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SOME MAJOR AMENDMENTS TO LEASE AGREEMENTS IN TURKISH LAW

Türk Hukuku'nda Kira Sözleşmeleri Alanındaki Önemli Değişiklikler

Assoc. Prof. Dr. Hüseyin Murat DEVELİOĞLU[1]

ABSTRACT

In this article, some of the amendments (and novelties) in the field of lease agreements, introduced to the Turkish obligations law, with the entry into force of the Turkish Code of Obligations July 1st 2012, will be examined. It can be argued that, these amendments are in line with the legislator's continuous inclination to protect the lessee. A subjective evaluation is carried out and firstly some minor amendments are listed, and those amendments considered to be more important and radical in view of the practice, are examined in detail. These important amendments relate to the transfer of or the establishment of a limited right in rem on the leased object and for residential and roofed business premises; the renovation or modification of the property by the lessee, the cessation of the usage of the property before the end of the lease term, tie-in transactions, downpayments, the increase and determination of the rent, the right of the lessor to terminate the lease agreement without cause at the end of twelve years, the failure by the lessee to pay accessory charges, the form of the notice of termination, the rights of the spouse in leases for family residences.

Keywords: Lease agreement, New Turkish Code of Obligations, Amendments, Lessee, Lessor

ÖZET

Bu makalede, 1 Temmuz 2012'de Türk Borçlar Kanunu'nun yürürlüğe girmesiyle Türk borçlar hukukunda, kira sözleşmesi alanında getirilen bazı düzenlemeler (ve yenilikler) incelenecektir. Bu düzenlemelerin kanun koyucunun kiracıyı korumaya yönelik süregelen eğilimi ile aynı doğrultuda olduğu tartışmasızdır. Çalışmada sübjektif bir değerlendirme yapılmış ve bunun sonucunda da, öncelikle kişisel görüşümüze nazaran daha az önem arz eden bazı düzenlemeler listelenmiş ve yine kişisel düşüncemiz uyarınca daha çok önem arz eden ve uygulama yönünden daha esaslı olan düzenlemeler daha detaylı olarak incelenmiştir. Bu son anılan ve önemli olarak nitelendirilen düzenlemeler, özellikle, kiralananın el değiştirmesi ve üçüncü kişinin kiralanan üzerinde sınırlı ayni hak sahibi olmasına, kiracı tarafından kiralananda yenilik ve değişiklik yapılmasına, kiracının kiralananı kullanmayı kira süresinin sona ermesinden önce bırakmasına veya kiralananı geri vermesine; konut ve işyeri kiralarında ise, kira sözleşmesi ile bağlantılı işlemlere, güvencelere, kira bedelinin belirlenmesine, kiraya verenin on iki yılın sonunda bir neden olmaksızın kira sözleşmesini sona erdirmesine, kiracının ek giderleri ödemede temerrüde düşmesine, fesih ihbarının şekline ve aile konutu kiralarında eşin haklarına ilişkindir.

Anahtar Kelimeler: Kira sözleşmesi, Yeni Türk Borçlar Kanunu, Değişiklikler, Kiracı, Kiraya veren

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INTRODUCTION

A number of amendments (and novelties) to many fields as well as lease agreements were introduced with the entry into force of the Turkish Code of Obligations (numbered 6098) on July 1st 2012. It can be argued that, these amendments are in line with the legislator's continuous inclination to protect the lessee. In this study, first of all, the modification in the systematic of positive law about lease contracts will be explained and then, major amendments will be examined article by article.

I. IN GENERAL

Before the entry into force of the Turkish Code of Obligations numbered 6098, the basic regulations about lease agreements – especially regulations regarding ordinary lease agreements and usufructuary lease agreements- were stipulated under the previous Code of Obligations numbered 818. In addition, a special code titled *"Code on Lease of Immovable Properties"* numbered 6570 was in force and generally, in terms of the legal relationship between a lessee and a lessor for the lease of immovables (except the roofless ones), located in municipalities, piers, harbors and stations, the Code numbered 6570, which was aimed at protecting the interests of the lessee, was applied.

Fourth Section titled "Lease Agreement" of the Turkish Code of Obligations numbered 6098, which is in force today, includes the regulations enshrined in the previous Code numbered 6570 and is structured into three parts: *"General Regulations"* as the First Part, *"Leases of Residential and Roofed Business Premises*[2]*"* as the Second Part and *"Usufructuary Lease"* as the Third Part. It should be noted that, the subject of lease agreements is the usage of the leased property, whereas in usufructuary lease agreements, the subject thereof comprises the usage of the leased property and its benefits[3].

Before examining the amendments to lease agreements, it should be stated that, as defined by the amendment made to Article 53 of the Code numbered 6353 and dated 4.7.2012 with the provisional Article 2 of the Law on the Amendment of Certain Laws For Acceleration of Jurisdiction Services numbered 6217 and dated 31.3.2011, Articles 323, 325, 331, 340, 342, 343, 344, 346 and 354 of the Turkish Code of Obligations numbered 6098 shall not be applied to lease agreements for business premises, where the lessees are

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[2] In this part, the regulations are similar to regulations in the Code numbered 6570 that is abolished with the entry into force of the Code numbered 6098 (this outcome has been expressly regulated in Article 10 section 1 of the Code on the Implementation and Enforcement of the Turkish Code of Obligations, numbered 6101).

[3] Nihal URAL ÇINAR, Türk Borçlar Kanunu'nda Düzenlenen Kira Sözleşmelerinde Kira Bedelinin Ödenmemesi ve Hukukî Sonuçları, İstanbul 2014, s. 21 vd.

merchants as defined by the Turkish Commercial Code and private and public law legal entities, until the date of 1.7.2020. In these cases, provisions of the lease agreements shall apply to the subjects regulated under these articles in accordance with the freedom of contract. If these subjects are not treated in the agreement, the regulations of the previous Code of Obligations numbered 818 shall be applied.

It should be stated that there are many amendments to the regulations on lease agreements. A thorough examination of these amendments would exceed the objective of this article. Below, a subjective evaluation is carried out and firstly some minor amendments are listed, and those amendments considered to be more important and radical in view of the practice, are examined in detail. Lastly, it should be stated that, regulations transferred from the “Code of Lease on Immovable Properties” numbered 6570, which was abolished by the entry of force of Code numbered 6098, are not considered as amendments and novelties.

II. A QUICK VIEW TO AMENDMENTS TO LEASE AGREEMENTS:

Amendments to lease agreement can be examined under three seperate titles as “amendments to ordinary lease agreements”, “amendments to lease agreements of residential and roofed business premises” and “amendments to usufructuary lease agreements” according to the systematic of the Turkish Code of Obligations.

A. Amendments to Ordinary Lease Agreement

Before treating the important amendments to ordinary lease agreements examined in detail below, other amendments should be overviewed.

It is regulated under Article 301 of TCO that the obligation of the lessor to render the object of the lease available on the agreed date in a condition fit for its designated use and to maintain it in that condition cannot be eliminated to the detriment of the lessee in leases for residential or roofed business premises by any means and in other lease agreements by general terms and conditions.

Several amendments have been introduced with regards to defects of leased objects. It has first of all been regulated under Article 304 of TCO that where the lessor hands over the object of the lease with substantial defects, the lessee may resort to regulations on the default of the debtor or the responsibility of the lessor for the defects which emerged after the handing over of the object of the lease; where the lessor hands over the object of the lease with non-substantial defects, the lessee may only resort to regulations on the responsibility of the lessor for the defects which emerged after the

handing over of the premises. If the defects emerge after the handing over of the premises, according to Article 305 I of TCO, the lessee may demand that the defects are repaired or the rent is reduced proportionately or his damages are indemnified. In addition, to the indemnification of his damages, the lessee may at the same time resort to other alternative rights. Where the defect is substantial, the right of the lessee to rescind the agreement is reserved. It is regulated under Article 306 III of TCO that the lessor may replace the object of the lease with an nondefective one, instead of repairing the object of the lease as demanded by the lessee; on the other hand in it is regulated in Article 306/IV that the lessor may prevent the lessee from using his alternative rights by replacing immediately the object of the lease with a nondefective one and indemnifying his damages. If the defects affect the usage of the object, Article 307 I of TCO foresees that the lessee may require that the rent is reduced proportionately from the period starting from the lessor becoming aware of the defect and lasting until the defect is remedied. According to Article 318 of TCO, upon learning of defects which he himself is not obliged to remedy, the lessee must inform lessor without delay. Failure to notify, renders the tenant or lessee liable for any damage incurred by the lessor as a result.

The lessor must also cover the accessory charges made by him or a third party in connection with the use of the object of lease, according to Article 303 of TCO, whereas the tenant or lessee must pay the rent and, if applicable, the accessory charges at the end of each month and at the latest on the expiry of the lease, unless otherwise agreed or required by local custom, under Article 314 of TCO. If the lessee is in arrears with payments of rent or accessory charges, it is regulated by Article 315 of TCO that, the lessor may notify him in a written manner that in the event of nonpayment the lease agreement will be terminated at the expiry of that time limit, which shall be no less than 30 days for leases of residential or roofed business premises and 10 days for other lease agreements.

According to Article 316 I of TCO, the lessee must use the object with all due care and where the lease relates to immovable property, the tenant must show due consideration for others who share the building and for neighbours. If, the lessee is in breach of this duty, the lessor may terminate the contract by a written notice warning the lessee to remedy this breach in at least thirty days for leases concerning residential and roofed business premises and by a written notice with immediate effect for other leases (316 II of TCO). However, leases of residential and roofed business premises the contract may be terminated with immediate effect with a written notice if the tenant intentionally causes serious damage to the property, if it is understood that the remedification period will be useless or the breach of the duty is unbearable fort he lessor ot the others who share the building (316/III of TCO).

It is regulated under Article 319 II of TCO that the lessee must permit the lessor or the third parties determined by him to inspect the object to the extent required for maintenance, sale or future leasing. However Article 319 III regulates that the lessor must inform the lessee of works and inspections in good time and take all due account of the lessee's interests when they are carried out.

The lessor may make renovation or modifications to the object where they don't necessitate the termination of the contract and are sustainable for the lessee, according to Article 320 I of TCO. However, in carrying out such works, the lessor must give due consideration to the lessee's interests; all claims of the tenant or lessee for reduction of the rent and for damages are reserved (320/II of TCO).

According to Article 323 I of TCO, the lessee cannot transfer his lease to a third party without the lessor's written consent; but the landlord may withhold consent only with good cause for leases of business premises. The second alinea foresees, once the lessor gives his consent, the third party is subrogated to the rights and obligations of the lessee under the lease and the former lessee is released from his obligations towards the lessor; however for leases of business premises, he remains jointly and severally liable with the third party until the end of the lease and in any event for no more than two years (323 III of TCO).

