 1976 report that Israel is obligated to comply with UNGA Resolution 194 (III) and to allow Palestinian refugees to return to their homes, stating the following: "*in this respect, it was pointed out that Israel was under binding obligation to permit the return of all the Palestinian refugees displaced as a result of the hostilities of 1948 and 1967. This obligation flowed from the unreserved agreement by Israel to honor its commitments under the Charter of the United Nations, and from its specific undertaking, when applying for membership of the United Nations, to implement General Assembly resolutions l8l (II) of 29 November 1947, safeguarding the rights of the Palestinian Arabs inside Israel, and 194 (III) of 11 December 1948, concerning the right of Palestinian refugees to return to their homes or to choose compensation for their property. This undertaking was also clearly reflected in General Assembly resolution 273 (III). The Universal Declaration of Human Rights, as well as the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, also contained relevant provisions concerning these rights. The States directly involved were parties to this Convention.*"[114] This obligation stemmed from Israel's acceptance of the UN Charter and its commitment, during its UN membership application, to uphold General Assembly Resolutions 181 and 194(III), which addressed the rights of Palestinian Arabs and refugees. The committee also highlighted that this obligation was reflected in Resolution 273, which formalized Israel's admission. Despite the centrality of the right of return in Israel's membership conditions, Israel has consistently refused to recognize it.

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112 Ibid.

113 Ibid. P.296.

114 United Nations Committee on the Exercise of the Inalienable Rights of the Palestinian People, 'The Right of Return of the Palestinian People' (Report, 1978) <https://www.un.org/unispal/document/auto-insert-210170/> accessed 23 September 2025.

IV. Israel's UN Membership Criteria in the Framework of the ICJ Advisory Opinion of 1948

In its advisory opinion of 28 May 1948 on the Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), the International Court of Justice analyzed the requirements set out in Article 4 as follows: "*The conditions therein enumerated are five: a candidate must be (1) a State; (2) peace-loving; (3) must accept the obligations of the Charter; (4) must be able to carry out these obligations; (5) must be willing to do so*."[115]

A. The statehood of Israel

According to the Article 1 of the Montevideo Convention on the Rights and Duties of States 1933, "*The state as a person of international law should possess the following qualifications: a. a permanent population; b. a defined territory; c. government; and d. capacity to enter into relations with the other states*."[116]. Israel does not have a constitution; instead, it has a set of Basic Laws[117], which do not specify the country's defined borders.[118] The lack of clearly defined borders[119] raises questions about Israel's statehood. These concerns were raised by the representatives of Iraq and Saudi Arabia to the UN during the meeting of the Ad Hoc Political Committee regarding Israel's membership application to the United Nations. Mr. Al-Swaidy the representative of Iraq stated: "*the so-called State of Israel had no boundaries. How, therefore, in those circumstances could the Conciliation Committee determine whether or not it exercised effective jurisdictions? In the Commission's last report (A/838) it was stated that it was of the opinion that the refugee problem could not be permanently solved unless other political questions, notably the question of the boundaries, were not solved*."[120]

Commenting on the undefined borders of Israel, Mr. Hussein Dahir, the Saudi Arabia representative to the UN, during the same meeting, stated that:

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115 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion [1948] ICJ Rep 57.*

116 Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19 <https://www.ilsa.org/Jessup/Jessup15/Montevideo Convention.pdf> accessed 23 September 2025.

117 Basic Laws of Israel 2013 <https://www.constituteproject.org/constitution/Israel_2013> accessed 23 September 2025.

118 Steven Rosen, 'Forget about Jewish or Democratic. Is Israel Even an Actual Country?' (Haaretz, 12 October 2020) <https://www.haaretz.com/israel-news/2020-10-12/ty-article-opinion/.highlight/forget-about-jewish-or-democratic-is-israel-even-an-actual-country/0000017f-ef12-d3be-ad7f-ff3b5d930000> accessed 23 September 2025.

119 Association for Civil Rights in Israel, '50 Years A State without Borders' <https://campaigns.acri.org.il/50yearsen/> accessed 23 September 2025.

120 UN Ad Hoc Political Committee, 'Israel's Membership in the UN' (Summary Record, 1949) 289–90.

"*That state, which was not a state in the right and true sense of the term, had no defined and final boundaries of its own and seemed to recognize none; by its aggressive actions, it had expanded beyond the limits laid down by the General Assembly resolution*."[121]

Israel did not comply with UNGA Resolution 181, the partition plan; instead, it occupied territories beyond those allocated to it by the resolution[122]. Furthermore, Israel has continued to violate the Oslo Accords signed with the Palestinian Authority by expanding illegal settlement construction in the West Bank and East Jerusalem[123]. The concept of Israel as "a state without defined borders" has become more evident, especially following its policies of occupation and expansion after October 8, 2023[124]. The Israel's security cabinet has approved a plan to occupy Gaza[125], and the Israeli government is reportedly working on similar legislation to annex the West Bank[126] in response to the growing global recognition of Palestine, led by France, the UK, Canada, and Australia[127]. Additionally, Israel has expanded its occupation in southern Syria, seizing new territories following the collapse of the Assad regime on[128]December 8, 2024.

B. Israel's unwillingness to fulfill its obligations under the UN Charter

Israel, both before and after its admission to UN membership, has always been unwilling to allow Palestinian refugees to exercise their right of return. This breaches its obligations as a UN member state and violates UNGA Resolutions 181 and 194, as well as the right of return, which is a fundamental human right

121 Ibid. P.296.

122 MIFTAH, 'United Nations Resolutions' (23 May 2018). <https://miftah.org/Display.cfm?DocId=26482&CategoryId=4> accessed 23 September 2025.

123 Peace Now, '30 Years After Oslo – The Data That Shows How the Settlements Proliferated Following the Oslo Accords' (11 September 2023) <https://peacenow.org.il/en/30-years-after-oslo-the-data-that-shows-how-the-settlements-proliferated-following-the-oslo-accords> accessed 23 September 2025.

124 'UN Report: Israel Escalates West Bank Settlements in Violation of International Law' (Middle East Monitor, 19 March 2025) <https://www.middleeastmonitor.com/20250319-un-report-israel-escalates-west-bank-settlements-in-violation-of-international-law/> accessed 23 September 2025.

125 'Israel's Security Cabinet: What Is It and What Does It Do?' (BBC News, 21 September 2025) <https://www.bbc.com/news/articles/c8ryekj1m1do> accessed 23 September 2025.

126 'Israeli Parliament Approves Symbolic Motion on West Bank Annexation' (Al Jazeera, 23 July 2025) <https://www.aljazeera.com/news/2025/7/23/israeli-parliament-approves-symbolic-motion-on-west-bank-annexation> accessed 23 September 2025.

127 'Israel's Security Cabinet: What Is It and What Does It Do?' *The Jerusalem Post (Jerusalem, 21 September 2025) <https://www.jpost.com/israel-news/article-868283> accessed 23 September 2025.*

128 Human Rights Watch, 'Syria: Israel Forcibly Displaces Villagers in Occupied South' (17 September 2025) <https://www.hrw.org/news/2025/09/17/syria-israel-forcibly-displaces-villagers-in-occupied-south> accessed 23 September 2025.

embodied in customary international law. Israel's unwillingness to fulfill its obligations as a UN member state is evident in Part II of the UNCCP's second progress report on April 19, 1949. The report cited Ben Gurion's statement regarding the question of the repatriation of the Palestinian refugees as follows: "*Mr. Ben Gurion did not exclude the possibility of acceptance for repatriation of a limited number of Arab refugees, but he made it clear that the Government of Israel considered that a real solution of the major part of the refugee question lay in the resettlement of the refugees in Arab States*."[129]

According to Ben Gurion, "*the real solution*" to the Palestinian refugee question is to resettle them in Arab countries, thereby denying their fundamental human right to return to their homes of origin and acting in violation of UNGA Resolution 194. In the same report, paragraph 4, sub-paragraph (b), the UNCCP reaffirmed the Palestinian refugees' right of return and emphasized Israel's obligation to comply with paragraph 11 of UNGA Resolution 194 (III), stating that: *"the necessity that any solution of the problem must be contingent upon the acceptance by the Government of Israel of the principle established in General Assembly resolution 194 (III) of 11 December 1948, paragraph 11, to the effect that "the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date"*[130]

Mr. Al-Swaidy highlighted Israel's non-compliance and violations of UN resolutions, referencing the obligations of member states as outlined in Article 5 of the UN Charter. He emphasized that:

> *"Was Israel capable of fulfilling its obligations as a member of the United Nations? While it might be willing to assert its good intentions and assure the Committee of its ability to carry out its obligations, a review of events from the past few months reveals that Israel has repeatedly flouted decisions of both the General Assembly and the Security Council."*[131]
>
> *"Article 5 of the Charter provided that a Member of the United Nations against which the Security Council has undertaken preventive or enforcement action can be suspended from exercising the rights and privileges of membership, if that was for the members already admitted, should not the United Nations reflect before admitting to membership a group that has repeatedly violated decisions of the Council?"*[132]

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129 United Nations Conciliation Commission for Palestine, 'Second Progress Report' (19 April 1949) UN Doc A/838 <https://www.un.org/unispal/document/auto-insert-211334/> accessed 23 September 2025.

130 Ibid.

131 UN Ad Hoc Political Committee, 'Israel's Membership in the UN' (Summary Record, 1949) 290.

132 Ibid.

At the Lausanne Conference, Israel unequivocally rejected the principle of "repatriation of the refugees and payment of due compensation" as articulated in Resolution 194.[133]

To date, Israel refuses to implement UNGA Resolution 194(III) and continues to deny Palestinians' right of return, which amounts to crimes against humanity according to Human Rights Watch[134], and the international law scholar *J. Quigley*.[135]

C. Israel as a Peace-Loving state

Israel's behavior before and after admission to the UN has no indications that Israel would fulfill the criterion of being a peace-loving state. Right before submitting its membership application to the UN, Israel continued to forcibly displace Palestinians from their homes, spread terrorism, act in violation of UNGA 181 and 194 resolutions, and assassinate the UN mediator Count Bernadotte.

Mr. Hussein Dahir, the Saudi Arabia representative to the UN, during the meeting of the Ad Hoc Political Committee, had questioned the fulfillment of the peace-loving criterion of Israel, stating that: "*Once they had obtained the recommendation of the General Assembly, the Zionists went ahead with the execution of a long-planned aggression. Count Bernadotte had said that "the Jewish State was not born in peace, as was hoped for in the resolution of 29 November, but rather, like many another State in history, in violence and bloodshed." Its establishment constituted the only implementation of the resolution, and even that had been accomplished by means which were contrary to the procedure intended. Employing tens of thousands of well-trained and well-equipped men from eastern European countries, the Zionists had invaded the Holy Land and embarked upon a campaign of savagery and terrorism which had driven hundreds of thousands of peaceful and innocent Arabs from their homes. Contrary to the provisions of the resolution of 29 November 1947, and in defiance of the orders issued later, the Zionists had occupied practically the whole of Galilee together with the major portion of central and southern Palestine which had been allotted to the Arabs. They had invaded hundreds of Arab towns and villages, such as Jaffa, Acre, Lydda, Ramleh, Beersheba, Nazareth, and Jerusalem*."[136]

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133 United Nations Conciliation Commission for Palestine, 'Summary Record of a Meeting between the Conciliation Commission and the Delegations of Israel' (Meeting Record, Hotel de Carillon, Paris, 26 October 1951) <https://www.un.org/unispal/document/auto-insert-210634/> accessed 23 September 2025.

134 Human Rights Watch, 'Israel's Crimes against Humanity in Gaza' (14 November 2024) <https://www.hrw.org/news/2024/11/14/israels-crimes-against-humanity-gaza> accessed 23 September 2025.

135 John Quigley, 'Prohibition of Palestine Arab Return to Israel as a Crime against Humanity' (2023) 34 Crim L Forum 1.

136 UN Ad Hoc Political Committee, 'Israel's Membership in the UN' (Summary Record, 1949) 294.

"*Nothing of what the applicant had done so far could lead to the belief that it was, as the Charter stated, a peace-loving state worthy of admission into the United Nations. Far from being a peace-loving state showing its willingness to accept the obligations of the Charter and to carry out the decisions of the United Nations, it had repeatedly, deliberately, and flagrantly violated such obligations and decisions"*[137]

Based on the facts that show Israel's lack of being a peace-loving state, Mr. Dahir called on the UNGA to reject Israel's request for admission to the UN until a final solution to the Palestinians' question is reached.[138] Today's Israel continues its long history of crimes and violations by committing genocide in Gaza[139], forcibly displacing millions of Palestinians[140], occupying more territories[141], preventing Palestinians from exercising their right of return[142], and using starvation as a weapon[143], which counts as war crime according to the UN and International Criminal Court[144]. Threatening international peace and security through violating the sovereignty and territorial integrity of other countries by targeting civil facilities and civilians via lethal airstrikes in Palestine, Syria[145],

137 Ibid. P.295.

138 Ibid. P.296.

139 Office of the United Nations High Commissioner for Human Rights, 'Israel Has Committed Genocide in the Gaza Strip, UN Commission Finds' (Press Release, 16 September 2025) <https://www.ohchr.org/en/press-releases/2025/09/israel-has-committed-genocide-gaza-strip-un-commission-finds> accessed 23 September 2025.

140 Amnesty International, 'Israel/OPT: Israel's Mass Displacement Order for the Entirety of Gaza City Is Unlawful and Inhumane' (Press Release, 10 September 2025) <https://www.amnesty.org/en/latest/news/2025/09/israel-opt-israels-mass-displacement-order-for-the-entirety-of-gaza-city-is-unlawful-and-inhumane/> accessed 23 September 2025.

141 Al Jazeera Staff, 'Israel Pushes for More Illegal Settlements in Occupied West Bank amid Raids' (Al Jazeera, 6 August 2025) <https://www.aljazeera.com/news/2025/8/6/israel-pushes-for-more-illegal-settlements-in-occupied-west-bank-amid-raids> accessed 23 September 2025.

142 Human Rights Watch, '75 Years Later, Israel Blocking Palestinian Refugees' Return' (15 May 2023) <https://www.hrw.org/news/2023/05/15/75-years-later-israel-blocking-palestinian-refugees-return> accessed 23 September 2025.

143 United Nations, 'UN Special Committee Press Release' (Press Release, 14 November 2024) <https://www.un.org/unispal/document/un-special-committee-press-release-14nov24/> accessed 23 September 2025.

144 Karim A A Khan, 'Statement of ICC Prosecutor Karim A. A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine' (International Criminal Court, 20 May 2024) <https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state> accessed 23 September 2025.

145 Syrian Network for Human Rights, 'Three Civilians Killed and 34 Others Wounded in Israeli Bombing Targeting the Ministry of Defense Headquarters in Damascus on July 16, 2025' (19 July 2025) <https://snhr.org/blog/2025/07/19/three-civilians-killed-and-34-others-wounded-in-israeli-bombing-targeting-the-ministry-of-defense-headquarters-in-damascus-on-july-16-2025/> accessed 23 September 2025.

Lebanon[146], Yemen[147], Iran[148], Qatar[149], and Tunisia[150]. This shows in practice and evidence that Israel has never been a peace-loving state; thus, its membership in the UN should be at least either reconsidered or suspended.

V. The Legal Character of the Admission Requirements under Article 4 of the UN Charter

There was a debate about the nature of the assessment of the admission requirements to the UN, since the UN member states that cast their votes have a political character. In its 1948 advisory opinion, the ICJ concluded that having a political character does not release member states from addressing admission issues within the framework of the UN Charter. ICJ states:

"*The conditions in Article 4 are exhaustive, and no argument to the contrary can be drawn from paragraph 2 of the Article, which is only concerned with the procedure for admission. Nor can an argument be drawn from the political character of the United Nations organs dealing with admission. For this character cannot release them from observance the treaty provisions by which they are governed when these provisions constitute limitations on their power. This shows that there is no conflict between the functions of the political organs and the exhaustive character of the prescribed conditions*."[151]

The decision to admit Israel to the UN appears to have been more political than legal for many reasons. Statements made by various UN representatives during the Ad Hoc Political Committee meetings indicate that the procedures were carried out within a short timeframe (Iraq), while a more important issue, the plight of Palestinian refugees, which required the UN's attention, remained unresolved. Additionally, the recommendations of the UN mediator were ignored.

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146 United Nations, 'Israeli Strikes in Lebanon Continue to Kill Civilians, UN Rights Office Warns' (UN News, April 2025) <https://news.un.org/en/story/2025/04/1162266> accessed 23 September 2025.

147 Human Rights Watch, 'Israeli Forces' Attack on Sanaa Kills Journalists' (15 September 2025) <https://www.hrw.org/news/2025/09/15/israeli-forces-attack-on-sanaa-kills-journalists> accessed 23 September 2025.

148 'Iran Civilian Deaths Rise in Israel Strikes, Officials Say' *The New York Times (New York, 18 June 2025) <https://www.nytimes.com/2025/06/18/world/middleeast/iran-civilian-deaths-israel-strikes.html> accessed 23 September 2025.*

149 Tom Bennett, 'US Joins UN Security Council Condemnation of Israeli Strikes on Qatar' (BBC News, 2025) <https://www.bbc.com/news/articles/c740kk7vxkdo> accessed 23 September 2025.

150 'Israel Targets Gaza Aid Flotilla in Drone Attack off Tunisia' (Daily Sabah, 2025) <https://www.dailysabah.com/world/mid-east/israel-targets-gaza-aid-flotilla-in-drone-attack-off-tunisia> accessed 23 September 2025.

151 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion [1948] ICJ Rep 57.* Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice, 1948-1991.

In his progress report to the UN on 14 May 1948, the UN mediator *Count Bernadotte* highlighted the problem of Palestinian refugees and called on the UN to link the recognition of Israel to the right of return for Arab refugees in Palestine. In his report, he stated the following: "*No settlement can be just and complete if recognition is not accorded to the right of the Arab refugee to return to the home from which he has been dislodged by the hazards and strategy of the armed conflict between Arabs and Jews in Palestine* (..) *It would be an offence against the principles of elemental justice if these innocent victims of the conflict were denied the right to return to their homes while Jewish immigrants flow into Palestine, and, indeed, at least offer the threat of permanent replacement of the Arab refugees who have been rooted in the land for centuries.*"[152]

The Israeli representative to the UN, Mr. Eban, stated during the Ad Hoc Political Committee meeting that his government's contribution to finding a solution for the Palestinian refugees is "*a moral obligation*" rather than a legal one.[153]

The U.S. support for Israel's admission to the United Nations was driven by political considerations. The U.S. representative to the UN during the Ad Hoc Political Committee meeting ignored the crimes and massacres committed by Zionist militias, the assassination of the UN mediator, Israel's non-compliance with UNGA Resolutions 181 and 194(III), and the tragic situation of the Palestinian refugees, claiming that Israel met the Charter requirements as a peace-loving state.[154]President Truman's administration recognized Israel right after it declared independence, mainly because of political reasons. The U.S. wanted to enhance its presence in the Middle East and prevent the Soviet Union from expanding there. Political interests were the main reason behind the U.S. support for Israel's admission to the UN.[155]

VI. Israel's Stance and Record of Non-Compliance

From the very beginning, the official policy of Israel has consistently rejected the Palestinian Right of Return. David Ben-Gurion articulated this position in June 1948, stating that "*the return of Palestinians "must now be prevented.... And I will oppose their return also after the war"*.[156] The Israeli representative during

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152 United Nations Mediator on Palestine, 'Progress Report of the United Nations Mediator on Palestine Submitted to the Secretary-General for Transmission to the Members of the United Nations' (1948) UN Doc A/648, 17 <https://digitallibrary.un.org/record/703168?ln=en&v=pdf> accessed 23 September 2025.

153 See above n 68.

154 UN Ad Hoc Political Committee, 'Israel's Membership in the UN' (Summary Record, 1949) 293.

155 US Department of State Office of the Historian, 'The Creation of Israel, 1948' <https://history.state.gov/milestones/1945-1952/creation-israel> accessed 23 September 2025.

156 Jean Shaoul, 'Zionism's Legacy of Ethnic Cleansing' (World Socialist Web Site, 22 January 2001) <https://www.wsws.org/en/articles/2001/01/isra-j22.html> accessed 23 September 2025.

the Ad Hoc Political Committee meeting in 1949 advocated for the resettlement of Palestinian refugees in other countries rather than allowing them to return to their homes in historic Palestine.[157] The same statement has been repeated decades later by the former Israeli Prime Minister Yitzhak Shamir in 1992, declaring that: "*the return of Palestinian refugees will never happen in any way, shape or form, there is only a Jewish right of return to the land of Israel*".[158] These statements were not mere words; they were implemented through laws and regulations. Israel enacted legislation such as the Law of Return (1950), which the article 1 o the law allows all Jews around the world to immigrate to Palestine and settle permanently[159], while simultaneously forbidding the return of Palestinian refugee through the Absentees' Property Law (1950).[160] Following that, Israel consistently targeted and killed Palestinians who attempted to cross the borders to return to their homes. Successive Israeli governments have continued to uphold this policy by denying Palestinian refugees their right of return. As stated by a former Israeli representative to the UN, there is no recognized right of return for Palestinians.[161] More recently, actions such as the ban on the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)[15] are interpreted by some as part of a broader "political program to extend Israel's control over all of Palestine... erasing Palestinians from the land"[162]. If states can selectively disregard commitments based on perceived demographic or security threats, it weakens the entire framework of international law and harms the UN's reputation. Israel's membership in the UN should be reconsidered due to its non-adherence to UNGA Resolutions 181 and 194 (III). Given the importance of the right of return as a customary norm, recognized by many international legal instruments and reaffirmed by several UN resolutions, Israel's non-compliance undermines the reputation of the UN, exposing it to a potential failure similar to that of the League of Nations and discrediting its credibility among member states and the international community. This concern was raised early on by the Iraqi representative to the UN during a meeting of the UN's Ad Hoc Political

157 See above n 63.

158 Donald Neff, 'The Passage of U.N. Resolution 194' (1993) Washington Report on Middle East Affairs 84.

159 Law of Return 5710-1950 (Israel). <https://main.knesset.gov.il/EN/About/History/Documents/kns1_return_eng.pdf> accessed 23 September 2025.

160 Absentees' Property Law 5710-1950 (Israel) <https://www.palquest.org/en/historictext/9607/absentees-property-law-5710-1950> accessed 23 September 2025.

161 See above n 48.

162 Kjersti G Berg, Jørgen Jensehaugen and Lex Takkenberg, 'The Consequences and Prospects of Israel's Ban of UNRWA' (2025) The Cairo Review of Global Affairs <https://www.thecairoreview.com/essays/the-consequences-and-prospects-of-israels-ban-of-unrwa/> accessed 23 September 2025.

Committee, who emphasized that: "Informed public opinion was questioning whether the United Nations, on which depended so many hopes, would not end in the same failure as the League of Nations. The way to save the United Nations from collapsing was to free it from all taint of force and to prevent it from being a pawn in the game of political intrigue."[163]

VII. Legal and Political Implications of Israel's Non-Adherence

The UN has the right to suspend or cancel the membership of a specific state member based on articles 5 and 6 of the charter. The suspension or expulsion of membership can be carried out under specific conditions and through a defined process, according to Article 5 of the UN Charter, "*A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council. The exercise of these rights and privileges may be restored by the Security Council.*"[164] This suspension can be carried out by the General Assembly based on the recommendation of the Security Council. Furthermore, a member state can be expelled from the UN by the General Assembly, but only upon the recommendation of the Security Council. This expulsion is possible if the member state has persistently violated the principles of the UN Charter, as outlined in Article 6 of the Charter, which states that : "*A Member of the United Nations which has persistently violated the Principles contained in the present Charter may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council*."[165]

Throughout the history of the UN, no member state has ever been expelled or suspended. However, the apartheid regime that ruled South Africa in 1974 was suspended from participating in the UN General Assembly meetings, and a recommendation was submitted to the UN Security Council to expel South Africa from the organization. Nevertheless, no action was taken in this regard.[166] Today, calls for the expulsion of Israel from the UN[167] or the suspension of its membership in the UN have increased due to allegations of genocidal acts, war

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163 UN Ad Hoc Political Committee, 'Israel's Membership in the UN' (Summary Record, 1949) 292.

164 United Nations, Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 5 <https://www.un.org/en/about-us/un-charter/chapter-2> accessed 23 September 2025.

165 Ibid. Art.6.

166 United Nations, 'General Assembly Decides to Suspend South Africa from Participation in Its Work' (Photograph, United Nations, 1974) <https://media.un.org/photo/en/asset/oun7/oun7593912> accessed 22 September 2025.