Under Article 328 of TCO, the parties may give notice to terminate a lease of indefinite duration by observing the legally prescribed notice periods and termination dates. Start of the lease agreement will be taken as a basis determining the termination date. Where the prescribed notice period or termination date is not observed, termination will be effective as of the next termination date.

A party may terminate a lease of immovable property or a movable structure by giving three months' notice expiring on a date fixed by local custom or, in the absence of such custom, at the end of a six month period of the lease, under Article 329 of TCO.

According to Article 330 I of TCO, a party may terminate a lease of a movable by giving three days' notice expiring at any time; but the lease of a movable leased by the lessor on the basis of the professional activity and hired by the lessee for his own private use may be terminated by giving at least one month prior notice expiring at the end of a three-month period of the lease.

The court determines the financial consequences of extraordinay termination on the grounds of unsubstainability, taking due account of all the circumstances, under Article 331 II of TCO.

In case of the bankruptcy of the lessee, it is regulated that an appropriate time limit is granted to the lessee in a written manner to the lessee to provide security to the lessor (Article 332 II). In the previous Code, there was no condition of granting a time limit either in written or other manner and rather the contract could be terminated "where no security is furnished to the lessor in an appropriate time limit" (Article 261).

In the event of the death of the lessee, his heirs may terminate the contract, in accordance with Article 333 of TCO, by giving the legally prescribed notice for the next admissible termination date.

According to Article 334 II of TCO, except for the compensation of the damages arising from usage of the object in breach of the contract, any undertakings to pay compensation on termination of the lease, are void.

It has been foreseen under Article 335 of TCO, when the object is returned, the lessor must inspect its condition and immediately inform the lessee of any deficiencies or defects of which he is responsible. Should the lessor fail to do so, the lessee is discharged of any responsibility. However, in case of deficiencies or defects which cannot be detected by ordinary inspection at handing over of the object, the responsibility of the lessee continues. The lessor must inform the lessee in writing of such deficiencies or defects as soon as he discovers them.

The lessor and the lessee may not waive in advance their right to set off claims arising from the lease, according to Article 326 of TCO.

It has also regulated under Article 312 of TCO that the parties to a lease agreement for an immovable may agree to have it entered under priority notice in the land register.

Amendments to Lease Agreement of Residential and Roofed Business Premises

Before treating the important amendments to lease agreements of residential and roofed business premises examined in detail below, other amendments should be overviewed.

According to Article 339 I of TCO, the provisions governing the lease of residential and roofed business premises are also applicable to goods on such premises left to the use of the the lessee; but, they are not applicable to immovables which are, due to their nature, allocated to temporary use for six months or less.

Unless otherwise is agreed or unless there is local custom against it, under Article 341 of TCO, accessory charges for residential and roofed business premises such as heating, electricity and water expenses are the responsibility

of the lessee. The party must communicate to the other party on his request a copy of the documentation for such expenses.

It is regulated under Article 347 III of TCO that, the lessor or the lessee may terminate the contract by using his termination right according to general provisions.

According to Article 351 II of TCO, the person who subsequently acquires the leased property may terminate the agreement for private use within one month starting from the end of the rent period, by filing a lawsuit.

If the lessee or the spouse have an available residence in the same province or municipal district, but the lessor is not aware of this at the time of the conclusion of the agreement, he may terminate the agreement within one month starting from the end of the rent period, by filing a lawsuit under Article 352 III (Although this regulation resembles Article 7 of the Code numbered 6570, it referred to having an available residence in the “same city or municipal district”. Further, there was no such condition as “lack of knowledge of the lessor about this situation while drawing up the agreement”).

If there is a written notification from the lessor to the lessee that he will file a lawsuit latest within the prescribed time period, time period to file a lawsuit will be extended one more lease year, under Article 353 of TCO.

It has been foreseen under Article 354, regulations on the termination of lease agreement can not be changed to the detriment of the lessee.

When the lessor makes the lessee evacuate the leased property for private use, under Article 355 I, he can not lease the leased property, without a just cause, to anyone other than the previous lessee until three years elapse.

According to Article 355 II, immovable properties which are evacuated due to re-construction and public improvements, can not be leased in their original condition to anyone other than the previous lessee until three years elapse. The previous lessee has a preemptive right to lease the reconstructed or improved property. This right shall be used within one month following the written notification of the lessor. Unless this preemptive right is waived, the immovable property can not be leased to anyone else until three years elapse. According to Article 355 III of TCO, if the lessor acts against these regulations, he must pay compensation to the previous lessee, not less than the annual rent amount that is paid in the last lease year.

B. Amendments to Usufructuary Lease Agreement

Amendments have also been introduced to usufructuary lease agreements.

In the absence of special provisions governing these usufructuary leases, the general provisions of the Code of Obligations about lease agreements apply, under Article 358 of TCO.

The lessor is required by Article 360 of TCO to "hand over" and "maintain for the duration of the lease" the object of the agreement and the goods inside, in a condition fit for its designated purpose.

Where the lessee is in arrears with payments of rent or accessory charges, the lessor may set a time limit of at least 60 days for payment and notify him, as foreseen under Article 362 II of TCO, that in the event of nonpayment the lessor will terminate the lease on expiry of that time limit.

If the yield of the immovable property significantly decreases because of extraordinary catastrophies or natural disasters, the lessee may require that lessor reduces the rent proportionately, under Article 363 of TCO. Waiver of this right in advance, is only valid if those kind of situations are considered while determining the rent or if the damage is recovered by an insurance.

According to Article 366 I of TCO, the lessee cannot sub-let all or part of the object of the lease or assign his usage or operating rights without the lessor's consent.

The court determines, as foreseen by Article 369 of TCO, the financial consequences of extraordinary termination where one of the parties terminates the contract in compliance with legally prescribed notification period, on the grounds of unsustainability of the agreement due to substantial reasons.

III. SOME MAJOR AMENDMENTS TO LEASE AGREEMENTS

We consider the amendments that will be examined under this section more *"important"* because in practice many conflicts have arisen in the fields that they regulate. These important amendments, in particular, relate to leases of residential and roofed business premises. However, there are many fundamental amendments to ordinary lease agreements that should be examined.

First of the important amendments to ordinary lease agreements is Article 310 of TCO titled *"Transfer of Leased Property"* under *"the Third Party Becoming Entitled to a Greater Right After The Agreement is Contracted"* within the general provisions of the Turkish Code of Obligations concerning lease agreements. According to the mentioned Article, if the leased property

is transferred any some reason, the new owner shall also become party to lease agreement. Under the previous Code of Obligations, a similar regulation was only foreseen for immovables. According to Article 254 of the previous Code of Obligations, it was stipulated that the new owner shall bear the usage of the lessee until the earlisest termination date and was considered to become party to the lease agreement if the contract was not terminated at this date.

The aforementioned provision is important since in its absence, according to the principle of subjectivity of the agreements, the third party new owner, who is not a party to the contract between the former lessor and the lessee, could demand[4] the restitution of the leased property based on his property right. In this light, it is obvious that Article 310 of TCO aims to protect the lessee.

In order for this provision to be applicable, the property right must have been transferred to the new owner. There are not limitations foreseen regarding the method for such transfer. The right of property can be transferred to the new owner on the basis of a sales agreement, as well as a donation, a contract of exchange or by an innominate contract, or else the new owner may acquire the right of property as a consequence of a procedure of compulsory execution. Either way, the new owner is considered to become a contracting party in lieu of the lessor. It is considered as a transfer of agreement arising from law[5].

According to Article 311 of TCO, which was not regulated under the previous Code of Obligations, where following the conclusion of the lease agreement, a third party gains a limited right in rem which affects the rights of the lessee on the object of the lease, the provisions governing the transfer the object are applicable by analogy. It is not clear what these limited rights in rem are. It can

4 Alper GÜMÜŞ, "Yeni" 6098 Sayılı Türk Borçlar Kanunu'na Göre Kira Sözleşmesi (TBK m. 299-356), İstanbul 2012; Seda ÖKTEM ÇEVİK, Kira Sözleşmelerine Etkisi Bakımından Kiralananın Devri ve Sınırla Aynî Hakka Konu Olması, İstanbul 2016, s. 40 vd.

5 GÜMÜŞ, p. 149; Cevdet YAVUZ, Türk Borçlar Hukuku, Özel Hükümler, İstanbul 2014, p. 432. Hasan AYRANCI, Sözleşmelerin Yüklenilmesi (Devri), Ankara 2003, p. 73; Oruç Hami ŞENER, **İşyeri İhtiyacı Nedeniyle Tahliye Davaları ve Ortaklıklar Hukukuyla Bağlantısı**, Ankara 2010, p. 13 – 14; Burak ÖZEN, Kira Konusunun Devri, Kazancı Hukuk Araştırmaları Dergisi**,** March-April 2013, p. 95; Sezer ÇABRİ, Kira Sözleşmesinde Mülkiyetin El Değiştirmesinin veya Üçüncü Kişinin Kiralanan Üzerinde Sınırlı Ayni Hak Sahibi Olmasının Sözleşmeye Etkisi, Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi, 18(3), 2012, p. 164; Faruk ACAR, Kira Hukuku Şerhi (TBK m. 199-321), İstanbul 2015, Article. 310, N. 63; ÖKTEM ÇEVİK, s. 40 vd.; Murat İNCEOĞLU, Kira Hukuku Book 1, İstanbul 2014, p. 573; Mustafa Hasanali, Kiralananın El Değiştirmesi, Yayınlanmamış Yüksek Lisans Tezi, İstanbul 2015, p. 72 ff.

be said that they are rights which are not compatible with the usage right of the lessee. It is indisputable that usufruct right is one of the typical examples[6]. Even though building right can be thought as another example, it is accepted that, building right is not always in conflict with the usage right of the lessee but if so, Article 311 of TCO should be deemed applicable[7]. There are different views about right of occupancy in the doctrine. According to one of the views, a right of occupancy can not be validly established[8], as the holder of a right of occupancy cannot lease the property and must occupy it himself; however, according to another view, Article 311 of TCO shall be applied even in this possibility and there is an exception to the rule which foresees that the holder of the right of occupation cannot lease the property[9]. Article 311 of TCO can be applied in case of other rights of easement -such as passage easement – only if they affect the lessee's right of usage.

Regulations on expropriation are reserved (310/II of TCO).

Another regulation concerning a matter which gives rise to many lawsuits[10] in practice, is Article 321 of TCO, which foresees that the lessee may renovate or modify the object with the written consent of the lessor and unless agreed in writing that neither the consenting lessor can require the restitution of the object in its previous condition, nor the lessee can clain a compensation for the increase in the value of the object of the lease.