167 Sari Jaber, 'It Is Time for Israel to Be Removed from the United Nations' (Al Jazeera, 14 November 2024) <https://www.aljazeera.com/opinions/2024/11/14/it-is-time-for-israel-to-be-removed-from-the-united-nations> accessed 23 September 2025.

crimes, crimes against humanity, the forcible displacement of Palestinians, and the illegal occupation and annexation of Palestinian territories. The UN Special Rapporteur on the situation of human rights in the Palestinian territory occupied since 1967 Francesca Albanese called for the suspension of Israel's membership in the UN, stating the following:

"*Under the fog of war, Israel has accelerated the forced displacement of the Palestinians that began decades ago, but "what's happening today is much more severe because of the technology, the weaponry and the impunity", she added. It is time to consider suspending Israel's credential as a Member State. Acknowledging that this is a sensitive topic, she said: "None of you really has clean hands when it comes to human rights," but no other country has maintained an unlawful occupation violating decades of UN resolutions as Israel has done*."[168] Following the Israeli attack on Qatar on September 9, 2025, which violated Article 2(4) of the UN Charter that prohibits the use of force against the territorial integrity or political independence of any state, the Arab-Islamic Summit called in September 2025 to suspend Israel's membership in the UN, citing its genocidal acts and behavior that threaten international security and peace.[169]

Expelling Israel from the UN or suspending its membership in the organization is technically possible and, at the same time, necessary. Israel, with its long history of impunity and non-adherence to international law and UN resolutions, along with its aggressive and criminal behavior, threatens international peace and security. The 78-year denial of Palestinian refugees' right of return, along with that of their descendants, has been intensified and exacerbated through Israel's ongoing policy of forcible displacement and genocidal acts against Palestinians. The Palestinian refugees' right of return is a *conditio sine qua non* for Israel's admission to the UN. This means that Israel's membership in the UN is conditional upon the implementation of UNGA Resolution 194(III), which requires Israel to permit Palestinians to return to their homes. Given the ongoing denial of this right of return, Israel's membership in the UN should be at least suspended to impose legal pressure on Israel to comply with international law and UN resolutions by allowing Palestinian refugees to exercise their right of return in safety and dignity.

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CONCLUSION

The assassination of Count Folke Bernadotte, the UN mediator, by Zionist militias (Lehi), followed by the release of the perpetrators and later the incorporation of the gang responsible for his assassination into the Israeli army, was an early and clear indication of Israel's non-compliance with international law and the UN Charter. Israel has not adhered to UN resolutions either before or after its membership. It occupied more territory than was allocated to it under Partition Resolution 181 and refused to implement Resolution 194, which calls for allowing Palestinian refugees to return to their homes. Israel justified its refusal with demographic, security, and political considerations linked to the peace process with Arab states, contradicting its statements and commitments made prior to its admission to the UN, where it pledged to implement UN resolutions without conditions.

The preamble of UN General Assembly Resolution 273, which accepted Israel's membership in the United Nations, implicitly states that Israel's admission is conditional upon its implementation of Resolution 194, which mandates the return of Palestinian refugees to the territories from which they were displaced. Israel's continued refusal to implement Resolution 194 places its UN membership under scrutiny and raises questions about its legality and compliance with the UN Charter. Articles 4 and 5 of the UN Charter allow the organization to suspend or revoke the membership of a member state if it is proven to have violated UN resolutions.

Historically, no member state has had its UN membership revoked or suspended. However, the apartheid regime in South Africa was suspended from participating in the General Assembly in 1974 due to its racist practices against the population. Today, in light of the genocide being committed by Israel in the Gaza Strip, its continued denial of the Palestinians' right of return, and its aggressive behavior that threatens international peace and security, there is an urgent need to suspend Israel's membership in the United Nations—or even revoke it—to pressure it to comply with international law and relevant UN resolutions.

Such a step could offer a glimmer of hope to Palestinian refugees and their descendants, who have been denied their right to return to their lands for decades. It may also bring an end to the long-standing suffering of Palestinian refugees in host countries, affecting all aspects of their legal, social, and psychological lives. The inability or unwillingness of the international community, particularly the UN, to suspend or revoke Israel's membership harms the reputation of the Organization, undermines the organization's authority, and creates a perception of selective application of international law. This dynamic contributes to a broader erosion of the rules-based international order. If states can disregard obligations without consequence, it sets a dangerous precedent for other international agreements and resolutions, potentially leading to a more anarchic global system where power politics supersede legal principles.

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THE PRINCIPLE OF INTERDEPENDENCE IN THE GLOBAL ASSESSMENT OF THE LIKELIHOOD OF CONFUSION IN TRADEMARK LAW*

Marka Hukukunda Karıştırılma İhtimalinin Bütünsel Değerlendirilmesinde Karşılıklı Bağımlılık İlkesi

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Abstract

In determining the likelihood of confusion, the principle of interdependence represents the methodological framework of holistic assessment in trademark law. This principle requires that the visual, aural, and conceptual similarities between the signs, together with the similarity of the goods and services, be evaluated not in isolation but through their mutual interaction. Within this framework, a low degree of similarity between goods or services may be offset by a high degree of similarity between the signs, and conversely, a high degree of similarity between goods may balance a lower similarity between the signs. In this sense, interdependence performs both an *offset* and a *balancing* function. The offset function compensates for weaknesses among the relevant factors, whereas the balancing function prevents any single element of similarity from being given excessive weight. Distinctive strength does not serve as a determinative factor in this assessment but rather as a regulatory one that amplifies or diminishes the influence of the relevant elements. Strong marks tend to broaden the scope of protection, while weak marks are subject to a stricter threshold of examination. In this way, the principle of interdependence prevents an excessively broad or unduly narrow interpretation of the likelihood of confusion, ensuring methodological stability that aligns with the realistic perception of the average consumer.

Key Words: Interdependence, global assessment, likelihood of confusion, offsetting function, the balancing function

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Özet

Karıştırılma ihtimalinin tespitinde **karşılıklı bağımlılık (interdependence)** ilkesi, marka hukukunda bütünsel değerlendirme analizinin metodolojisini gösteren bir ilkedir. İlke, işaretler arasındaki görsel, işitsel ve kavramsal benzerlik unsurlarıyla mal ve hizmet benzerliğinin birbirinden ayrılmadan, etkileşim içinde değerlendirilmesini gerektirir. Bu çerçevede, düşük düzeydeki mal veya hizmet benzerliği yüksek işaret benzerliğiyle telafi edilebilir; aynı şekilde, yüksek mal benzerliği düşük işaret benzerliğini dengeleyebilir. **Interdependence** bu yönüyle hem telafi edici hem de dengeleyici bir işlev görür. Telafi edici işlev, unsurlar arasındaki zayıflıkları giderirken; dengeleyici işlev, herhangi bir benzerlik unsurunun aşırı ağırlık kazanmasını önler. Ayırt edicilik gücü bu değerlendirmede belirleyici değil, unsurların etkisini artıran ya da azaltan bir düzenleyici unsur olarak rol oynar. Güçlü markalar koruma alanını genişletirken, zayıf markalar için daha sıkı bir inceleme eşiği aranır. Böylelikle interdependence, karıştırılma ihtimalinin aşırı geniş veya dar yorumlanmasını engelleyerek, tüketici algısını, kamu yararını ve rekabet serbestisini dengeleyen bir metodolojik istikrar sağlar.

Anahtar Sözcükler: Karşılıklı bağımlılık, bütünsel değerlendirme,karıştırılma ihtimali, telafi edici işlev, dengeleyici işlev

INTRODUCTION

One of the fundamental problem areas of trademark law is the determination of the likelihood of confusion. Both at the stage of registration and in infringement proceedings, the likelihood of confusion plays a decisive role not only in protecting the rights of the proprietor of the earlier mark but also in ensuring fair and sound competition in the marketplace. Therefore, the scope of this concept and the criteria for its assessment have been extensively discussed in both judicial case law and legal doctrine.

In determining the likelihood of confusion, criteria such as the similarity of the signs, the proximity of the goods and services, and the distinctiveness and reputation of the earlier mark are taken as the basis. However, none of these elements is regarded as an absolute criterion in itself; on the contrary, a holistic approach is adopted in which the elements interact with one another.

This approach, doctrinally articulated as the principle of interdependence, posits that a low degree of similarity between goods or services may be compensated by a high degree of similarity between the signs; conversely, marks endowed with a strong distinctive character are entitled to a correspondingly broader scope of legal protection.

In this manner, the doctrine operates as a structural mechanism preventing excessive formalism in the assessment of the likelihood of confusion, thereby ensuring a flexible yet normatively coherent and predictable analytical framework within trademark jurisprudence.

Although the principle of interdependence has been shaped primarily through the jurisprudence of the Court of Justice of the European Union (CJEU), the absence of a comprehensive and systematic academic study devoted exclusively to this subject, and the resulting lack of clarity regarding the scope and weight of the principle, have prompted the present inquiry.

The primary objective of this study is to examine the emergence, legal foundations, and theoretical functions of the principle of interdependence, and ultimately to evaluate its contribution to the analytical framework governing the assessment of the likelihood of confusion between trademarks. Following an exploration of the nature and functions of this principle, the study proceeds to assess—within the framework of the CJEU's jurisprudence—the impact of distinctive strength and descriptiveness on the application of the interdependence rule. Considering that well-known marks are protected under specific legal provisions, the analysis intentionally excludes the influence of trademark fame on the operation of the interdependence principle.

I. THE CONCEPT OF LIKELIHOOD OF CONFUSION IN TRADEMARK LAW

A. General Overview

The way in which consumers perceive a trademark depends on numerous variables — ranging from whether there exist other marks of a similar appearance in the marketplace to whether such marks are used in connection with similar goods or services.

The CJEU has defined the essential function of a trademark as guaranteeing the identity of origin of the goods or services bearing the mark, by enabling the consumer or end user to distinguish them—without any likelihood of confusion—from goods or services originating from other commercial sources.[1]

The proprietor of a trademark has the right to prevent any third party from using, in the course of trade, an identical sign for goods or services identical to those for which the mark has been registered. In such circumstances, it is not necessary to establish the existence of a likelihood of confusion separately.[2]

The likelihood of confusion arises from the comparison of the elements of similarity. In assessing the likelihood of confusion, the manner in which the consumer perceives the trademarks, as well as the psychological foundations of such perception, play a crucial role.

The value of a trademark is essentially embodied in its "selling power," which derives not only from the qualities of the goods on which it is used but also from

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1 Case C-206/01, Arsenal v. Reed, [2002] E.C.R. I-10273.

2 Annette Kur, 'Trademark Functions in European Union Law' (Max Planck Institute for Innovation and Competition Research Paper No: 6 2019) 6.

the inherent singularity and uniqueness of the mark itself.[3] In this context, the principle of trademark unity[4] requires the prevention of the use of an identical or confusingly similar sign for identical or similar goods or services.[5]

The granting of exclusive rights to trademark proprietors is fundamentally grounded in the belief that market transparency must be ensured. In a transparent market, consumers can easily distinguish between different products through trademarks and make choices by selecting a particular good or service. Signs that mislead consumers, however, undermine market efficiency, as consumers in such cases inevitably end up purchasing the wrong product.[6]

In European Union trademark law, the concept of "likelihood of confusion" lies at the very core of trademark protection under both Directive (EU) 2015/2436 and Regulation (EU) 2017/1001 on the European Union Trade Mark. The likelihood of confusion does not merely refer to the consumer directly mistaking

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3 Frank I. Schechter, 'The Rational Basis of Trademark Protection' (1927) 40 *Harvard Law Review* 813,831.

4 According to this principle, trademarks must indicate to consumers that a particular product is offered by a specific producer. See, David M Kaye, 'I'll Be Your Mirror: Broadening the Concept of Trademark Joint Ownership to Reflect the Developing Collaborative Economy' (2014) 44*Southwestern Law Review 59, 61; Schechter (n 3) 817; During the period of the abrogated Decree-Law No. 556, the principle of the unity of trademark ownership—also referred to in Turkish trademark law as "singularity," "exclusive ownership," or "the sole proprietorship of a trademark"—was in force. Under this principle, the use of the same trademark by more than one person was considered potentially misleading and deceptive to the public, and thus the principle was regarded as a requirement of public order. See, Cafer Eminoğlu, 'Marka Sahibinin Tekliği ilkesi ve Bu İlkenin Markanın Devri Bağlamında İncelenmesi (Anayasa Mahkemesi'nin 556 sayılı KHK'nin m. 16/5 Hükmünü İptal Eden Kararı Bağlamında Bir Değerlendirme' (2016) 1 YBHD 229, 233-234; With the entry into force of the Industrial Property Code No. 6769, scholars have argued that situations such as consent letters, coexistence agreements, loss of rights through acquiescence, and peaceful coexistence constitute mere exceptions, and that the principle of trademark unity continues to prevail. See Sabih Arkan, 'Sınai Mülkiyet Kanunu'nun 5.3. Maddesiyle İlgili Bazı Düşünceler' (2017) 33 (3) BATİDER 5, 6; In the same vein as Arkan, and for a detailed discussion on this matter, see Buket Gün, *Marka Hukukunda Birlikte Var Olma*(1.Bası, Yetkin Yayınları 2019)48,50; Another view on this matter asserts that the principle of trademark unity has been abandoned as a result of Article 5(3) of the Industrial Property Code See. Rauf Karasu, Cahit Suluk ve Temel Nal, *Fikri Mülkiyet Hukuku* (7. Bası, Seçkin Yayıncılık 2023)201; In our view, the principle of the unity of trademark ownership continues to apply as a general rule, while the consent system constitutes an exception to this fundamental principle.

5 Arkan (n 4) 6; Gün (n 4) 35; Eminoğlu (n 4) 233.

6 Anette Kur and Martin Senftleben, *European Trade Mark Law. A Commentary* (1st Ed. Oxford University Press 2017) 6–7; Mark P. McKenna 'The Normative Foundations Of Trademark Law' (2007) 82(5) Notre Dame Law Rev 1839,1844; Stephen L.Carter 'The Trouble With Trademark' (1990) 99 Yale Law Journal 759,762; Robert G.Bone', Hunting Goodwill: A History Of The Concept Of Goodwill In Trademark Law'(2006)86 Boston Univ Law Rev,547, 555.

one sign for another; it also encompasses the likelihood of association or the perception of an economic connection between the marks.[7] Under Turkish law, the likelihood of confusion is regulated both as a relative ground for refusal and invalidation,[8] and as a ground for infringement.[9]

Recital 16 of the Preamble to Directive (EU) 2015/2436 on the approximation of the laws of the Member States relating to trade marks sets forth the framework for assessing the *likelihood of confusion*. Accordingly: "It is necessary to interpret the concept of similarity in relation to the likelihood of confusion. The likelihood of confusion depends on numerous factors, in particular the recognition of the trade mark on the market, the association which can be made with the sign used or registered, the degree of similarity between the trade mark and the sign, and the degree of similarity between the goods or services designated. Therefore, the likelihood of confusion should constitute a specific condition for such protection."

In the context of the likelihood of confusion, there exists a risk that the commercial origin of the goods or services may not be distinguished or may be

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7 Article 10(2)(b) of Directive (EU) 2015/2436 provides that:"Where the sign is identical with, or similar to, the trade mark and is used in relation to goods or services which are identical with, or similar to, those for which the trade mark is registered, and where there exists a likelihood of confusion on the part of the public — which includes the likelihood of association between the sign and the trade mark — the proprietor of the trade mark shall be entitled to prevent all third parties from using such a sign in the course of trade.. Article 8(1)(b) of Regulation (EU) 2017/1001 provides that: "Where there exists identity or similarity between the earlier trademark and the mark applied for, and the goods or services covered by them are identical or similar, registration of the latter shall be refused if there is a likelihood of confusion on the part of the public; such likelihood of confusion includes the likelihood of association between the earlier mark and the later sign. Article 8(2)(b) of Regulation (EU) 2017/1001 provides that:"The proprietor of a trade mark shall be entitled to prevent all third parties not having his consent from using in the course of trade any sign where, because of its identity with, or similarity to, the EU trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark."

8 Article 6(1) of the Turkish Industrial Property Code (IPC, Law No. 6769) provides that:"*An application for registration shall be refused upon opposition if, because of the identity or similarity of the trademark applied for with an earlier registered trademark or an earlier filed application, and the identity or similarity of the goods or services covered, there exists a likelihood of confusion on the part of the public, including the likelihood of association with the earlier trademark*." Article 25(1) of the same Code stipulates that:"*Where any of the situations listed in Articles 5 or 6 exists, the court shall declare the trademark invalid."*

9 Article 7(2)(b) provides that:"*Use of any sign which is identical or similar to a registered trademark, in relation to goods or services that are identical or similar to those for which the trademark is registered, and where there exists a likelihood of confusion on the part of the public, including the likelihood of association with the registered trademark, shall be prohibited*."

incorrectly identified.10 A direct confusion arises where a new mark used for identical or similar goods or services leads consumers to believe that this new mark originates from the same commercial source as the earlier mark.11 In other words, in cases of direct confusion, the relevant public recognizes that the signs are not identical, yet believes that they belong to the same undertaking.[12]

In cases of indirect confusion, even if the public (consumers) do not actually confuse the commercial origin of the goods or services and recognize that they originate from different undertakings, they may nevertheless believe that the user of the sign is economically or legally connected to the trademark owner, for instance by assuming the existence of a licensing, merchandising, franchising, or sponsorship relationship between them[13]. This situation is also regarded as a likelihood of association.[14]

The Court of Justice of the European Union (CJEU), in the **SABEL v. PUMA** judgment, held—based on the wording of the Directive—that the likelihood of association does not constitute an alternative to the likelihood of confusion, but

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10 Paul Torremans and Jon Holyoak, *Intellectual Property Law*(9th. ed. Oxford Press 2019) 455; Paul Maeyaert and Jeroen Muyldermans, 'Likelihood of Confusion in Trademark Law: A Practical Guide Based on the Case Law in Community Trade Mark Oppositions from 2002 to 2012' (2013) 103(5) The Trademark Reporter 1032; Lionel Bently, Brad Sherman, Dev Gangjee and Phillip Johnson, *Intellectual Property Law(* 4th. ed., Oxford 2014) 741-742, 989

11 Hamdi Yasaman, Tolga Ayoğlu, Fülürya Yusufoğlu Bilgin, Pınar Memiş Kartal, Sinan H. Yüksel and Zeynep Yasaman, *Sınai Mülkiyet Kanunu Şerhi* (Seçkin Yayıncılık 2021) 963; Shan Zixin, 'Confusion or likelihood of confusion ?'(Master's Thesis 30 ECTS, Upsala University 2018).

12 M.Emin Bilge, *Ticari Ad ve İşaretler Arasında Karıştırılma Tehlikesi*(1.Bası Yetkin Yayınları 2014).60; Rıza Ayhan ,Hayrettin Çağlar, Burçak Yıldız ve Dilek İmirlioğlu (Çağlar), *Sınai Mülkiyet Hukuku*(1.Bası Adalet Yayınevi 2021) 67; Savaş Bozbel, *Fikri Mülkiyet Hukuku(*1. Bası Oniki Levha Yayıncılık 2015) 67-68.

13 Stephen P Ladas, *Patents, Trademarks, and Related Reights National and International Protection* (Harvard University Press 1975) 1082.

14 PL Roncaglia and GE Sironi,' Trademark Functions and Protected Interests in the Decisions of the European Court of Justice' (2011) 101 Trademark Reporter 147 157; Yasaman and Others (n 11) 964; In Turkish legal scholarship, the concept of likelihood of confusion has also been classified in another manner, namely in a *narrow* and a *broad* sense. In its classical, narrow sense, the likelihood of confusion refers to a situation in which the purchaser of a good or service—that is, the public at large—faces the risk of acquiring the same or a similar good or service originating from another undertaking, mistakenly believing it to be the one he or she intended to purchase. In its broader sense, however, even though the public recognizes that the product originates from a different commercial enterprise or producer, it acts under the misapprehension that there exists an *economic connection* between the trusted enterprise and the one from which the product has been purchased. Bkz. Ünal Tekinalp*, Fikri Mülkiyet Hukuku*(5.Bası Oniki Levha Yayıncılık 2012)439-440.

rather serves to clarify and delineate its scope as a complementary element.[15] In certain circumstances, the likelihood of confusion may arise by way of association, where the later mark evokes the earlier one in the perception of the relevant public [16].

The approach adopted in assessing the likelihood of confusion arising from the use of identical or similar signs for identical or similar goods aims to draw attention to the interests of consumers within the protective scope of trademark law. The principal point of reference relied upon in such assessments is the average consumer.[17]

Pursuant to the Court of Justice's reasoning in *Gut Springenheide*, the evaluation must proceed on the premise that the average consumer possesses a reasonable level of information, is observant, and acts with circumspection.[18]

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15 Case C-251/95 SABEL BV v Puma AG, Rudolf Dassler Sport. [1997] ECR I-06191; In European Union law, scholarly debate has arisen as to whether the *likelihood of association*—that is, the possibility of a mental or economic link being established between the marks—should be regarded as an element encompassed within the *likelihood of confusion*, or as a distinct and autonomous concept. According to one view, the assessment should be undertaken in light of the *origin-indicating function* of the trademark, focusing on whether, in the perception of the relevant public, such a connection between the marks has been established. See: Guy Tritton, *Intellectual Property in Europe*(1st Ed.Sweet&Maxwell 1996) 169; Given that the relevant public must recall the earlier mark upon encountering the later one, it has been argued that the establishment of an association should be regarded solely as a constituent element of the likelihood of confusion, rather than as an independent concept. See. Ilanah Fhima and Dev S Gangjee, *The Confusion Test in European Trade Mark Law* (1st ed,Oxford University Press 2019) 6; Another view, however, maintains that the concept of *likelihood of association* (the possibility of a mental or economic connection being established between the marks) is broader than the concept of *likelihood of confusion*. Contrary to what is suggested in the text of the Directive, it is argued that the notion of association may, in fact, encompass the likelihood of confusion within its scope. See. David T Keeling, *Intellectual Property Rights in EU Law* (Oxford University Press 2003) 181.

16 The concept of *mental association*—that is, the likelihood that one mark evokes another in the mind of the public—was first articulated within the Benelux trademark law system See. Uniform Benelux Law On Marks, http //www.uaipit.com/uploads/legislacion/files/0000007431_MARCASBENELUX.pdf, accessed 15.10.2025. In the decision of the Brussels Court of Appeal in the *Monopoly v. Anti-Monopoly* case, the court held that it was not necessary for confusion to exist solely with respect to the origin of the mark. It reasoned that the use of the expression *Anti-Monopoly* would immediately evoke the term *Monopoly* in the minds of the public, and therefore ruled that the company using the *Anti-Monopoly* mark had infringed the trademark rights of the proprietor of *Monopoly*. See. Charles Gielen, 'Harmonization of Trade Mark Law in Europe: The First Trade Mark Harmonization Directive of the European Council' (1992) *European Intellectual Property Review* 266, 266.

17 Aleksandra Nowak-Gruca, 'Consumer Protection Against Confusion in the Trademark Law' (2018) 5(1) *European Journal of Economics, Law and Politics* 13, 14.

18 Case C-210/96 Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung [1998] ECR I-04657.

Although a trademark most often functions as a sign indicating the commercial origin of goods, it need not necessarily bear the seller's name or directly identify the trader. Indeed, in most cases, the average consumer does not know the actual manufacturer of the goods purchased. It suffices that the public generally assumes that goods bearing the same mark originate from the same source. Accordingly, the concept of *confusion as to the origin of goods* does not necessarily presuppose a misunderstanding as to the identity of the actual producer or manufacturer. In certain circumstances, the public may perceive the trader who markets or promotes the goods under the mark as the source of origin itself.[19] In this context, it is not necessary that the likelihood of confusion be established with respect to the entirety of the relevant public. It is sufficient that a significant portion of the relevant consumers is likely to be confused as to the commercial origin of the goods or services.[20]

In United States trademark law, courts assess the likelihood of confusion by reference to the so-called *Polaroid factors*, derived from the Second Circuit's 1961 decision in *Polaroid Corp. v. Polarad Electronics Corp.*, 287 F.2d 492 (2d Cir. 1961). The court identified eight non-exhaustive factors to be considered in determining whether confusion is likely to occur: (1) the strength of the prior mark; (2) the degree of similarity between the marks; (3) the proximity of the products; (4) the likelihood that the prior mark owner will bridge the gap; (5) evidence of actual consumer confusion; (6) the defendant's intent in adopting the mark; (7) the quality of the defendant's product; and (8) the sophistication and degree of care exercised by consumers.[21] The tests applied in the analysis of the likelihood of confusion under U.S. trademark law have been the subject of extensive scholarly and judicial debate.[22]

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19 Rudolf Callmann, 'Trade-Mark Infringement and Unfair Competition' (1949) 14 *Law and Contemporary Problems* 185, 186–187.

20 David I Bainbridge, *Intellectual Property* (9th edn, Pearson Education 2012) 742; Fhima/ Gangjee (n 15) 168; Karasu /Suluk/Nal (n 4) 195.

21 Timothy R Koch. 'Own Your Mark: Trademark Law and the Likelihood of Confusion' (2014) 505 Seton Hall Law, Student Works 1, 12.