Again, an issue which constitutes the subject of many Court of Cassation decisions is the cessation of the usage of the object by the lessee before end of the term of the lease agreement. Where according to fundamental principle of pacta sunt servanda, it can be argued that lessee is responsible the rent until the end of the term, the Court of Cassation had a different view during the application of the previous Code. This view envisaged that the lessor was obliged to make an effort to lease the object of the agreement again, according to good faith principle. If he did not show that effort, following the consept of contributory fault, a reduction should have been made to the remainder rent,.

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6 YAVUZ, p. 436; ÖKTEM ÇEVİK, s. 154.

7 ACAR, Article. 311, N. 28; İNCEOĞLU, p. 606; ÇABRİ, p. 182 – 183.

8 AKAY, p. 115-116.

9 İNCEOĞLU, p. 609; ÖKTEM ÇEVİK, s .157.

10 In practice, disputes arise in the determination of who should assumed the costs for modifications, introduced by the lessee during the term of the lease agreement without the consent of lessor, and which ameliorate the property and become the property of the lessor as they are a component part of the premises. Installing a steel door, renewal of the central heating boiler, change of roofing tile are examples of such modifications. For examples, see, GÜMÜŞ, p.244.

Article 324 of TCO regulates that cessation to use the the object of the agreement wholly or partially stays responsible for paying the rent and only demand the by tenant or lessee due to reasons resulting from himself, he must pay the rent and he may only demand the deduction of the*"landlord is absolved from"* and a regulation in parallel with the practice of the Court of Cassation is introduced in Article 325. According to the mentioned Article, where the lessee returns the object without observing the term of the contract or the rescission[11], his responsibilities arising from the contract will continue for a reasonable time during which the object of the agreement may be leased in similar conditions; however if the lessee proposes to the lessor a new lessee who can be deemed acceptable by the lessor, solvent and willing to take on the lease agreement, such responsibilities will be terminated (325 I of TCO). Any expenses that the lessor was absolved from and any earnings which he has obtained, or intentionally failed to obtain, will be deducted from the remainder rent (325 II of TCO).

There are also major amendments to leases of residential and roofed business premises.

According to Article 340 of TCO, a tie-in transaction linked to a lease of residential or commercial premises is void where the conclusion or continuation of the lease is made conditional on the assumption of an obligation by the lessee, without providing him any benefit. For this, there must be a legal transaction between the lessee and the lessor and/or the third party on which the conclusion or the continuation of the lease agreement depends, and where the lessee undertakes a debt[12] and the debt should not be related to the direct usage of the property. If this agreement is in favor of the lessee, the above-mentioned regulation shall not be applied and it is accepted that the tied agreement is valid. For example, if lease of a residence is linked with the purchase of a good that the lessee does not need at all, sales agreement is a tie-in agreement and it is not valid.

In residential and roofed business premises leases, if the lessee is obliged to make a downpayment, the amount of this downpayment shall not exceed the amount of three months' rent, under Article 342 I of TCO. Where the

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[11] It should be stated that, according to the practice of the Court of Cassation, the lessee must determine an entrusting location to entrust the keys or draw a notification and notify that the keys have been entrusted to the notary, there after evacuating the leased property. For example, see Decision dated 22.05.2002 and numbered 4969/5996 of the 13th Chamber; Decision dated 08.02.2005 and numbered 14282/1809 of the 13th Chamber. Otherwise, the lessor may claim the rent without any obligation to investigate the leased property.

[12] YAVUZ, p. 597. According to a view in the doctrine, if there is an offer to draw up an agreement from the lessee, the mentioned regulation shall not be applied. However, the burden of proof about this issue lies with the lessor. GÜMÜŞ, p.49.

security is agreed in the form of cash or negotiable securities, the lessor must deposit it the cash in a deposit savings account or store the negotiable securities at a bank, not to be withdrawn or released without the consent of the lessor. The bank may release such downpayment only with the consent of both parties or in compliance with a final payment order or final decision of the court (342 II of TCO). It is regulated under Article 342 III that, within the three months following the end of the lease, the lessee may request from the bank to return the downpayment if the lessor has not notified the bank in writing that a court file, an enforcement or bankruptcy proceeding has been initiated in relation to the lease agreement and the bank is obliged to return the downpayment on the demand of the lessee.

The legislator, influenced by previous legal precedent of the Court of Cassation, made very detailed regulations about rent. These are as follows:

- Agreements between the parties on the rent for subsequent rent periods are only valid if the increase rate does not surpass the "*Producer Price Index (PPI")* of the previous lease year (Article 344 I of TCO). If a higher increase rate is foreseen in the agreement, the increase rate shall be the PPI. This rule shall also be applied to lease agreements concluded for more than one year. For example, if it is agreed on that there will be an increase in every two years and if the increase rate is not stated, Article 344 I of TCO shall be applied. [13]

- In the absence of an agreement between the parties, the court fixes the increase amount on a yearly basis on condition that it does not surpass the PPI of the previous lease year and by considering equitably the situation of leased property (TCO 344 II).

- Without taking into consideration if an agreement on this matter exists between the parties, lease agreements which are longer than five years or renewed after five years and after every subsequent five years period, the court determines the rent amount for the new lease year by taking into consideration the amount of increase in PPI, the situation of leased property and similar rent amounts and according to equity. The rent amount which has been determined in this manner can be changed according to principles in previous subsections, in the lease year following every five years period (TCO 344 III). This regulation shall be applied even if the rent amount has been determined according to TCO 344 I following the conclusion of the lease agreement. In this way, the lease agreement will be adjusted to conditions of relevant time and place.

[13] GÜMÜŞ, p. 75.

- Lease agreements concluded in a foreign currency, can not be amended until five years elapse. However, Article 138 of TCO titled *"Hardship"* is reserved. After five years, while determining the rent amount, TCO 344 III shall be applied, taking also into consideration the changes in the value of the relevant foreign currency (TCO 344 IV).
- The lawsuit for determining the rent amount can always be filed however; if it is filed at least thirty days before the start of the new lease period or a written notification is communicated to the lessee within the same period that that rent amount will be increased and the lawsuit is initiated until the end of the new lease period, the rent amout that is fixed by the court will bind the lessee from the start of this new lease period (Article 345 of TCO).
- If there is a provision in the contract foreseeing an increase in the rent amount in new lease period, the rent amount that will be fixed with a lawsuit that is filed until the end of new lease period, shall be valid from the start of this new period (345 II of TCO).
- Any obligation to pay amounts other than rent and ancillary costs can not be imposed on the lessee; in particular agreements to pay penalty or to call for payment of future rents, in case of failure to timely pay rents, are invalid. (346 of TCO).

In has been foressen by Article 347 of TCO, the lessor can terminate the contract, without cause, by a notification three months prior to the the end of every subsequent lease period following ten years of renewal period. This regulation did not exist in the previous Code. During the application of the previous Code, lease agreements of residential and roofed business premises could not be terminated unless there was a reason foreseen in the Code numbered 6570. This was vigorously criticized for extremely limiting the right of property. With the new Code, ten year extension period will be calculated from the end of the first year and at the end of the subsequent renewal year –meaning, after twelve years from the date of agreement, at the earliest - the agreement can be terminated without justification.

Where the lessee fails to pay accessory charges, as is the case for failure to pay rent, the lessor may grant the lessee a time limit of at least thirty days to be able to terminate the agreement, under Article 315 of TCO. In the previous Code, this regulation was only foreseen for failure to pay rent, many disputes had arisen due to the failure of the lessee to pay the accessory charges – especially subscription fee of the property- of tenant or lessee. Legislator aims to protect the interests of the lessor with Article 315 of TCO.

According to Article 348 of TCO, the notice to terminate leases of residential and roofed business premises must be in writing to be considered valid.

In has been foreseen by Article 349 of TCO, where the leased property serves as the family residence, a spouse may not terminate the lease without the express consent of the other. If this consent cannot be obtained or is withheld without just cause, the lessee may apply to the court. If a spouse becomes party to the lease agreement by way of notifying the lessor, the lessor must seperately notify the lessee and the spouse regarding any notification of termination or when granting a period of payment leading to termination.

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TURKISH – CHINESE BILATERAL INVESTMENT TREATY REGIME: PAST, PRESENT AND FUTURE

Türk-Çin İki Taraflı Yatırım Antlaşması Rejimi: Geçmiş, Günümüz ve Gelecek

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ABSTRACT

The bilateral investment treaties or agreements play an important role in encouraging foreing investments. Commencing from the late 50s there have been immense developments in the practice of these agreements. In particular, dispute settlement provisions have been the core agenda. Of these, international arbitration under the ICSID Convention has emerged as the most preferred venue for the dispute settlement. In line with the general tendency worldwide, Turkey and China getting an enduring trade and investment partnership envisioned a new arrangement in their bilateral investment agreement system. Both countries recently signed a new agreement in 2015, which has yet to be in force, in order to bring the current (old) agreement to meet the expectations of their investors for a better environment of investment. This agreement undoubtedly brings Turkish-Chinese bilateral investment protection regime to the desired standards of protection.

Key Words: Bilateral investment treaty, Turkey, China, arbitration, ICSID, UNCITRAL arbitration, investment arbitration, investor, notification, dispute settlement, expropriation, dispute resolution procedures.

ÖZET

İki taraflı yatırım antlaşmaları ya da anlaşmaları yabancı yatırımların teşvikinde önemli bir rol oynamaktadır. Ellili yılların sonlarından başlayarak, bu anlaşmaların uygulanmasında oldukça yoğun bir gelişme olmuştur. Özellikle, uyuşmazlık çözüm hükümleri gündemin kalbini oluşturmaktadır. Uyuşmazlık çözümünde ICSID Konvansiyonu kapsamında uluslararası tahkim en çok tercih edilen yer olarak belirmektedir. Dünya genelindeki bu eğilim doğrultusunda, uzun sureli bir ticaret ve yatırım ortağı olarak Türkiye ve Çin iki taraflı yatırım anlaşma sistemini yenilemeyi öngörmüşlerdir. Her iki ülke kendi yatırımcılarının daha iyi bir yatırım ortamı için olan beklentilerini karşılamak üzere henüz yürürlüğe girmemiş olan yeni bir anlaşmayı 2015 yılında imzalamışlardır. Bu anlaşma şüphesiz Türk-Çin iki taraflı yatırım koruması rejimini arzu edilen koruma standartlarına getirecektir.

Anahtar Kelimeler: İki taraflı yatırım anlaşması, Türkiye, Çin, tahkim, ICSID, UNCITRAL tahkimi, yatırımcı, bildirim, yatırım tahkimi, uyuşmazlık çözümü, kamulaştırma, uyuşmazlık çözüm usulleri.

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I. INTRODUCTION

First modern studies on the importance of foreign investments and internationalisation of trade go back in 1870s.[2] In the years following the Second World War, Germany's instinct to secure its international investments we acknowledged the first bilateral investment treaty of the kind signed with Pakistan in 1959.[3]

Those treaties as called *Bilateral Investment Treaties* or in short form *BITs* contain provisions for the protection and promotion of the investments made by the investors of each contracting state in the territory of the other contracting state. The main purpose to be attained by such protection is to reinstate certain substantive protective provisions and to resolve the investment disputes between the investor and the host state in a neutral international platform, being international arbitration.

Following the development of international relations and of cross border investments, number of the BITs signed have reached from 500 in 1990 to 2000 in the next decade. Today it is reported that the number of BITs in force are close to 3000.[4]

Within the framework of the protecion of international investments at a neutral dispute resolution level, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States done in Washington came to the play under the aegis of the World Bank in 1965.[5] The Washington Convention has created a center for the settlement of investment disputes, through arbitration and conciliation, named *International Centre for Settlement of Investment Disputes* as in the short form ICSID. The Center is located within the premises of World Bank in Washington. The convention has been ratified by 153 states as of April 2017. [6]

Dispute resolution forms the Washington Convention entails are binding arbitration and conciliation. In particular, investment lawyers have mostly visited arbitration in order to resolve investment disputes arising between host states and investors who are nationals of states other than the host states.

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[2] For an historical development see **DOLZER Rudolf/SCHREUER Christoph**, Principles of International Investment Investment Law, 2008, p.1 onward.; **SORNARAJAH Muthucumarswamy**, The International Law on Foreign Investment, Second Edition, Cambridge 2005, p.18 onward.

[3] Germany later on in the 50th anniversary of its BIT with Pakistan renewed it in 2009.

[4] http://investmentpolicyhub.unctad.org/IIA

[5] It may also be referred to as the "ICSID Convention".

[6] https://icsid.worldbank.org/en/Pages/icsiddocs/ICSID-Convention.aspx ; Turkey ratified the ICSID Convention in 1988. See OG (*Turkish Official Gazette =Resmi Gazete*) 2.6.1988 – 19830.

Special nature of so-called *ICSID arbitration* has received well acceptance by the international investment dispute resolution practice.

Although the Convention and the BITs were in force since 1960s, the matter has not attracted ample attention until the beginning of 1990s by international investment lawyers and thus there was no reference to investment agreements/treaties in practice. As they put it, the sleeping beauty was awakened in early 1990s. Looking at the case load of ICSID, there were 26 cases registered until 1990 whereas this number was doubled in the next decade. The increase in applications for ICSID arbitration has been continued and the number of the investment arbitration registrations hit 38 only in year 2011. Currently, there are around 600 cases reported.[7]

In the new millennium when one speaks of protection of international investments the first intertational protection instrument that comes to one's mind is bilateral investment treaties. In an international investment, investors traditionally first organize the tax exposure of their investment. For this, they search for the best possible country to place their headqurter from which they invest in the targeted host country. The main tool in so doing is double taxation treaties(DTT). Investors' preference in this regard is to move the investment proceeds in a manner that is taxed at the minimum legally allowed rates. Thus, countries with an extended DTT web is mostly chosen as the headquarter for an internatonal investment. In the recent years, in parallel with the improvement of effectiveness of BITs in the protection of international investments, investors' second attempt, sometimes the first depending on the position of the host state, is to look for a country which provides satisfactory bilateral investment treaty protection that investor can use for its best benefit. Investors prefer to place their originating country as the one which has an available BIT with the host country where he plans to invest. In this choice, it is material that such BIT includes international arbitration for the settlement of disputes between the investor and the host state. Existense of ICSID arbitration as an alternative is always considered the best choice. These studies by investors are carried out as a part of preparatory works which we can call "*legal engineering*".

Turkey started its journey of BITs with its first BIT with Germany in 1962.[8] As of April 2017, Turkey has signed BITs with 98 countries and 76 of them are

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7 https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=CaseLoadStatistics

8 Türkiye Cumhuriyeti ile Federal Almanya Cumhuriyeti Arasında Sermaye Yatırımlarının Karşılıklı Olarak Teşvik ve Himayesine Mütedair Anlaşma (*Agreement between the Federal Republic of Germany and the Republic of Turkey Concerning the Reciprocal Promotion and Protection of Capital Investments*), OG 8.10.1963-11525.

currently in force.[9] China's first move in this regard came after its openness policy in early 1980s. China signed its first BIT with Sweden in 1982. China's BITs stock has reached 110 as a result of China's growing international investments. China follows in this regard Germany for which 131 BITs are in force.[10]

China and Turkey's roads intersect in the number of the investment agreements (BITs, DTTs and Free Trade Agreements (FTAs)) signed. China is on the top of the list and Turkey becomes third just after South Korea for those that are signed by the developing countries.[11]

II. II. TURKEY CHINA BILATERAL INVESTMENT AGREEMENT

1. IN GENERAL

The first Turkish-Chinese BIT was signed on 3 November 1990 and came into force on 20 August 1994(the 1990 BIT). It is still in force.[12]

When we consider the period of time the agreement was signed and its content this agreement can be defined as early period BIT for both countries. In the following years, both China and Turkey have each signed more comprehensive investment agreements. In particular, China has substantially changed its early agreements in its new forms of agreements as a consequence of China's high score of outward investments especially in less developed and developing countries as well as new open gate policy.

Following the same pattern, Turkey and China have decided to renew their outdated bilateral investment agreement. The talks reached to a signed agreement on 29 July 2015 which has yet to come into force(the 2015 BIT).[13]

2. SALIENT PROVISIONS

In the preambles of the both agreements, the purpose is stated to promote greater economic cooperation, the treatment to be accorded to the investments will stimulate the flow of capital and technology and the

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9 See for the list http://www.economy.gov.tr

10 See for the BITs database http://investmentpolicyhub.unctad.org/IIA

11 World Investment Report 2011, UNCTAD, s.100. http://www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf

12 Agreement between the Government of the Republic of Turkey and the Government of the People's Republic of China Concerning the Reciprocal Promotion and Protection of Investments, OG 1.5.1994 – 21291.

13 Text of the Agreement has not been published yet. The text we have utilized for this study was kindly provided for academic pusposes only by the relevant state agency for which we are thankful. See for the info http://investmentpolicyhub.unctad.org/IIA/CountryBits/214#iiaInnerMenu and http://www.economy.gov.tr .

economic development of the contracting parties. In the 1990 BIT, it is also stated that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum economic utilization of economic resources. In fact, the reason why this sentence is not embodied in the second BIT may be that there is more lenghty provision in Article 3 of the 2015 BIT titled "*Treatment of Investments*" whereas the same provision in the 1990 BIT has a narrower scope.[14]

It is commonground that BITs have parallel and similar provisions if not identical in certain points. However, in the newly adopted BITs worldwide one can also see that older versions of BITs are now being left and the newly signed BITs reflecting the findings of the court practices have gradually started to reshape a new framework. The same naturally applies to the drafting of the Turkish Chinese 2015 BIT. These provisions may be analized under three headings:

- Definitions,
- Substantive/Standart protection provisions,
- Procedural or settlement of disputes provisions.

a- Definitions

Investors are defined as company and nationals under Article 1 of the 1990 Agreement. Company means any kind of juridical entity, including any corporation, company, business association or other organization incorporated or otherwised organized in either of the contracting states pursuant to its applicable laws.

National of a contracting state means natural persons who hold nationality of one contracting state under the laws of that contracting party whose nationality is concerned.

Investor definition as embodied in this Agreement is a broader definition of investor if compared with subsequent agreements each China and Turkey has later signed with third countries. In fact, China has changed the definition of investor in the third generation BITs it signed since 2008. Investor to be a qualified investor under a BIT is required to have "*substantial existence*" in the contracting state and/or should be "*controlled by nationals*" of the contracting state. Thus, it is intended that post box companies are excluded from the protection that BITs grant. For instance, Chinese-Mexican BIT and FTAs signed with New Zealand and Peru can be cited in this regard.[15]

[14] Article 2 of the 1990 BIT.

[15] **DULAC Elodie**, "*The Emerging Third Generation of Chinese Investment Treaties*", Transnational Dispute Management(TDM), Vol. 7, Issue 4, December 2010, p.6.

In the Turkish case, in the recently signed BITs we may note the similar direction. The requirements that are included in those new BITs can be singled out as follows: In the Czech BIT, the definition reuires that investor company's headquarter should be in the contracting state.[16] In the Tanzanian BIT the provision states that investor company should have "*ample business activities*" in the country of incorporation which needs to be a contracting state.[17] The Senegal BIT, on the other hand, speaks of "*main activities*" that investor company should have in the contracting state. [18] The latter additionally states that relevant investment should be related to the activities aiming at "*long lasting economic relations*".[19] This expression of the BIT is rather a rigid requirement that is difficult to attain, even to asses how such intention should be determined. Of course, it is left to the practitioners who will then evaluate such intention when a dispute arises between an investor and a host state.

The definition of investor in the 2015 BIT introduces both Turkish and Chinese recent BIT implementations. Article 1/2 defines the investor as natural persons deriving their status as nationals of a contracting party according to its laws. There is nothing new in this definition of real person investor. However, second limb of the same paragraph 2 embraces a new definition of corporation investors in parallel of both parties' newly signed BITs. The formula embodies three components, articulated as follows: corporations, firms, business partnerships be i- incorporated or constituted under the laws of a contracting party and ii- should have their registered offices and iii- substantial business activities within that contracting party. The aim is very clearly to avoid post box companies to use the benefits of the concerned BIT.

A new type of investors is adopted by the 2015 BIT under Article 1/2/c. It contains that corporations, firms, business partnerships incorporated or constituted under the laws of a non-contracting party-neither Turkey nor China- can benefit from the protection granted by the BIT provided that they are directly owned or controlled by nationals or enterprises defined in the above paragraph. Considering new BITs, that are adopted around the world,

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16 Agreement between the Government of the Republic of Turkey and the Government of the Czech Republic Concerning the Reciprocal Promotion and Protection of Investments dated 29.4.2009. Article 1/b. OG 15.01.2012 – 28174. In fact, this is the second BIT signed with the Czech Republic. The first one had been signed on 30.4.1992 which was terminated upon entry force of the current second BIT.

17 Agreement between the Government of the Republic of Turkey and the Government of the United Republic of Tanzania Concerning the Reciprocal Promotion and Protection of Investments dated 11.3.2011. Article 2/b. OG. 25.7.2013-28718.