22 For a discussion on the view that the likelihood of confusion test entails a normative gap — in that it focuses solely on the probability of confusion while neglecting the nature of the harm resulting from such confusion and the underlying justifications for its remediation — see: Robert G. Bone, Taking The Confusion Out Of "Likelihood Of Confusion Toward A More Sensible Approach To Trademark Infringement,' (2012)106 (3) Northwestern University Law Review 1307,1309; For an argument that the analysis should incorporate a *materiality* element — by comparing trademark law with the law of unfair advertising — see: .Rebecca Tushnet, 'Running the Gamut from A to B: Federal Trademark and False Advertising Law'(2011)159 U. Penn. Law Review. 1305, 1365: For the argument that a new, national multi-factor test should be adopted — one designed to assist the judge in predicting the likely outcome of an "ideal survey" conducted among the relevant consumer group . It is further suggested that the test should not purport to be exhaustive of all possible factors, but, in line with insights

B. THE RULE OF GLOBAL ASSESSMENT IN THE ANALYSIS OF THE LIKELIHOOD OF CONFUSION

In analysing the likelihood of confusion between trademarks, the Court of Justice of the European Union (CJEU) has embraced the global assessment as its fundamental analytical approach. The Court first articulated this principle in *SABEL v. Puma*[23] emphasising that the likelihood of confusion cannot be inferred solely from the similarity between the signs; rather, it must be determined through a comprehensive evaluation that takes into account all relevant factors as a whole.

Except for those consisting of a single element, a trademark is protected as a whole composed of its essential and ancillary components. Accordingly, the assessment of similarity and the likelihood of confusion between trademarks should not be made by isolating and comparing the verbal or figurative elements separately, but rather on the basis of the overall impression created by all the elements that constitute the mark.[24]

The likelihood of confusion may arise from a complex interplay of multiple variables, including the similarity of goods and services; the degree of aural, visual, conceptual, and semantic resemblance between the signs constituting the marks; the level of distinctiveness and reputation of the earlier mark; the characteristics of the relevant public and the degree of attention and care exercised by its members when purchasing the goods or services; as well as whether the marks being compared belong to a series of marks.[25]

Consumers rarely have the opportunity to compare trademarks side by side. Typically, they encounter the allegedly infringing mark in the marketplace, while recalling the earlier mark only as it remains in their imperfect memory. Consequently, it is difficult for the average consumer to make a direct and complete comparison between different marks.[26]

The level of attention of the average consumer may vary depending on the nature of the goods or services concerned. It should also be borne in mind that not all consumers possess the same degree of attentiveness or the same type of memory. Accordingly, certain groups, such as the elderly, may be more prone

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from social-science research, should consist of three or four core elements presented as illustrative rather than restrictive in nature. See. Barton Beebe, 'An Empirical Study Of The Multifactor Tests For Trademark Infringements' (2006)94(California Law Review) 1581, 1646.

23 Case C-251/95 SABEL BV v Puma AG, Rudolf Dassler Sport. [1997] ECR I-06191.

24 David I Bainbridge, *Intellectual Property* (6th edn, Longman 2007) 634.

25 Fhima,/Gangjee, (n 15) 8; 634: Bainbridge (n 24) 634.

26 Hedvig K.S. Schmidt, 'Likelihood of Confusion In European Trademarks, Where Are We Now'(2002) 24(10) EIPR 463,465.

to confusion than others.[27] This is because consumers perceive all the elements constituting the mark together and act on the basis of the overall impression formed by the combination of those elements.[28]

In the doctrine, it has been argued that three principles should govern the analysis of similarity between trademarks: (1) marks should be assessed as a whole as they appear in the marketplace; (2) similarity should be measured in terms of appearance, sound, and meaning; and (3) similarities are to be given greater weight than differences. Courts, therefore, determine whether a mark is likely to mislead the public by examining it independently and considering the possibility that similar marks may cause confusion among consumers who do not have both marks before them but retain only a general, vague, or even blurred recollection of the other mark.[29]

The existence of identical or dominant features does not mean that two marks are automatically similar. Courts determine whether the overall effect created by the two marks is sufficiently alike to give rise to a likelihood of confusion.[30] The assessment of similarity is based not merely on the overlap of certain elements, but on the overall perception and awareness that the marks, as a whole, create in the mind of the average consumer.

In assessing the visual, aural, or conceptual similarity of trademarks, the global evaluation of the likelihood of confusion must be based on the overall impression produced by the marks, taking particular account of their distinctive and dominant elements.[31]

In *Calida Holding AG v OHIM*, the General Court upheld the decision of the Fourth Board of Appeal of OHIM, which had found no likelihood of confusion between the figurative mark **DADIDA** and the earlier word mark **CALIDA**. The Court observed, inter alia, that while phonetic similarity alone may in certain circumstances give rise to a likelihood of confusion, such a finding must form part of a **global assessment** encompassing the conceptual, visual and phonetic **similarities** between the signs. In other words, the existence of a likelihood of confusion must be determined on the basis of the perception of the relevant public, taking into account all the circumstances of the particular case.[32]

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27 *Jeremy Phillips, Trade Mark Law: A Practical Anatomy* (OUP 2003) 23.

28 Catherine Seville, *EU Intellectual Property Law and Policy* (Edward Elgar Publishing Limited 2009) 268.

29 Daryl Lim, 'Trademark Confusion Revealed: An Empirical Analysis' (2022) 71American University Law Review 1285,1328.

30 Lim (n 29) 1328.

31 Case C-3/03 P Matratzen Concord GmbH v OHIM [2004] ECR I-03657.

32 Case T-597/13, Calida Holding AG v Office for Harmonisation in the Internal Market (OHIM (2015), ECLI:EU:T:2015:781.

Although the assessment of similarity between trademarks is based on a holistic or global evaluation, it has been argued that this approach should not be understood as an absolute rule. In the case of a composite mark consisting of both figurative and verbal elements, where the figurative component clearly emerges as the dominant element, it has been suggested that the verbal elements may be disregarded and that the analysis may be conducted primarily with reference to the figurative component.[33]

The principle of global assessment requires that the likelihood of confusion be evaluated through the mutual interaction of multiple factors, thereby reflecting an approach that does not allow any single element to be determinative on its own. Within this framework, the existence of a likelihood of confusion may be established on the basis of the overall impression created by the mark in the perception of the relevant consumer, through a systematic consideration of all the circumstances of the particular case.

Under the principle of overall assessment, even where certain elements of the two marks differ, the overall image and message conveyed by the marks as a whole may render them similar. Conversely, despite the presence of similarities between particular elements, the overall impression created by the later mark may be sufficient to distinguish it from the earlier one.

The crucial point to be observed here is that, although a flexible approach may be adopted in the global assessment depending on the particular circumstances of each case, developments that would lead to an extraordinary expansion or undue restriction of the concept of likelihood of confusion must be avoided.[34]

II. THE PRINCIPLE OF INTERDEPENDENCE AS A METHODOLOGICAL APPROACH

A. GENERAL OVERWİEV

The principle of interdependence was first formulated by the Court of Justice of the European Union (CJEU) in *Canon Kabushiki Kaisha v. Metro-Goldwyn-Mayer Inc.*[35] In this judgment, the Court emphasised that the similarity between the goods or services and the similarity between the marks must be assessed in an interdependent manner. The similarity of the marks and that of the goods or services are not to be examined separately but in their reciprocal interaction. Thus, even where the goods or services are only slightly similar, a likelihood of confusion may still arise if the marks themselves are highly similar. The

33 Arslan Kaya, *Marka Hukuku*(2.Baskı, Vedat Kitapçılık 2024) 263-264.

34 Hanife Dirikkan, *Tanınmış Markanın Korunması(*1.Bası Seçkin Yayınları 2003)187.

35 Case C-39/97, Canon Kabushiki Kaisha v Metro-Goldwyn-Mayer Inc., formerly Pathe Communications Corporation [1998] ECR I-05507.

interdependence of these factors implies that a lower degree of similarity between the goods or services may be offset by a higher degree of similarity between the marks, and vice versa.[36]

Indeed, this point is expressly reflected in the EUIPO Guidelines for Examination of European Union Trade Marks. The Guidelines state that:

"The requirement of a global assessment and the principle of interdependence in the analysis of the likelihood of confusion mean that, where the signs and the goods and/or services at issue are at least to some degree similar, the assessment of the likelihood of confusion entails an iterative process in which all relevant factors are taken into account. This process takes place within the section on the global assessment.[37]

The Guidelines further state that *"the Court established the fundamental principle that the assessment of the likelihood of confusion entails a certain interdependence between the relevant factors, and in particular between the degree of similarity between the marks and that between the goods or services concerned. Accordingly, a lesser degree of similarity between the goods or services may be offset by a greater degree of similarity between the marks, and vice versa (29 September 1998, C-39/97, 1998:442, § 17). This principle of interdependence is of vital importance for the analysis of the likelihood of confusion."*.[38] As can be seen, the **interdependence rule** is regarded as one of the methodological approaches underlying the holistic assessment of the likelihood of confusion.

The interdependence principle is not merely an abstract notion of decisive value in judicial case law, but also a methodological principle that guides the concrete process of assessment in the evaluation of the likelihood of confusion.

Under this principle, the identity or similarity of the signs constituting the trademark — including their visual, phonetic, and conceptual similarities — and the similarity of the goods or services are not assessed in isolation, but rather **in light of their mutual interaction**.[39] For these factors do not create separate

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[36] It has also been stated under Turkish law that the greater the similarity between the goods and services covered by the trademark registrations, the lower the degree of similarity required between the signs for a likelihood of confusion to arise. Conversely, as the similarity between the goods and services decreases, a higher level of similarity between the signs is required for the likelihood of confusion to be established.See..Sabih Arkan, *Marka Hukuku C.1(*1. Bası AÜHF Yayınları 1997)97; Dirikkan (n 34) 187.

[37] <https://guidelines.euipo.europa.eu/1803468/1789458/trade-mark-guidelines/2-interdependence–principle> accessed 10.10.2025.

[38] <https://guidelines.euipo.europa.eu/1803468/1789458/trade-mark-guidelines/2-interdependence-principle> accessed 10.10.2025.

[39] Phillips (n 27) 335-336; Dirikkan (n 34) 186-187; Sevilay Uzunallı, 'Marka Hukukunda Malların ve/veya Hizmetlerin Benzerliğinin Tespiti Sorunu' iç H. Ercüment Erdem ve Tolga

perceptions in the mind of the consumer, but rather form a unified overall impression.

In practice, not all factors included in the test for likelihood of confusion are equally decisive, and it is nearly impossible to give full and simultaneous consideration to each of them.[40] It has been argued that the element of similarity constitutes the most decisive factor in the analysis of the likelihood of confusion, since unless similarity is interpreted in favor of finding a likelihood of confusion, the claimant's chances of success remain rather low regardless of the outcome of the other factors.[41]

In the **Lloyd Schuhfabrik** judgment,[42], The Court stressed that the factors used in the analysis of the likelihood of confusion must not be considered in isolation, but rather within a global assessment that takes into account their mutual interdependence and interaction.

This principle can only be applied where the signs and the goods or services concerned display a certain minimum degree of similarity.[43] The relationship between the similarity of the signs and that of the goods or services resembles the two poles of a magnet; for a likelihood of confusion to arise, these two poles must approach each other to a certain degree.[44]

From a theoretical standpoint, the interdependence rule renders the assessment of the likelihood of confusion more realistic and meaningful, as in practice consumers make their purchasing decisions through a multidimensional process of evaluation.[45] Therefore, the rule prevents a single element of similarity (for instance, phonetic resemblance) from being determinative of the consumer's decision, ensuring instead that all relevant factors are assessed in a balanced

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Ayoğlu vd (eds), Prof. Dr. Hamdi Yasaman'a Armağan, (On İki Levha 2017) 675; Tekinalp (n 14) 442; Hayri Bozgeyik ve Sefa Er 'Yargıtay Kararları Işığında İlaç Markalarında Karıştırılma İhtimali' (2024) 10 (1)TFM, 79, 82.

40 Michael Grynberg, 'Trademark Litigation as Consumer Conflict' (2008) 83 *N Y U L Rev.* 60, 68.

41 Ariel Fox, Christina J Hayes and James (Hanjun) X, 'Consistency of Confusion? A Fifteen-Year Revisiting of Barton Beebe's Empirical Analysis of Multifactor Tests for Trademark Infringement' (Harvard Law School 2024) 16, Scholars have further observed that the strength of the mark constitutes an important factor in achieving an outcome in favor of the claimant, and that the element of intent becomes decisive for the claimant only insofar as it supports the finding of a likelihood of confusion.

42 Case C-342/97 Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV.[1999] ECR I-03819.

43 Fhima/Gangjee (n 15) 163.

44 Karasu/Suluk ve Nal (n 4) 217.

45 Even when faced with complex decisions, consumers generally reach conclusions by relying on only a few decisive factors. See, for instance Beebe (n 22) 1601-02.

manner. Conceptually, the essence of the rule lies in establishing a connection between the various elements of similarity, thereby grounding the assessment of the likelihood of confusion on a foundation consistent with consumer perception.