18 Agreement between the Government of the Republic of Turkey and the Government of the Republic of Senegal Concerning the Reciprocal Promotion and Protection of Investments dated 15.6.2012. Article 2/b. OG 27.3.2012-28246.

19 Senegal BIT Article 1.

have been implementing similar provisions for the sake of avoiding post box companies, this provision is aimed at providing such protection that may be thrown away from those companies within the framework of Turkish-Chinese mutual flow of investments. This view is strengthened by the provision of Article 11/2 of the Agreement. It says that the Agreement shall not apply to those enterprises that are constituted in a third country with which the hosting contracting state has a BIT. This provision opens a new window to the definition of investor but may still keep the door closed. The mere fact that there is a BIT between such third country and the hosting contracting state does not always guarantee a protection under the said BIT to the enterprise that is owned or controlled by national or enterprise of a contracting party. Therefore, we are in the opinion that the provision in Article 11/2 should have covered the situation where there is no protection granted under the BIT with third non-contracting state. In such a case, the enterprise concerned should have the abilitiy to recourse to remedies granted under the 2015 BIT. Of course, it may well be possible that in a dispute an investment arbitral tribunal may interpret this provision in the way we have suggested.

Definition of investment is, as traditionally done, broadly stated but with a certain proviso. They are any kind of assests that are accepted as "*investment*" acquired in accordance with the host state's laws and regulations. They are non-exhaustedly listed in the agreement. Both 1990 and 2015 BITs have similar provisions. Since the definition is not exhaustive both agreements can accommodate one another.

However, the 2015 BIT introduces a widely accepted principle in terms of portfolio investments. Last paragraph of Article 1/1 rules that the Agreement shall not cover the investments made in the nature of acquisition of shares or voting power less than 10 percent of a company through stock exchanges without establishing lasting economic relations.[20]

One can note the similar provisions in new Chinese BITs. Definitions in the new BITs each Turkey and China signs have become more detailed and with some exclusions in terms of investment subject. For instance, China in its BIT with Mexico[21] excludes certain types of loans whereas Turkey uses

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[20] The same formula is repeated in new generation Turkish BITs. For instance, see Article 1 of Turkey-Senegal BIT. The same provision is also included in the Law on Direct Foreign Investments Law (*Doğrudan Yabancı Yatırımlar Kanunu*) dated 2003 and numbered 4875 of Turkey, Article 2. OG 17.6.2003-25141.

[21] **DULAC**, s.9. Mexico-China BIT Article 1: ""**investment**" means the assets owned or controlled by investors of a Contracting Party and acquired in accordance with the laws and regulations of the other Contracting Party, listed below:(a) an enterprise; (b) an equity security of an enterprise; (c) a debt security of an enterprise (i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the debt security is

the portfolio investment exclusion in its BITs with Tanzania[22] and Kuwait[23] in addition to Senegal[24]. In Turkish-Czech BIT, a framework of "*direct investment*" is drawn by reference to the definition of International Monetary Fund, being a totally divergent approach.[25]

b- Substantive Protection Provisions

aa- Standart Protection

These provisions may be defined as such against procedural provisions in the BITs. Since they appear in all BITs in some way they are referred to as standart protection provisions too.[26] They may be grouped as follows:

- an undertaking of a contracting state to an investor of another contracting state to provide at least the same treatment that the former grants to its own investor, ***national treatment***,

at least three years, but does not include a debt security, regardless of original maturity, of a Contracting Party or of a State enterprise;(d) a loan to an enterprise(i) where the enterprise is an affiliate of the investor, or (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a Contracting Party or to a State enterprise;(e) an interest in an enterprise that entitles the owner to share an income or profits of the enterprise; (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d) above; having an investment in the territory of the other Contracting Party;(g) real estate or other property, tangible or intangible, acquired or used for business purposes; (h) and interests arising from the commitment of capital or other resources in the territory of a Contracting Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor's property in the territory of the other Contracting Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise; but investment does not mean, (i) claims to money that arise solely from (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Contracting Party to an enterprise in the territory of the other Contracting Party, or (iii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by sub-paragraph (d) above, or any other claims to money, (j) that do not involve the kinds of interests set out in subparagraphs (a) through (h) above;".

22 Tanzania BIT, Article 1 last sentence.

23 Agreement between the Government of the Republic of Turkey and the Government of the Kuwait State Concerning the Reciprocal Promotion and Protection of Investments dated 15.6.2012, Article 1 last sentence. OG 20.1.2012-28179.

24 Senegal BIT, Article 1 last sentence.

25 Article 1/2 reads "*The term "investment" means direct investment, under the definition of the International Monetary fund …*".

26 **DOLZER/SCHREUER**, Chapter VII. Standarts of Protection, p. 119 onward; **WEILER Todd**/ **LAIRD Ian**, "*Standarts of Treatment*", in International Investment Law by MUCHLINSKI Peter/ORTINO Federico/SCHREUER Christoph(International Investment Law), 2008, s. 259.

- treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favourable that treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State, ***most favoured nation*** **(MFN)** [27],

- any contracting state is to grant to investments of the investor of another contracting state fair and equitable treatment regardless of how other investments of entities are treated by the former host state, ***fair and equitable treatment*** [28],

- As formulated in most of the BITs, investments of nationals or companies of each Contracting Party shall enjoy ***full protection and security*** [29] in the territory of the other Contracting Party.

Although most BITs in force contain all or some of the standart protection provisions mentioned above, the 1990 BIT only includes most favoured nation principle in Article II/1 and 2. In early or first generation BITs China signed, including the one with Turkey that is the 1990 BIT, one cannot come come across national treatment provision. The reason is that China intended to protect the privileged attitude of the then state companies.

However, fair and equitable treatment is found in the Preamble of the 1990 Agreement. Despite its being in the Preamble, it can still be applicable in the protection of investments within the agreement framework. Other standart protection provisions that are not involved in the Agreement may be imported from a BIT that is signed with a third country by means of application of the most favoured nation provision. Therefore, want of such provisions in an explicit form could be overcome under certain circumstances through the application of the most favoured nation as accepted by both the doctrine and

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27 For a detailed work see United Nations Conference on Trade and Development (UNCTAD) (2010). **Most-Favoured-Nation Treatment**. UNCTAD Series on Issues in International Investment Agreements (New York and Geneva: United Nations), United Nations publication, *Sales* No. 10.II.D.19. Available at: http://unctad.org/en/Docs/diaeia20101_en.pdf . For the definition see International Law Commission (ILC) (1978). "Draft articles on most-favoured-nation", in *Yearbook of the International Law Commission,* Vol. II, Part Two. Available at: http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_3_1978.pdf .

28 See for a detailed work see United Nations Conference on Trade and Development (UNCTAD) (2012). ***Fair and Equitable Treatment****. UNCTAD Series on Issues in International Investment Agreements* (New York and Geneva: United Nations), United Nations publication, *Sales* No. E.11.II.D.15. Available at http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf.

29 See for a detailed work **SCHREUER**, "Full Protection and Security", Journal of International Dispute Settlement, 2010, 1-17.

the practice of investment arbitration courts.[30] We should also mention that the foregoing standart provisions that lack in the early generation BITs of China have found their places in the second and third generation BITs that China has adopted. Turkish practice here follows China in this regard as well. In addition to the standard protecion provisions, the Agreement contains provisions regarding employment of foreign personnel, transfer of the proceeds of the investment out of the host country including the investor's own country and subrogation right of the insurer for non-commercial risks.

The 2015 BIT is, as explained earlier, much more generous than the 1990 BIT. The former has explicit arrangements for the standart protection measures. "*Fair and equitable treatment*" and "*full protection and security*" have both been described under Article 2 of the Agreement titled "*Promotion and Protection of Investments*". In addition, it was stated that neither of the contracting states shall in any way impair maintenance, use, enjoyment or disposal of investmenst by way of unreasonable or discriminatory measures.

National treatment principle finds its place in Article 3 titled "*Treatment of Investments*". Most favoured nation provision is also contained in the Article with a broader context. Paragraph 5/d of the Article sets out the limits within which the MFN clause can play. It reads that MFN provisions as embodied in paragraphs 1-4 of the Article shall not be applicable in respect of dispute settlement provisions of the Agreement and of another similar international agreement to which one of the contracting parties is signatory.

[30] For example in *AAPL v. Sri Lanka*, ICSID Case No. ARB/87/3, dated 27 June 1990, the tribunal accepted the premise that a claimant can use the MFN clause in the basic treaty to take advantage of more favourable substantive provisions in the third treaty. Looking from this angle, we should state that the area in which the MFN clause plays its role is very broad. It follows that it covers both substantive protection provisions of bilateral investment treaties as well as procedural provisions referring to the jurisdiction issues in those agreements. The application of the MFN clauses to the jurisdictional matters is not new. Its first reported application go back in 1956 arbitral award in the *Ambatielos* case where the tribunal opined that administration of justice is an important part of the rights and thus be treated within the context of the MFN provision. *Greece v. United Kingdom of Great Britain and Northern Ireland*, United Nations Reports of International Arbitral Awards, vol. XII, p. 83. See Report of the International Law Commission, Sixty-seventh Session 2015, Annex, Final Report of the Study Group Report on the Most-Favoured-Nation Clause, para 82. http://legal.un.org/docs/?symbol=A/70/10 ; In particular, jurisdictional expansion of the MFN clauses in bilateral investment treaties emerged with the the so-called *Maffezzini* decision rendered by an ICSID arbitration tribunal in 2000. Maffezini v Spain, ICSID Case No. ARB/97/7, http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C163/DC565_En.pdf **HAMIDA W. Ben**, "*MFN Clause and Procedural Rights: Seeking solutions from WTO Experiences*", TDM, Vol.6, Issue 1, March 2009.

This provision comes as a response to the long debated implementation and interpretation of the MFN provisions or clauses in the BITs.[31] Very briefly, the issue has been whether an MFN clause in a BIT or similar international agreement[32] can be applied to import procedural provisions as well as substantive provisions from another BIT or similar international agreement that one of the contracting parties to the former is signatory. The doctrine and arbitral awards in this regard have divergent results. The drafters of the 2015 BIT acknowledging the said findings of those tribunals and views of the learned authors have made it clear that dispute settlement provisions of the Agreement in hand shall in any case be applicable and prevails despite the MFN clause contained in the Agreement. The Agreement does not allow any importation of dispute settlement mechanism by application of the MFN provision. It goes without saying that an investor under the Agreement can have recourse to the MFN provision of the Agreement in order to claim a better treatment that is granted to an investor of any third country under like circumstances in terms of the substantive provisions of the Agreement.

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[31] The import of the procedural provisions or dispute settlement provisions by virtue of MFN clause can be in several ways : i- the basic treaty does not include a dispute settlement procedure and the third treaty can be invoked to have recourse to for such purpose; ii- to extend the jurisdictional scope of the basic treaty which originally encompasses a specific category of disputes, such as disputes relating to compensation for expropriation (just like the 1990 BIT for ICSID arbitration); and iii- to override the so-called waiting period which requires the investor to submit its claim first to a local dispute reolution venue prior to submission to international arbitration. The third situation is mostly resorted in the practice of investment arbitration, as it started with the *Maffezini* decision. See **ATAMAN-FİGANMEŞE İnci**, "*The Impact of the Maffezini Decision on the Interpretation of MFN Clauses in Investment Treaties*", Ankara Law Review, Vol.8 No.2 (Winter 2011), p.221; **FIETTA S**, "*Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: Turning Point*", TDM Vol.2 Issue 3 June 2005; **GALLUS N**, "*Plama v Bulgaria and the Scope of Investment Treaty MFN Clauses*", TDM, Vol.2 Issue 3 June 2005.

[32] The term BIT-bilateral investment treaties falls within a broad definition of international investment agreements as part of general meaning of treaties with investment provisions(TIPs). Other international investment agreements comprise free trade agreements (FTAs), regional trade and investment agreements(RTIAs), economic partnership arrangements, agreements establishing free trade areas and trade and investment framework agreements (TIFAs). TIPs may involve more than two contracting parties as opposed to the BITs. Of those almost 400 TIPs worldwide, majority as 132 TIPs include obligations commonly found in BITs. Some may be cşted as the Singapore-Turkey FTA, the republic of Korea-Turkey Investment Agreement, Australia-China FTA, the China-Republic of Korea FTA, the Eurasian Economic Union(Armenia, Belarus, Kazakhistan, Kyrgyztan and the Russian Federation). For more info see UNCTAD, World Investment Report 2016, http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf and for the complete list and texts of those agreement see http://investmentpolicyhub.unctad.org/IIA.

bb- Expropriation

How expropriation is regulated under the 1990 BIT and what sort of protection the expropriation is afforded merits special mention. As in almost all BITs, expropriation is also allowed in the Agreement however being subject to the following internationally accepted formula:

Investments of an investor of each contracting party to the Agreement shall not be expropriated, nationalised or made subject to any practices or measures having similar effects unless;

- there is a public purpose,
- due process of law and non-discrimination and
- freely transferable fair market value is promptly paid. Any expropriation or the like without the foregoing requirements would result in the liability of the contracting state adopting such decisions or measures.

The above definition of expropriation includes both **direct expropriation** meaning the taking of the state by an explicit administrative decision and **indirect expropriation** meaning that the taking by the state by virtue of regulatory measures as well as expropriatory acts without any decision to that end.[33]

The important issue here is whether regulatory expropriation, a kind of indirect expropriation, is subject to compensation even if such exporporiation is carried out in good faith by relevant state authority. There are decisions and opinions both for and against this issue.[34] The opinions mostly differ in the conclusion whether the relevant state is obliged to compensate when such expropriation occurs. This mainly arises from the fact that there is no clear provision in investment treaties. Hence, one may witness divergent decisions rendered by arbitral tribunals.

Some states include specific provisions in their recently signed investment treaties in order to avoid or at least limit such compensation requests. For

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[33] **YILMAZ** İlhan, "*Uluslararası Yatırım Tahkimleri*"(*International Investment Arbitrations*), Galatasaray Üniversitesi Hukuk Fakültesi Dergisi(*Galatasaray University Law Faculty Journal*), 2006/1, s. 74-77; **SCHREUER**, "*The Concept of Expropriation under the ECT and other Investment Protection Treaties*", paper presented in the coneference titled "Investment Arbitration and Energy Charter Treaty", Stockholm Arbitration Institute June 2005; **REINISCH August**, "*Expropriation*", in International Investment Law, s.407 vd.

[34] **NEWCOMBE Andrew**, "*The Boundaries of Regulatory Expropriation in International Law*", TDM, Vol.4, Issue 4, July 2007; **PAULSSON Jan, "***Indirect expropriation: is the right to regulate at risk?*", TDM, Vol.3, Issue 2, April 2006; **DALHUISEN Jan H.** / **GUZMAN Andrew T**, "*Expropriatory and Non-Expropriatory Takings in International Investment Law*", TDM, Vol.10, April 2013.

instance under the Chinese-Indian BIT's Protocol[35], any regulatory measure that is taken for public good and that is non discriminatory will not constitute an indirect expropriation and nationalisation.

In recent BITs signed by Turkey such as with Tanzania[36], Senegal[37] ve Kuwait [38] provide that regulatory measures of non-discriminatory nature aiming at ***Public welfare*** do not form indirect expropriation.[39] Even if inclusion of ***Public welfare*** qualifies as a limitation to indirect expropriation it inevitabely opens another door to discussion that is what consitutes ***Public welfare***. Any interpretation in this regard may well be for the benefit of the investor. Development of the case law has yet to be there to see untouched corners of any such interpretation of ***Public welfare***.

The 2015 BIT taking all the developments in this regard into account included a detailed set of provisions regarding expropriation and compensation in Article 5. There is a clear reference to indirect expropriation. The determination of whether a measure or a series of measures constitutes indirect expropriation is made subject to "*a case-by-case*", "*fact based inquiry*". An inquiry for such requirements in determining whether there is an indirect expropriation is to take into consideration, among other factors[40], the following:

- the economic effects of such measure or series of measures causing an adverse effect on the value of investments, on its own, does not result in the existence of indirect expropriation;
- the gravity of the measure or series of measures causing discrimination over investors or their investments;
- the degree of the measure or series of measures interfering "the obviously reasonable investment expectation of investors"; and
- nature and purpose of the measure or series of measures in adopting those whether the purpose of public interest is realised in good faith and whether it is proportional to attain that purpose.

Lastly, there also includes a reference to regulatory expropriation as a kind of indirect expropriation. Non-discriminatory legal measures aiming at

[35] **DULAC**, 15.
[36] Article 6/2.
[37] Article 5/2.
[38] Article 4/2.
[39] In these three BITs signed in 2010 and 2011 the following provision is contained: "*Non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation.*".
[40] Despite a detailed drafting those "*other factors*" are not specified in the Agreement.

public welfare such as public health, safety and environment will not establish indirect expropriation. However, there is an exception that in rare situations for instance when those measures exceed to what is necessary to maintain relevant legitimate public welfare one may speak of an indirect expropriation.

As seen, the 2015 BIT addresses certain disputed issues of expropriation in international investment law. In order to avoid lengthy and unpredictable dispute resolution mechanisms detailed provisions were adopted. However, there are still daunting questions left such as what is "*legitimate public welfare*" ?, what are the boundaries of "*necessity to maintain corresponding public welfare*" ?, what is "*reasonable investment expectation*" ? and the like. Those questions are obviously to be replied by arbitral tribunals and courts when any such dispute arises. Though, it would be difficult to argue that those denominations would ease the tasks of adjudicators.

c- Dispute Resolution Procedures

The most prominent provisions of BITs are the ones dealing with the settlement of investment disputes between investors and contracting host states whereby investors have, at their choice, the right to recourse to international arbitration being subject to legal norms of international law.

Turkey has already accepted ICSID arbitration as one of the dispute settlement mechanism in the certain BITs, for instance, with Denmark[41], Austria[42], Switzerland[43], Belgium-Luxembourg[44], the Netherlands[45], for all type of investment disputes under those agreements, prior to the entry into force of the BIT with China. [46]

In Turkish-Chinese 1990 BIT, amicable settlement of the disputes is to be first visited and then may be followed by non-binding alternative dispute

41 Agreement between the Republic of Turkey and the Kingdom of Denmark concerning the Reciprocal Promotoion and Protection of Investments, OG 27.5.1992-21240, Article 8.

42 Agreement between the Republic of Turkey and the Republic of Austria for the Reciprocal Promotion and Protection of Investments, OG 10.2.1991-20782, Article 9.

43 Agreement between the Republic of Turkey and the Swiss Confederation on the Reciprocal Promotion and Protection of Investments, OG 6.10.1989-20304, Article 8.

44 The Agreement between the Republic of Turkey and the Belgo-Lüxemburg Economic Union on the Reciprocal Promotion and Protection of Investments, OG 8.10.1989-20306, Article 9.

45 Agreement on Reciprocal Encouragement and Protection of Investments between the Republic of Turkey and the Kingdom of the Netherlands OG 8.9.1989-20276, Article 8.

46 **YILMAZ ilhan**, Uluslararası Yatırım Uyuşmazlıklarının Tahkim Yoluyla Çözümü ve ICSID, İstanbul 2004. (*Settlement of International Investment Disputes by Arbitration and ICSID*) (ICSID)

resolution methods. Finally, any party, whether the investor or the host state, has the right to take the dispute to the courts of relevant contracting state where the investment was made.[47] However, if the dispute involves deciding on the compensation for an expropriaition or nationalisation as referred to in Article 3 of the 1990 BIT and such dispute has not been resolved by amicable ways in a year time, then any party to the dispute may apply to international arbitration pursuant to *ad hoc* arbitration under the UNCITRAL rules.[48]

For settlement of other disputes, any party to the dispute, either investor or contracting state, has the right to apply international arbitration tribunal to be constituted under the laws of the contracting state which is party to the dispute. Nevertheless, if the investor has already filed a case in the courts of the relevant contracting state he cannot anymore apply to the arbitration for the same dispute.

The last resort in settlement of investment disputes under 1990 BIT is the ICSID Convention under certain conditions. Pursuant to the 1990 BIT, an investor can invoke ICSID arbitration provided that both contracting states are parties to the ICSID Convention.[49] More importantly, an application under the ICSID Convention can only be made within the accession conditions of any contracting party to the BIT. In other words, any notification made by contracting states of the 1990 BIT under the ICSID Convention must be taken into consideration. Under Article 25 paragraph 4 of the Convention, dealing with the jurisdiction of the Centre/ICSID, any contracting state to the Convention may notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. This notification can be made at the time of ratification, acceptance or approval of the Convention or at any time thereafter. Such notification is immediately transmitted to all contracting states to the Convention. As reported by the *Executive Directors*[50], this notification is not a consent required under Article 25 of the Convention necessary for the jurisdiction of the Centre but only for information purposes. Likewise, a notification to exclude certain classes of disputes from consideration would not constitute a reservation to the Convention either.

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[47] Article 7.