An important point must be underlined regarding consumer perception. Although consumer perception largely influences judicial decisions, it is equally true that judicial decisions can, in turn, reshape consumer perception. As courts prohibit even those practices that create only a low degree of likelihood of confusion among certain consumers, consumers gradually become accustomed to a marketplace in which such uses are increasingly restricted. Combined with the fact that attentiveness entails cognitive and economic costs, this dynamic ultimately leads consumers, over time, to lower their level of attention in a market environment rendered "safe" for them by trademark law.[46]

In this context, it may be said that the primary role of the interdependence rule in the analysis of the likelihood of confusion is to relax rigid formalism by allowing the elements of similarity between the signs and between the goods or services covered by the registration to balance and compensate for one another. At this point, the interdependence rule performs two distinct functions: a compensatory function and a balancing function.

This dual functional distinction is implicitly present in the case law of the CJEU; however, the doctrine has predominantly emphasized only its compensatory aspect. Yet, the balancing function serves as a corrective mechanism, preventing exaggerated extensions in favor of finding a likelihood of confusion.

B. THE OFFSETTING FUNCTION OF THE INTERDEPENDENCE PRINCIPLE

The offsetting function emerges as the fundamental and determining aspect of the interdependence principle.

Following the **Canon** judgment, in **Lloyd Schuhfabrik Meyer**[47], it was expressly emphasized that the determination of the likelihood of confusion is based on the principle of a global assessment, which inherently involves interdependence between the relevant factors. According to the Court, a low degree of similarity between the goods or services may be offset by a high degree of similarity between the marks, and conversely, a low degree of similarity between the marks may be balanced by a higher degree of similarity between the goods or services.

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46 Barton Beebe and Roy Germano and Christopher Jon Sprigman and Joel H. Steckel, 'Consumer Uncertainty in Trademark Law: An Experimental Investigation'(2023) 72(3) Emory Law Journal 489, 540.

47 Case C-342/97 Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV. [1999] ECR I-03819.

Thus, the weaker impact of one factor considered in the analysis of the likelihood of confusion may be offset by the greater weight of another factor, leading to the conclusion that a likelihood of confusion exists.[48]

Within the normative framework of the likelihood of confusion, a structure is envisaged in which the elements of similarity complement one another. In this context, the close connection between the similarity of the signs and the similarity of the goods or services constitutes the focal point of their mutual interaction. Accordingly, "complementation" refers to the joint meaning derived from the interaction of the similarity factors, whereas "offsetting" denotes the capacity of one factor to compensate for the relative weakness of another.

In the **Castellblanch** judgment[49] The CJEU's **Castellblanch** case concerned the refusal of registration for the figurative mark **"CRISTAL CASTELLBLANCH"**, on the ground of a likelihood of confusion with the earlier word mark **"CRISTAL."** The applicant, **Castellblanch SA**, a Spanish producer of *cava* sparkling wine, sought to register its mark as a Community Trade Mark (CTM). However, **Champagne Louis Roederer SA**, the producer of the luxury French champagne "CRISTAL" since 1876, filed an opposition. Both the **Opposition Division** and subsequently the **Board of Appeal of OHIM** (now EUIPO) rejected the application, holding that both marks covered the same category of goods (champagne/sparkling wines) and that the term "CRISTAL" constituted the distinctive and dominant element of the marks. Castellblanch SA appealed to the **Court of First Instance** (now the General Court), which, in its judgment of **27 October 2005 (T-29/04)**, dismissed all of the applicant's claims. The applicant then brought an appeal before the **Court of Justice**, which upheld the General Court's decision.The Court emphasized that the element "CRISTAL" represented the dominant and distinctive component of both marks, while "CASTELLBLANCH" remained secondary in the perception of the relevant public. Consequently, the Court found that the marks were **visually, phonetically, and conceptually similar**, and given the similarity of the goods, a **likelihood of confusion** was established. Importantly, the Court conducted its reasoning on the basis of a **global assessment** of the likelihood of confusion and expressly referred to the **principle of interdependence** between the relevant factors—holding that even where the similarity between the goods was low, a higher degree of similarity between the signs could **offset** that weakness and increase the likelihood of confusion.

In the **T.I.M.E. ART** judgment[50] "The dispute concerns the likelihood of confusion between the figurative mark "QUANTUM," filed by T.I.M.E. ART

48 Dirikkan (n 34) 186-187.

49 C131/06 P Castellblanch SA v European Union Intellectual Property Office [2007] I-00063.

50 Case C-171/06 P T.I.M.E. ART v OHIM [2007] ECR I-00041.

for watches, and Devinlec's earlier national word mark "Quantième." The General Court (Case T-147/03) annulled the OHIM Board of Appeal's decision rejecting the opposition and held that a likelihood of confusion existed. Upon appeal by T.I.M.E. ART, the Court of Justice upheld the General Court's ruling. The Court emphasized that the weak distinctive character of the earlier mark does not, in itself, preclude a finding of likelihood of confusion. Rather, visual and phonetic similarities, together with the identity or similarity of the goods, must be assessed as part of a global evaluation. The Court further observed that marketing conditions—such as sales taking place in stores with the assistance of sales personnel—are variable and therefore cannot be given decisive weight in the analysis of likelihood of confusion. Moreover, the Court clarified that for a conceptual difference to "counteract to a large extent" the existing similarities, at least one of the signs must have a clear and specific meaning for the relevant public, and that meaning must be immediately perceptible (which was not the case for QUANTUM and Quantième). Finally, the Court reiterated that in the global assessment, all relevant factors must be considered in a state of "interdependence."

In our view, the word **"Quantum"** does not immediately evoke the concept of a *watch* in the mind of the average consumer. Accordingly, it cannot be regarded as **descriptive** in relation to goods in Class 14 (watches), and it possesses a certain degree of **inherent distinctiveness**. In this context, although the signs are **visually and phonetically similar**, they exhibit a **degree of conceptual difference**. However, this **conceptual distinction is not sufficient** to neutralize or substantially outweigh the **visual and phonetic similarities** existing between the signs.

In the **HALLOUMI / BBQLOUMI** judgment,[51] A Bulgarian company filed an application for the sign "BBQLOUMI," which was opposed by the Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi ("Halloumi Foundation"), relying on its earlier EU collective mark "HALLOUMI." The General Court found that the similarity between the signs was low and held that there were visual, phonetic, and conceptual differences, concluding that there was no likelihood of confusion.However, on appeal, the Court of Justice of the European Union (CJEU) emphasized that since both signs covered the same goods—cheese products—the identity of the goods could constitute an important factor reinforcing the likelihood of confusion, even where the similarity between the signs was low. The judgment demonstrates that in cases involving marks of low distinctiveness, particularly those containing geographical or regional designations, a low degree of similarity between the signs alone does not suffice

[51] Case C-766/18 P Foundation for the Protection of the Traditional Cheese of Cyprus named Halloumi v European Union Intellectual Property Office [2020] ECLI:EU:C:2020:170.

to rule out the likelihood of confusion.Accordingly, the CJEU explicitly applied the offsetting function of the principle of interdependence, holding that a low level of similarity between the signs may be offset by a high degree of similarity or identity between the goods. The Court further advised national courts to adopt a **global assessment** approach in evaluating such cases.

In our view, trademarks that are closely associated with a particular region and also registered as geographical indications tend to evoke, almost reflexively, that specific region in the mind of the average consumer. Therefore, in the present case, the establishment of an offsetting relationship within the framework of the principle of interdependence appears to be well founded.

C. THE BALANCING FUNCTION OF THE PRINCIPLE OF INTERDEPENDENCE

Whether a likelihood of confusion arises in a particular case depends on a global assessment of various factors that are interdependent with one another. It has been stated that the degree of similarity between the goods and services, the similarity between the signs, the relevant public, the presence of distinctive and dominant elements in the conflicting signs, the degree of recognition of the earlier mark, and other relevant factors must all be evaluated with due regard to their relative weight in the specific circumstances of the case.[52]

In determining the likelihood of confusion, it is not necessary for all the factors under analysis to carry the same weight. Depending on the specific circumstances of each individual case, where one of these factors does not possess sufficient strength, the overall balance may be achieved through the compensating influence of the other factors.[53]

In the analysis of the likelihood of confusion, the principle of interdependence functions not only as an offsetting mechanism but also as a balancing instrument.[54]

When assessing the likelihood of confusion between trademarks, one of the different dimensions of similarity—visual, phonetic, or conceptual—may appear relatively more dominant from the perspective of the average consumer. Through this function, the analysis prevents any single element (for example, phonetic similarity) from gaining disproportionate importance.

In this way, the principle of interdependence not only establishes an offsetting relationship among the various similarity factors but also ensures that their

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52 Aleksandra Nowak-Gruca, 'Consumer Protection Against Confusion in The Trademark Law' (2018) 5 (1) European Journal of Economics, Law and Politics 1, 13.

53 Dirikkan (n 34) 186-187.

54 Özge Ulukapı, Marka Hukukunda Karıştırılma İhtimali (Doktora Tezi, Ankara Üniversitesi 2025); See. Büşra Bıçakcı, <https://iprgezgini.org/2022/08/12/karistirilma-olasiligi-incelemesinde-karsilikli-bagimlilik-ilkesi/>.

relative weight remains balanced. This prevents the scope of protection granted to the mark from being unduly broadened or narrowed. The balancing function thus reflects the very essence of the principle of global assessment: none of the individual similarity factors, on its own, should determine the outcome of the decision.

Trademarks may sometimes be visually and phonetically similar, yet convey entirely different meanings at the conceptual level. The CJEU's **PICASSO/ PICARO** judgment[55] provides a clear illustration of how conceptual differentiation may counterbalance visual and phonetic proximity. In that case, **Peugeot** opposed the registration of the mark "PICARO," arguing that it gave rise to a likelihood of confusion with its earlier mark "PICASSO." The word "PICARO" means "rogue" or "rascal" in Spanish, whereas "PICASSO" is the name of the famous painter. Conceptually, therefore, the marks were clearly distinct. The Court acknowledged that the two signs shared a certain degree of **visual and phonetic similarity**, yet emphasized that the name "Picasso" possesses a **strong conceptual resonance**, immediately evoking the well-known artist in the mind of the public. This conceptual difference was deemed sufficient to **neutralize** the effects of visual and phonetic similarity. The CJEU thus **upheld** the General Court's decision and **dismissed Peugeot's appeal**, confirming that the strong conceptual divergence between the signs outweighed their visual and phonetic similarities.

Consequently, it was held that there was no likelihood of confusion capable of preventing the registration of the mark "PICARO." This judgment refers to the **balancing function of the principle of interdependence**, demonstrating that a high degree of visual or phonetic similarity may be neutralized by conceptual differences. Moreover, it can be observed that trademarks consisting of the names of famous individuals possess a particularly strong conceptual force, which carries distinctive weight in the analysis of the likelihood of confusion. Thus, the decision underscores, as a matter of methodology, that **conceptual differentiation** may perform **a balancing function** within the overall assessment.

In the **Medion v. Thomson** judgment 56 the Court of Justice of the European Union (CJEU) dealt with the likelihood of confusion between the registered mark "LIFE" and the later composite mark "THOMSON LIFE." The earlier mark "LIFE" had been registered alone for electronic goods, while the contested sign combined this element with the word "THOMSON."The Court of First Instance had excluded the likelihood of confusion, reasoning that "THOMSON" was a well-known and dominant element within the composite mark. The CJEU,

[55] Case C-361/04 P - Ruiz-Picasso and Others v OHIM [2006] ECR I-643.

[56] Case C-120/04 Medion AG v Thomson multimedia Sales Germany & Austria GmbH [2005] ECR I-08551.

however, found this approach insufficient. It held that, in determining the likelihood of confusion, it is not enough to consider only the dominant element of the composite mark. The Court emphasized that if the earlier mark—although incorporated into a later composite sign—**retains an independent distinctive role** in the perception of the relevant public, a likelihood of confusion may still arise.Accordingly, even if the element "LIFE" appeared secondary beside "THOMSON," it still possessed the capacity to evoke a separate association in the mind of the consumer. Therefore, it had to be taken into account in the overall assessment of the likelihood of confusion.

This judgment demonstrates that even where the earlier mark consists of a single element, this fact is not in itself decisive in the assessment of the likelihood of confusion. In the present case, the earlier mark was reproduced identically within the later mark. The term "LIFE" possessed distinctiveness in relation to the specific goods covered by its registration. Although the later mark included the element "THOMSON," this addition was not considered sufficient to differentiate it from the earlier mark.Taking into account that the average consumer exercises a higher degree of attention when purchasing electronic goods, it can be said that the **balancing function** of the principle of interdependence serves here to prevent a **one-sided assessment**, ensuring that neither the dominant element nor the overall impression is overemphasized in the analysis.