[48] For UNCITRAL Arbitration rules see http://www.uncitral.org/uncitral/uncitral_texts/arbitration.html

[49] ICSID Convention came into force on 6 February 1993 for China and 2 April 1989 for Turkey. https://icsid.worldbank.org/ICSID/FrontServlet

[50] The Report of the Executive Directors of the International Bank for Reconstruction and Development Bank on the Convention for Settlement of Investment Disputes between States and National of Other States, Paragraph 31. http://icsidfiles.worldbank.org/icsid/ICSID/StaticFiles/basicdoc/basic-en.htm

The notification China made when ratifiying the ICSID Convention relates to the expropriation matters. The notification envisages that ICSID arbitration could only be applied for disputes on determination of the compensation for expropriation.[51] Therefore, it may be accurate to conclude that China excludes the disputes arising from whether there is an expropriation of the jurisdiction of ICSID.

On the other hand, Turkey's notification in this regard is a generalized one. Turkey notified ICSID that only the disputes arising directly out of investment activities which have been obtained necessary permission, in conformity with the relevant legislation of Turkey on foreign capital[52], and that have effectively started shall be subject to the jurisdiction of the Center. However, the disputes, related to the property and real rights on real estates are totally under the jurisdiction of the Turkish courts and therefore shall not be submitted to the jurisdiction of the Center.[53]

In line with the above explanation, when one may well acknowledge the wording in Article 7 last paragraph of the Turkish-Chinese 1990 BIT[54][55] as a confirmation of the notification made by China (and Turkey) at the accession to ICSID,[56] we may reach the following conclusions under the 1990 BIT:

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51 China's notification reads "[P]ursuant to Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the International Centre for Settlement of Investment Disputes disputes over compensation resulting from expropriation and nationalization." https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx

52 Although the Turkish notification speaks of a "necessary permission" regarding the foreign investment, under the current legislation as a general rule there is no such permission procedure as it was abolished by the Law on Foreign Direct Investments dated 2003.

53 See all notifications made under the Convention at The same contents of the notification are also included in Turkey's ratification law. OG. 2.6.1988 –19830.

54 That is "… a dispute can be submitted to the International Centre for the Settlement of Investment Disputes for resolution **in accordance with the terms on which the Contracting Party admited the investment is a party to the convention.**"

55 Turkish text of the BIT reads "... *uyuşmazlık yatırımın yapıldığı Akit Tarafın* ***sözleşmeye katılma koşullan dahilinde*** *Uluslararası Yatırım Uyuşmazlıkları Çözüm Merkezine sunulabilir*." This text more precisely emphasis the fact that submission to the ICSID jurisdiction can be made under the accession terms for the Convention.

56 **YILMAZ**, ICSID, 72-82. The reason why a confirmation in a consent instrument, here it is the BIT, is needed that the notification allowed under the Convention do not automatically result in the exclusion of the jurisdiction of the Centre. In order for such an exclusion to be effective, there should also be a separate arrangement or provision to that end regarding the notification in the BIT that contains the consent to the jurisdiction of the Centre. This conclusion was reached in the first ICSID case of Turkey where Turkey as the respondent claimed otherwise. Turkey argued that the notification excludes submission to the ICSID jurisdiction in the matters dealt with in the notitification. *PSEG Global Inc, The North American Coal Corporation and Konya Ilgın Elektrik* Üretim *ve ticaret*

1- Turkish investors can only have resort to ICSID arbitration for their investments in China in relation to "*the disputes over compensation resulting from expropriation and nationalization*" taken by the Chinese authorities.

2- The Chinese investors, however, will have a wider playground in terms of eligible disputes that are subject to ICSID arbitration against Turkey. The only limitation, if decided so considering the early *PSEG* award, would be in this regard the notification made by Turkey to the ICSID, as outlined above.

It follows that Chinese investors have a wider availability resorting to ICSID arbitration in comparison to Turkish investors in China. Turkish investors may only have their compensation disputes relating to expropriation and the like for the jurisdiction of the ICSID arbitration, whereas Chinese investors can have all their investment disputes be resolved by ICSID arbitration. Turkish investors' mere relief in terms of arbitration for other disputes is the international arbitration to be constituted in accordance with Chinese laws. As it is beyond doubt that ICSID arbitration under the ICSID Convention is more advantegous and efficient than other international arbitrations[57], Chinese investors are in much better position vis-à-vis Turkish investors under the relevant 1990 BIT.

Nevertheless, in the first investment arbitration case under a BIT to which China is party, the Chinese investor *Tza Yap Shum* filed an arbitration case at ICSID against Peru. He contended that certain measures taken by the Peruvian authorities constituted expropriation and thus subject to compensation to be paid by the Peruvian state.[58]

Peru, in its reply to the said arbitration request, relying on the Peru-Chinese BIT[59], which has the same corresponding provision in the Turkish-Chinese 1990 BIT[60], articulated that ICSID arbitration could only be invoked for the determination of the amount of the compensation. Hence, the issue whether there was an expropriation falls outside the jurisdiction of ICSID.

Ltd v Republic of Turkey (ICSID Case No ARB/02/5. https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded

57 **YILMAZ** İlhan, Uluslararası Yatırım Tahkimleri(*International Investment Arbitrations*), 69-84; For ICSID's advantages see **YILMAZ**, ICSID, in particular 41-44.

58 *TZA Yap Shum v Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence 19 June 2009. See **ELIASSON Nils**, "*Investment Treaty Protection of Chinese Natural Resources Investments*", TDM, Vol.7, Issue 4, December 2012, 12 onward; For English text of the award see TDM, Vol.7, Issue 1, April 2010. For a comment on the award see **WANG Guiguo**, "*Investor–State Dispute Settlement in China*", TDM, Vol.8, Issue 5, December 2011.

59 For the English text see http://investmentpolicyhub.unctad.org/Download/TreatyFile/767.

60 As explained earlier, such disputes were not for ICSID jurisdiction but for UNCITRAL arbitration.

However, the ICSID tribunal, composed of KESSLER, as the president, OTERO and FERNANDEZ-ARMESTO, stated that the word "*involving*" in the text of the relevant provision of the agreement[61] is not of a restrictive nature. It must be interpreted to encompass the question of whether there is an expropriation. The tribunal then refused the objection of the Peruvian state to the jurisdiction of ICSID. The Tribunal went on to the merits of the case. Following the decision on the merits of the case in favour of the claimant, then Peru applied for the annulment of the decision by an *ad hoc* committee under the ICSID Convention.[62] Peru claimed that the arbitral tribunal did *manifest excess of power* , as one of the annulment grounds under the Convention, in interpreting the relevant provision of the BIT. The *ad hoc* committee in the end dismissed all the arguments of the Peruvian state.[63]

Should one accept the interpretation of the above ICSID tribunal for the application of Turkish-Chinese 1990 BIT as well, Turkish investors in China may also bring a dispute, whether there is an expropriation, to the UNCITRAL arbitration thereunder since the corresponding provision in the 1990 BIT states the formula as "… *disputes* ***involving*** *the amount of compensation resulting from expropriation or nationalization ..*". However, in this case the dispte settlement provision does only refer to an *ad hoc* arbitral tribunal in accordance with the arbitration rules of UNCITRAL.

As regards a dispute for the jurisdiction of ICSID we should look into the notification made by China. There it was unambigiously stated that "*disputes* ***over*** *compensation resulting from expropriation and nationalization*" will qualify for the ICSID jurisdiction. It follows that the term used "*over*" as opposed to "*involving*" may change the interpretation. Nevertheless, the limitation, as we explained in earlier pages of this article, may be mitigated at least for the disputes arising out of expropriation and nationalisation for

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61 Peruvian-Chinese BIT Article 8/3 reads "…*If a dispute* ***involving*** *the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to the international arbitration of the International Centre for Settlement of Investment Disputes (ICSID)*…". Ibid note 58.

62 Annulment of an ICSID arbitration decision is regulated in Article 52 of the Convention. Annulment is not an appeal but a limited review of the award on the limited grounds that are listed in the Article. Upon request for the annulment, the chairman of the administrative council of the ICSID appoints three ad hoc committee members to hear the request.

63 The ad hoc committee opined as follows: "… *the Arbitral Tribunal committed no manifest excess of powers in its interpretation of Article 8 and in finding that the word "involving" is ambiguous*." Paragraph 98. Decision on Annullment was rendered on 2 February 2015. See for the English text of the ad hoc committee's annulment decision: https://www.italaw.com/sites/default/files/case-documents/italaw4371.pdf

the sake of international arbitration that is UNCITRAL as opposed to ICSID but more importantly to arbitration under Chinese laws. Obviously, this conlusion arises in the realm of the interpretation made by the *TZA Yap Shum* tribunal for the term "*involving*".

We should indicate that China has abolished the above limitation in its second and third generation BITs. In the second generation BITs, the criterion of "*any dispute in relation to an investment*" is employed whereas the third generation BITs speak of a "*breach of the agreement*".[64] From Turkey standpoint, Turkey did not include any limitation in its first generation BITs.[65] However, new generation Turkey BITs contain limitations as envisaged in Turkey's notification to the Center in clear terms, following the experience of the ICSID case of *PSEG v Turkey*.

In fact, Turkish-Chinese 2015 BIT represent both contracting parties' recent BIT practices. It has a very detailed settlement of disputes provisions which, i.a., include time bar[66] and even cost attribution[67] in Article 9.

First layer of the dispute resolution platform is stated as domestic administrative review procedure which will take place on the basis of non-binding good faith negotiations. If the dispute is not resolved in 6 months after the notification of the dispute, then the investor -not any of the parties to the dispute i.e. excluding the host states- has the right to choose:

- competent courts of the host contracting party; or
- ICSID; or
- An *ad hoc* arbitration court under the UNCITRAL Arbitration Rules.

The 1990 BIT embraces both China's and Turkey's exclusion provisions as articulated in their relevant notifications made under Article 25/4 of the ICSID Convention in Article 7/c by reference to the terms of the accession. As seen above, this reference to the terms of accession causes more restrictive results to Turkish investors than Chinese investors. However, when the 2015 BIT enters into force the exclusion in the China's notification as embedded in the 1990 BIT will not be aplicable.

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[64] **DULAC**, 4 onward; **ROONEY Kim**, "*Treaty Arbitration – Is it a real Alternative for China Investment Disputes ?*", TDM, Vol. 7, Issue 4, December 2012.

[65] See the BITs mentioned in the above footnotes 40 to 44 inclusive.

[66] Article 9/6 rules that a dispute shall not be submitted to arbitration when more than 5 years elapsed from the date of the investor knowledge or should be reaosanbly in a position to acquire such knowledge.

[67] The cost attribution provisions in Article 9/8 represent the internationally applied principles of attribution. It may not be necessary to include such a detail in a BIT.