In the OHIM v Shaker (Limoncello) judgment[57], Limiñana y Botella, the proprietor of the Spanish word mark "LIMONCHELO," filed an opposition against the figurative mark application submitted by Shaker di L. Laudato, which contained the verbal elements "Limoncello della Costiera Amalfitana" and "shaker." The General Court accepted that the goods covered by the parties' marks were identical; however, it confined its similarity assessment solely to the visual dimension. It held that the element consisting of a "round plate decorated with lemons" constituted the dominant component of the contested figurative sign from the perspective of the relevant consumer, whereas the verbal elements "Limoncello della Costiera Amalfitana" and "shaker" occupied a secondary position within the overall impression. Consequently, finding no need to examine phonetic or conceptual similarity, the General Court concluded that the dominant visual element did not resemble the earlier word mark "LIMONCHELO" and therefore ruled out any likelihood of confusion. On appeal, the CJEU set aside the judgment, holding that the General Court's approach was incompatible with the principle of a global assessment. According to the Court, although a particular component of a composite mark may, in certain circumstances, be dominant, this does not justify disregarding the remaining elements, as the

[57] Case C-334/05 P European Union Intellectual Property Office v Shaker di L. Laudato & C. Sas [2007] ECR I-04529.

consumer's perception is shaped by the overall impression created by the mark as a whole. The CJEU emphasized that limiting the comparison of the signs to the visual aspect, excluding phonetic and conceptual considerations, and analysing the components of the mark in isolation constituted an error of law. Stressing that the likelihood of confusion must be evaluated through a balanced and comprehensive examination of all relevant components, the Court remitted the case back to the General Court for a fresh assessment.

In the **SO…? / SO COUTURE** judgment of the **General Court of the European Union**[58]:, the dispute concerned the visual, phonetic, and conceptual similarities between the marks "SO…?" and "SO COUTURE," both used in relation to cosmetic products.The Court observed that cosmetics are typically purchased in **self-service retail environments**, where **visual perception plays a decisive role** in the consumer's selection process. Consequently, greater weight was attributed **to visual similarity**, while the **limited impact** of phonetic and conceptual similarities was addressed in a **balancing manner** within the framework of the overall assessment. The Court thus held that differences at the phonetic or conceptual level would have only a **limited influence**, and that the possibility of the products being displayed side by side on store shelves would further enhance the impact of visual similarity.The Court also noted that the earlier mark possessed **only** a modest level of distinctiveness, which narrowed the scope of protection it could claim. Conversely, although the term "COUTURE" in the later mark evoked notions of **fashion and elegance**, it did not form a clearly unified conceptual whole with the element "SO" in the perception of the relevant public.Accordingly, despite the existence of **visual similarity**, the **overall impression** created by the signs was sufficiently different, and the Court concluded that **no likelihood of confusion** existed between the two marks.

This judgment illustrates that **actual market conditions** may also be taken into account in the assessment of the likelihood of confusion, in line with the **balancing function** of the principle of interdependence. In the case at hand, the **low conceptual similarity** between the marks was not merely offset by a **high degree of visual similarity**; rather, the Court conducted a more realistic and context-sensitive analysis by considering market realities such as self-service purchasing practices and the side-by-side display of products on store shelves. The decision thus demonstrates that the application of the principle of interdependence can interact dynamically with market circumstances, confirming that the evaluation of the likelihood of confusion should not be abstract or mechanical but grounded in the actual conditions of trade and consumer perception.[59]

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[58] Case T-30/21 L'Oréal v European Union Intellectual Property Office [2022] R 158/2016-5.

[59] It has been argued in the doctrine that if judges show interest solely in empirical studies aimed at demonstrating the existence of a likelihood of confusion or the reputation of a trademark,

III. THE EFFECT OF DISTINCTIVE CHARACTER ON THE APPLICATION OF THE INTERDEPENDENCE PRINCIPLE

The distinctiveness of the sign constituting the trade mark derives from its originality, its capacity to attract attention, its ability to remain in the memory for an extended period, and the fact that, upon a subsequent encounter with the sign, its details can be recalled rapidly and with clarity.[60] The closer the sign is to the relevant goods or services, the more its distinctiveness is eroded, whereas the further the sign moves away from the relevant goods or services, the greater its distinctiveness becomes.[61]

In cases where a mark possesses a low degree of distinctiveness, the scope of protection may narrow even with respect to the goods or services for which it is registered. This is because even a minor alteration made to the sign may be sufficient to eliminate the likelihood of confusion.[62]

The scope of trademark protection is proportionate to the degree of a mark's distinctiveness, and this principle serves as a significant factor in determining the likelihood of confusion in infringement proceedings. In assessing such likelihood, the extent of the mark's use in the marketplace, the scale and intensity of its advertising, and its resulting recognition among the relevant public are all taken into account alongside its inherent distinctiveness. Together, these elements form the foundation of the evaluative framework through which courts and trademark authorities calibrate the breadth of legal protection afforded to the mark.[63]

It is argued that the principle of interdependence operates not only in the assessment of similarity between goods or services and the signs at issue, but

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the infringement analysis may become unbalanced. See. Lotte Anemaet, 'The Fairy Tale of the Average Consumer: Why We Should Not Rely on the Real Consumer When Assessing the Likelihood of Confusion' (2020) 69(10) GRUR International, 1008,1008; It has also been stated that the extent to which consumers are able to adapt to the challenges posed by modern marketing systems is of significance, and that courts should not confine the assessment of the "level of consumer awareness" merely to a subordinate stage of the analysis. On the contrary, this element should be addressed at the very outset of the evaluation, and every aspect of the purchasing experience should be examined within this framework. See. Laura A. Heymann, 'Trademark Law and Consumer Constraints'(2022)2067 Faculty Publications. William & Mary Law School Scholarship Repository 340,381.

60 Arkan (n 36) 100; Dilek Cengiz, Türk Hukukunda İktibas veya İltibas Suretiyle Marka Hakkına Tecavüz(1. Bası, Beta Yayınevi 1995) 23.

61 Uğur Çolak, Türk Marka Hukuku (5.Bası, Oniki Levha Yayıncılık 2023) 34-35; Hamdi Yasaman ve Zeynep Yasaman Kökçü, 'Kullanım Yoluyla Ayırt Edicilik Kazanan veya Kaybeden Markaların Koruma Kapsamı", (2016) Fikri Mülkiyet Hukuku Yıllığı 2014(Ed. Tekin Memiş) 393,396; Cahit Suluk, Fikri Mülkiyet Haklarının Koruma Kuvveti (1.Bası, Seçkin Yayınları 2025) 222.

62 Suluk (n 61)215.

63 Beebe (n 22) 1634-1637.

also across all other factors taken into account in determining the likelihood of confusion.64 While this view may appear compatible with the principle of global (holistic) assessment, in our opinion, it does not hold true with respect to the interdependence rule as a methodological construct specifically governing the analysis of similarity.

The degree of distinctiveness is not, in itself, one of the elements directly encompassed by the interdependence rule. Rather than serving as an autonomous criterion of similarity in the assessment of likelihood of confusion, distinctiveness operates as a catalyst that amplifies or attenuates the effect of the similarity factors. A high degree of distinctiveness may lower the threshold of similarity required between the marks, thereby facilitating a finding of likelihood of confusion. Conversely, where a mark possesses weak distinctiveness, a more rigorous threshold of examination is required, particularly regarding the proximity of the signs and the similarity of the goods or services. The same reasoning applies, mutatis mutandis, to well-known trademarks.

In the *Canon v. MGM* judgment, the Court of Justice of the European Union (CJEU) held that trademarks possessing a high degree of distinctiveness—whether inherent or acquired through market recognition—are entitled to broader protection than marks of lesser distinctiveness. From this principle it follows that, where the signs are highly similar and the earlier mark, particularly owing to its reputation, enjoys a high degree of distinctiveness, the registration of a later mark may be refused even where the goods or services covered by the two marks are only of a low degree of similarity.[65]

In *Adidas AG v. Marca Mode CV*[66] the Court of Justice of the European Union (CJEU) first acknowledged that the sign consisting of three parallel stripes was not perceived by consumers merely as a decorative element but rather as an indicator of commercial origin. At this point, the Court affirmed that where a trademark possesses an enhanced distinctive character, it is entitled to a broader scope of protection, such that even minor similarities may suffice to give rise to a likelihood of confusion. However, the Court further clarified that although highly distinctive trademarks enjoy wider protection than marks of weak distinctiveness, this does not imply that the likelihood of confusion is to be presumed automatically or established by way of a legal presumption.

It has likewise been stated in the scholarly literature that a stronger mark is entitled to a broader scope of protection, and that, in circumstances where a senior mark is highly distinctive in comparison with all other marks in the

64 Dirikkan (n 34) 186-187.

65 C-39/97 Canon v. MGM [1998] ECR I-5507, [18] and [19].

66 Case C-425/98 Marca Mode CV v Adidas AG and Adidas Benelux BV. [2000] ECR I-04861.

marketplace, consumers may be susceptible to confusion upon the emergence of a junior mark that is not as distinctive as the senior mark.[67]

This approach likewise confirms the tendency to accord a broad scope of protection to strong marks. A "strong" trade mark—namely, one possessing a high degree of distinctiveness—benefits from a broader scope of protection in the European Union, the United Kingdom, and the United States compared to weaker marks. However, it has been argued that evidence from psychology and marketing indicates that, in reality, strong marks are less likely to be confused by consumers. Despite this, courts and administrative tribunals have been said to reach findings of likelihood of confusion in cases involving strong marks, even where the factual circumstances do not support such a conclusion.[68]

According to one view, the CJEU's assumption that the likelihood of confusion increases as the distinctiveness of a mark rises does not constitute an empirical rule; rather, it serves a normative purpose aimed at safeguarding the substantial investments that trade mark owners make in marketing and brand-building activities. Therefore, the CJEU's approach amounts to a legal fiction that substitutes for empirical evidence in order to protect highly distinctive trade marks.[69]

However, there are also scholarly views that argue to the contrary of this jurisprudential approach. It has been argued that, in certain circumstances, the fact that a mark possesses a high level of market recognition and occupies a fixed and established position in the consumer's memory may mean that a high degree of distinctiveness does not always increase the likelihood of confusion; on the contrary, in certain instances, it may actually reduce it. In the doctrine, it has been stated that empirical studies demonstrate that when consumers encounter a sign assessed in a relationship of similarity with a well-recognised mark, the probability of confusion arises at a lower level.[70] In other words, according to this view, the greater the distinctiveness of a trademark, the lower the likelihood of confusion becomes.

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67 Barton Beebe, 'The Semiotic Analysis Of Trademark Law' (2004)621 Ucla Law Review, 623,672

68 Phillip Johnson,' Enhanced Distinctiveness and Why ''Strong Marks'' Are Causing Us All Confusion'(2024)55 IIC,185,185.

69 Lotta Anemaet, 'The Many Faces of the Average Consumer: Is It Really So Difficult to Assess Whether Two Stripes Are Similar to Three?'(2020)51 IIC 187,197; Wolfgang Sakulin, *Trademark protection and freedom of expression: an inquiry into the conflict between trademark rights and freedom of expression under European law*. (1st edn, Kluwer Law International, Alphen aan den Rijn 2011) 248.

70 Annette Kur and Martin Senftleben, *European Trade Mark Law: A Commentary* (1st edn, Oxford University Press 2017) 326.

It has also been argued that the assumption that "the more distinctive a trademark is, the more likely confusion will arise" may not necessarily align with economic reality. This outcome will depend on the nature of the mark and the type of goods concerned. For instance, when it comes to colour schemes on everyday food products, the close imitation of a highly distinctive colour arrangement on a peanut butter jar may be highly confusing for consumers engaged in routine grocery shopping. Shoppers in such contexts tend to be in a hurry and therefore pay less attention to subtle differences. Conversely, trademarks used for expensive luxury goods are far less likely to be confused with similar marks.[71]

It has been argued that as the distinctiveness of a trademark increases, the likelihood of the public being misled about the origin of the goods decreases, whereas the likelihood of an association being made between the marks increases. Although this approach may appear more appealing from the perspective of trademark owners—since the scope of protection expands in proportion to the investment made in the mark—it has been contended that it does not fully align with the essential function of a trademark, namely, the guarantee of origin.72

Trademarks with strong distinctiveness occupy a much more prominent place in consumers' memory compared to weak marks. This is because the proprietors of such trademarks maximise non-intrusive signals that enhance the exposure of the mark. This, in turn, increases the visibility of the trademark, strengthens its perceived reliability, and encourages consumer preferences toward the associated product.[73]

A structural divergence appears to exist between empirical consumer behaviour and the logic of judicial protection. The likelihood of confusion test, which under normal circumstances ought to be grounded in consumer perception, has become a tool of normative expansion in relation to marks possessing a high degree of distinctiveness.

In our view, the principle of interdependence applied in the assessment of the likelihood of confusion is, in essence, a methodological principle regulating the relationship between the similarity of goods and services and the similarity of signs, and therefore does not itself constitute a criterion that inherently incorporates the factor of distinctiveness. Nevertheless, as clearly established

71 Wolfgang Sakulin, 'Trademark Protection And Freedom Of Expression : An Inquiry Into The Conflict Between Trademark Rights And Freedom Of Expression Under European, German, And Dutch Law' (Thesis Fully Internal, Universiteit van Amsterdam 2010.

72 William Robinson, Giles Pratt, and Ruth Kelly, 'Trademark Law Harmonization in the European Union: Twenty Years Back and Forth,' (2013) 23 Fordham Intell. Prop. Media & Ent. L.J. 731, 741-742.

73 Kimberlee Weatherall, 'The Consumer as the Empirical Measure of Trade Mark Law' (2017) 80 Modern Law Review 57, 59.

by the CJEU in *Canon*, *Lloyd*, and *Sabel*, the degree of distinctiveness exerts a "catalysing effect" within the similarity analysis, thereby increasing or decreasing the weight of the similarity factors. In this respect, a high level of distinctiveness enables the likelihood of confusion to arise even where the similarity between the marks occurs at a lower level; in other words, it lowers the threshold of similarity required for a finding of likelihood of confusion.

In light of these assessments, it appears that the protective approach adopted in respect of highly distinctive marks creates a marked tension with the empirical foundations of the likelihood of confusion test. Although the principle of interdependence provides a methodological framework that enables a holistic evaluation of the factors of similarity, the role of distinctiveness within this framework is not an element that can be entirely excluded. This is because the principle acknowledges that the impact of similarity factors on consumer perception may vary depending on the concrete circumstances of the case. In this respect, distinctiveness may be evaluated, in harmony with the holistic structure of the principle, as a complementary factor guiding the analysis of similarity.

IV. THE EFFECT OF DESCRİPTİVENESS WİTHİN THE FRAMEWORK OF THE PRİNCİPLE OF INTERDEPENDENCE

Descriptive signs may be defined as words or figurative elements that indicate the quality, nature, characteristics, type, kind, quantity, or other attributes of the goods or services for which registration is sought.

Descriptive signs that indicate the kind, type, nature, quality, quantity, or intended purpose of goods or services are signs that may be freely used by all and cannot be monopolized by any single person. To hold otherwise would mean granting exclusive rights to the first applicant over a sign that, by its very nature, should remain available for everyone's use because it describes the characteristic features of a good or service. Such an outcome would be unacceptable, as it would also run contrary to the fundamental principles of fair competition.[74] However, where descriptive signs have acquired distinctiveness through long and consistent use over time, there is no obstacle to their registration.[75]

In German trademark law, the INJEKT decision stands out as a significant precedent in which the Federal Court of Justice (BGH) applied the principle of interdependence and declined to disregard a mark merely because of its descriptive character. The dispute concerned the registered mark "INJEKT" for medical syringe products and the sign "INJEX" used for similar goods. Pursuant

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74 Tobias Cohen Jehoram, Constant van Nispen and Tony Huydecoper, *European Trademark Law* (Wolters Kluwer, Kluwer Law International 2010) 369.

75 Bkz. 2015/2436 Sayılı AB Marka Direktifi m.4/4 ve 2017 1001 Sayılı AB Marka Tüzüğü m.7/3; 6769 Sayılı SMK m.5/2.

to §9(I) No. 2 of the German Trademark Act (MarkenG), the Court emphasized that the likelihood of confusion must be assessed within the framework of the "interdependence" of all relevant factors. Although the term "INJEKT" was found to be descriptive and of weak distinctiveness, the Court held that this circumstance did not entirely eliminate protection but merely required a higher degree of similarity to establish confusion. The Court determined that the two signs were highly similar both phonetically and conceptually and that the goods were in the same commercial class and addressed to the same group of consumers. Within this framework, the BGH confirmed that weak distinctiveness does not categorically preclude the likelihood of confusion, as the relevant elements may interact in a compensatory manner. In other words, when the similarity of signs and goods is high, a likelihood of confusion may still arise despite the weak distinctive character of the earlier mark.[76]

It has been argued that the BGH has now clearly moved away from the dogmatic exclusion of descriptive components in the assessment of sign similarity—an approach that effectively pre-limited the scope of protection—and has instead aligned itself with the CJEU's line of reasoning[77], which calls for a holistic assessment of the signs as a whole. In practice, this shift may tend to increase the relative value of the same weakly distinctive or descriptive elements, particularly in the case of single-word marks, thereby making similarity assessments more complex where "weak" marks are concerned. Nevertheless, concerns about the indirect monopolisation of descriptive signs are unfounded, since both the BGH and the CJEU have clarified that in proceedings based on absolute grounds for refusal—such as invalidity actions on the basis of descriptiveness—as well as in infringement cases, reliance may still be placed on the defence of descriptive use.[78]

In this context, there is little doubt that descriptive signs generally possess weak inherent distinctiveness. In the BGH's decision, the single-word mark "INJEKT" exhibited a very low level of distinctiveness in relation to the goods covered by its registration. Where a trademark consists solely of one descriptive and weakly distinctive word, the likelihood of confusion analysis must necessarily be conducted on the basis of that single element. The fact that the mark is composed of a single descriptive component has a narrowing effect on the scope of protection. In my view, applying the offset effect of the similarity factors—akin to the principle of interdependence—to the present case is misguided. Expanding the scope of protection of a mark that would ordinarily constitute

[76] BGH – "INJEKT / INJEX" [2020] I ZB 21/19 <https://www.wipo.int/wipolex/en/text/591954> accessed 24.10.20205.

[77] See. Case C-108/97 - Windsurfing Chiemsee Produktions- und Vertriebs GmbH (WSC) v Boots- und Segelzubehör Walter Huber and Franz Attenberger- [1999] ECR I-02779.

[78] <https://www.boehmert.de/en/german-federal-supreme-court-reorientation-upgrading-of-weakly-distinctive-trademarks-in-case-of-likelihood-of-confusion/> accessed 25.10.2025.

an absolute ground for refusal to an exaggerated extent would undermine and neutralise the fundamental principles of trademark protection.

In the present case, the following approach would be the most appropriate: both marks under comparison consist of a single element. The earlier mark, "INJEKT," directly means "to inject" or "to administer by injection" in German and is a descriptive expression, particularly in relation to medical devices, syringes, or injection systems. The word "INJEX," on the other hand, has no independent or dictionary meaning in German and therefore constitutes an artificial (invented) term. Although the trademarks differ conceptually, they are similar from both visual and phonetic perspectives. Given that they are used for identical goods, and that the term "INJEX" lacks an autonomous meaning, the adoption of such a sign may be regarded as an attempt to create an association with the "INJEKT" mark, and thus as indicative of bad faith. In this context, the likelihood of confusion is evident. However, if the term "INJEX" had an independent meaning, extending the scope of protection of the "INJEKT" mark on the basis of conceptual similarity would not have been a justified approach.

Another decision in which the offset function was found to have led courts to give insufficient weight to the descriptive nature of a sign was delivered by the Court of Appeal of The Hague. According to the court, when the similarity between the sign used and the registered mark is high, and the goods or services are considered almost identical, courts may disregard the fact that the mark is descriptive rather than distinctive. The case concerning the word "Lief" illustrates this point. The term is one of the most common exclamations used in the Netherlands when addressing infants, yet it had been registered as a trademark for baby clothing. In relation to the use of the sign "Lief!" by a third party on baby garments, the Court of Appeal (Hof Den Haag) held that such use gave rise to a likelihood of confusion. The court observed that the fundamental problem lay in the registration of the "Lief" sign as a trademark in the first place. Nevertheless, since the trademark owner had made substantial investments in promoting the sign as a conceptual brand rather than a mere descriptive term, and as the court considered these investments to constitute significant evidence, it held that the owner was entitled to prohibit other producers from using the same descriptive expression on baby clothing. It was subsequently argued that this judgment could not be justified under Article 10(2) of the European Convention on Human Rights, since "Lief!" is clearly a descriptive expression and prohibiting other manufacturers from using a term meaning "sweet" or "dear" in reference to babies—even where the use is legitimate and proportionate—was highly inappropriate.[79]

[79] Sakulin (n 71).

In the present case, the fact that the word "LIEF" is an expression commonly used when addressing infants does not render it directly descriptive for goods such as baby clothing. The mark may therefore be characterised as a *suggestive* trademark[80]. In this regard, its distinctiveness may be considered low, yet not entirely absent. However, even if the term "LIEF" has been registered in the name of another party, its use by third parties cannot be deemed infringing where such use satisfies the conditions of honest commercial practice.

Particularly in cases where a trademark consists of multiple elements, the degree of distinctiveness of each component may vary. Accordingly, even if a trademark contains weak elements, it may not necessarily be characterised as a weak mark when assessed as a whole. Undoubtedly, as in the case of inherently weak marks, the distinctiveness of the individual elements in a mark that includes weak components also affects the scope of protection. In this regard, the trademark owner may obtain protection under Article 7(2) of the Turkish Industrial Property Code (SMK) with respect to the elements possessing a high degree of distinctiveness, whereas, as a rule, they must tolerate the use of weak elements by third parties.[81]

CONCLUSION

The principle of interdependence establishes an analytical framework in which the assessment of the likelihood of confusion between trademarks is not reduced to a mechanical measurement of similarity, but rather is based on a dynamic and holistic evaluation of all relevant factors, including the degree of similarity between the marks and their respective distinctiveness. This methodological approach introduces flexibility both in registration proceedings and in infringement disputes.

This principle, on the one hand, enhances the accuracy of the likelihood of confusion analysis by recognising that a low degree of similarity in one element may be offset by a high degree of similarity in another (the *offset function*). On the other hand, it prevents any single criterion of similarity—such as mere phonetic resemblance—from becoming dominant or determinative. Subjecting all elements of similarity to a balanced and interactive assessment (the *balancing function*) also prevents the scope of protection from being expanded in an exaggerated or disproportionate manner.

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80 Under United States Trademark Law, *suggestive marks* are presumed to be inherently distinctive by their very nature and are therefore protectable from the moment they are first used in commerce. See Jake Linford, "The False Dichotomy Between Suggestive and Descriptive Trademarks," *Ohio State Law Journal*, Vol. 76, No. 6 (2015) 1367, 1374.

81 İfakat Balık ve İbrahim,Bektaş,' Markanın Koruma Kapsamının Belirlenmesinde Ayırt Edicilik Gücünün Etkisi Ve Tanınmış Markanın Zayıf Unsurunun Durumu -Mcdonald's Kararları Yönünden Bir İnceleme' (2019) 5(1) TFM 6 .

There is no doubt that descriptive signs possess weak inherent distinctiveness. Where a trademark consists solely of one descriptive and weakly distinctive word, the likelihood of confusion must necessarily be assessed on the basis of that single element. The fact that the mark is composed of a single descriptive component has a narrowing effect on the scope of protection. Expanding the protection of a mark that would ordinarily constitute an absolute ground for refusal to an exaggerated extent would undermine and neutralise the fundamental principles of trademark protection. However, where a subsequent mark, applied for in respect of the same class of goods, has no established conceptual meaning and appears to have been deliberately designed to evoke similarity with a prior single-element descriptive mark, such conduct may amount to bad faith, and the existence of a likelihood of confusion may properly be acknowledged.

The distinctiveness of a mark does not operate as a direct criterion of similarity within the application of the principle of interdependence; rather, it functions as a complementary element that amplifies or diminishes the impact of the similarity factors. This "catalytic" role of distinctiveness lowers the threshold of similarity required for a finding of likelihood of confusion in the case of highly distinctive marks, while necessitating a more stringent assessment of similarity for marks possessing weak distinctiveness. Thus, distinctiveness does not constitute an autonomous factor in the assessment but acts as a regulatory element that shapes both the direction and the intensity of the similarity analysis.

Nevertheless, the extended protection afforded to highly distinctive marks generates a degree of tension with the empirical consumer-perception basis on which the likelihood of confusion test is founded. The tendency toward normative expansion does not always align with actual consumer behaviour. However, the principle of interdependence provides a flexible methodological framework that recognises that the influence of similarity factors on consumer perception may vary depending on the specific circumstances of the case.

Within this framework, distinctiveness may be evaluated, in harmony with the holistic structure of the principle, as a complementary factor guiding the similarity analysis. Accordingly, the structure of the principle requires not the exclusion of distinctiveness, but its functional incorporation within reasonable limits—without allowing it to displace similarity analysis or undermine the empirical foundation of the confusion test. In this way, methodological coherence is preserved while ensuring a balanced relationship between the practical reality that highly distinctive marks tend to receive broader protection and the empirical, consumer-oriented nature of the likelihood of confusion assessment.

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