The 2015 BIT also introduced Turkey's notification in the text of the BIT under paragraph 4 of Article 9.[68] Since the provisions are directly embedded in the BIT text it will be applied as a string for the jurisdiction of the Centre not only for Chinese investors in Turkey but also Turkish investors in China. Moreover, the 2015 BIT does not include any provision for the exclusion of the expropriation and nationalization matters as a whole as there is no reference to the notification made by China. In fact, as in the Turkish notification a provision could have been included to cover the Chinese notification regarding the expropriation and nationalization. It is wise that China did release this notification in effect by just leaving it as a notification to the Centre but not embodying it in its consent instrument, in this case, the 2015 BIT. By so doing, we may conclude that the effect of the Chinese notification for the exclusion of ICSID arbitration for the matters except the compensation for expropriation has been lifted from the 2015 BIT for both of the contracting parties. In effect, the 2015 BIT will clear the way for the settlement of disputes without any limitation regarding the expropriation and nationalisation at the ICSID arbitration. It is doubtless to state that this will run in the interests of both Chinese and Turkish investors and result in an effective protection of investments for the contracting parties.

III. CONCLUSION

As we have endeavoured to suggest, the current Turkish-Chinese 1990 BIT falls behind the prevalent practice of international investment law. It is even in itself has divergent application that favours investors of one contracting party against the other despite the fact that the aim and title of the agreement is to provide mutual (and equal) protection of investments. This is caused by the contents of the notifications made by China and Turkey under the ICSID Convention as they in essence differ from one another. Since each China and Turkey has more broadminded provisions for the protection of investors in their recently signed BITs, it was inevitable to replace the current BIT with a modern one embracing the investors of both sides on equal footings. This has also become a need considering the amount of investments realised in both

[68] Paragraph 4 reads " (a) Only the disputes arising directly out of investment activities which have obtained necessary permission, if there is any permission requirement, in conformity with the relevant legislation of the hosting Contracting party on foreign capital, and that effectively started shall be subject to the jurisdiction of the International Center for Settlement of Investment Disputes (ICSID) or any other international dispute settlement mechanism as agreed upon by the Contracting Parties; (b) the disputes, related to the property and real rights upon the real estates are totally under the jurisdiction of the courts of the hosting Contracting Party and therefore shall not be submitted to jurisdiction of the International Center for Settlement of Investment Disputes (ICSID) or any other international dispute settlemen mechanism.".

territories. With the renewal of the BIT in 2015 investors of both contracting parties will have much clearer investment climate and this will no doubt provide comfort in planning new investment projects.

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THE LEGAL NATURE OF THE GENERAL ASSEMBLY RESOLUTION REGARDING WHOLESALE OF SUBSTANTIAL PART OF COMPANY ASSETS UNDER TURKISH CORPORATIONS LAW

Önemli Miktarda Şirket Varlığının Satışında Genel Kurul Kararının Hukuki Niteliği

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ABSTRACT

Pursuant to article 408 paragraph 2 subparagraph (f) of the New Turkish Commercial Code, "*wholesale of substantial part of company assets*" is an unassignable and inalienable competence of the general assembly and therefore, requires a general assembly resolution. Article 538/2 of the Code foresees the same solution for liquidation process. Our paper will focus on a particular problematic that arises out the said provisions. In cases where a sales agreement is concluded between the company and a third party despite the inexistence of a general assembly resolution, would the sales agreement be valid and binding? We believe that articles 408/2 (f) and 538/2 aim to regulate the distribution of powers among the organs of the company and the general assembly resolutions required by these provisions, as to their legal nature, shall have an internal character. Therefore, we believe that inexistence of the general assembly resolution required by the said articles shall not affect the validity of the sales agreement concluded between the company and the third party.

Keywords: joint stock companies, sales agreement, general assembly resolution, substantial part of company assets, invalidity.

ÖZET

6102 sayılı Türk Ticaret Kanunu'nun ("TTK") m. 408/2 (f) hükmü, önemli miktarda şirket varlığının toptan satışını genel kurulun devredilemez yetkileri arasında saymaktadır. Bu nedenle, bu yönde bir satış işlemine ancak genel kurul tarafından karar verilebilir. Kanun'un m. 538/2 hükmü, aynı kuralı tasfiye süreci bakımından da öngörmektedir. Çalışmamız, bu yönde bir genel kurul kararı bulunmaksızın şirket ile üçüncü kişi arasında önemli miktarda şirket varlığının satışı için satım sözleşmesi akdedilmesi halinde, sözleşmenin şirket açısından geçerli ve bağlayıcı olup olmayacağı sorunsalına odaklanmaktadır. Kanımızca, TTK m. 408/2 (f) ve m. 538/2 hükümleri organlar arası yetki paylaşımına ilişkin hükümlerdir ve anılan hükümlerde aranılan genel kurul kararı iç ilişkiye yönelik bir karar niteliğindedir. Dolayısıyla, söz konusu hükümlerde aranılan genel kurul kararının mevcut olmaması, şirket ile üçüncü kişi arasında yapılan satım sözleşmesinin geçerliliğini etkilememelidir.

Anahtar Kelimeler: anonim şirket, satım sözleşmesi, genel kurul kararı, önemli miktarda şirket varlığı, toptan satış.

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Introduction

Article 408 paragraph 2 of the New Turkish Commercial Code numbered 6102[2] ("TCC") sets forth the unassignable and inalienable competences of general assembly in joint stock companies' law. Pursuant to the subparagraph (f) the said article, "*wholesale of substantial part of company assets*" is an unassignable and inalienable competence of the general assembly and therefore, requires a general assembly resolution[3]. Furthermore, the New Turkish Commercial Code also sets forth that the wholesale of substantial part of company assets "within the liquidation process" requires a general assembly resolution in art. 538/2[4]. Since it is accepted that article 408/2 subparagraph (f) and article 538/2 also applies to limited liability companies by analogy[5], it would be accurate to say that, in the pre-liquidation phase or within the liquidation process, wholesale of substantial part of company assets requires a general assembly resolution under Turkish Corporations law.

Our paper will focus on a particular problematic that arises out of articles 408/2 (f) and 538/2 of TCC. In cases where a sales agreement is concluded between the company and a third party despite the inexistence of a general assembly resolution (or, as a second scenario, contrary to the general

[2] The New Turkish Commercial Code numbered 6102 has entered into force as of July 1, 2012.

[3] It shall be underlined that, the former Turkish Commercial Code numbered 6762 did not contain a positive provision equivalent to subparagraph (f) of article 408/2. The subparagraph (f) had been included in article 408/2 of the New Turkish Commercial Code, with the aim to render the established Supreme Court decisions into a positive provision. In the era of the former Commercial Code (numbered 6762), in relation with the limited liability companies, the Supreme Court had decided in several occasions that wholesale of substantial part of company assets requires a general assembly resolution [Supreme Court of Turkey ("Yargıtay") 11th Chamber of Private Law; 13.02.2006, 2005/1362 E. 2006/1253 K.; 01.03.2011, 2009/8511 E. 2011/2021 K.; 10.03.2011, 2009/4025 E. 2011/2497 K.]. Therefore, it is possible to say that subparagraph (f) of article 408/2 of the New Turkish Commercial Code has rendered the case-law of the Supreme Court into a positive provision of the law.

[4] Nevertheless, it shall be underlined that this provision had an equivalent in the former Turkish Commercial Code, namely article 443/2. Accordingly, we can say that, the New Turkish Commercial Code has widened up the solution accepted by the former Commercial Code, by foreseeing that a general assembly resolution is required for wholesale of substantial part of company assets, even in the pre-liquidation period.

[5] **Biçer, Levent/ Hamamcıoğlu, Esra;** Anonim Ortaklıklarda Genel Kurulun Devredilemez Yetkileri Kapsamında Önemli Miktarda Şirket Varlığının Toptan Satışı ve Uygulama Alanı (TTK m. 408/2-f), Kadir Has University Faculty of Law Review (Kadir Has Üniversitesi Hukuk Fakültesi Dergisi), June 2013/1, p. 49; **Dural**, **Ali;** Anonim Şirketin Önemli Miktarda Varlığının Satışına İlişkin Genel Kurul Kararının İçeriği ve Kapsamı, Essays in Honour of Prof. Dr. Hamdi Yasaman (Prof. Dr. Hamdi Yasaman'a Armağan), İstanbul 2016, p. 227 footnote 3.

assembly resolution), what would be the legal fate of the sales agreement? In other words, would the sales agreement be valid and binding under such a scenario? Or shall we qualify the general assembly resolution as a "*condictio sine qua non*" for the validity of the sales agreement? It will be needless to say that, the answers of all these questions are closely linked with the legal nature of the general assembly resolution foreseen in articles 408/2 (f) and 538/2 of TCC[6].

Since the specific source of subparagraph (f) of article 408/2 of TCC is article 179a of the German Stock Corporation Act (The "Aktiengesetz"), we prefer to begin to our examination with the German law system. Subsequently, having regard to its importance for the Turkish law system as a main source for TCC, we will examine the Swiss law system, which is totally under the influence of German law regarding our subject matter. Following our explanations regarding the decisions of the Turkish Supreme Court and the attitude of the Turkish doctrine, we will end up our examination with our personal opinion and assessment.

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[6] We shall clarify that the conclusions we reach in this paper will not be valid for the public and listed companies. Under Turkish law, public and listed companies are subject to the Capital Markets Law numbered 6362, article 23 of which sets forth "material transactions". Pursuant to subparagraph (b) of article 23/1, wholesale or lease of all or substantial part of company assets, or establishing rights in rem (real rights) on them is a material transaction. Pursuant to the Communiqué numbered II-23.1 of the Capital Markets Board on the Common Terms on Material Transactions and Shareholders' Right to Dissociate, based on the value of the assets in the recently disclosed financial tables, wholesale or lease of more than 50% of the company assets in value will be considered as "material" [please see art. 6.1 (a) of the Communiqué]. Material transactions in public & listed companies requires general assembly resolution (Communiqué art. 7) and shareholders, who counter voted (who issued a negative vote) for the material transaction and annotated their dissenting vote to the minutes of the meeting, are granted a right to dissociate, by selling their shares to the company over the average price of the shares in the stock exchange market within the last thirty days before the material transaction was disclosed to the public (please see art. 24/1 of Capital Markets Law). Pursuant to article 23/2 of Capital Markets Law, the Capital Markets Board is entitled to issue a fine or to sue the annulment of the transaction in cases where the requirements set forth by the Communiqué for material transactions are not fulfilled. Therefore, article 23 of the Capital Markets Law and the related Communiqué shall be considered as a separate system for public and listed companies, which deserves peculiar academic examination, since the said system excludes application of articles 408/2 (f) and 538/2 to such kind of companies (please see **Yanlı, Veliye;** Halka Açık Anonim Şirketler ve Bağlı Şirketlerinin Teminat İşlemleri, Essays in Honour of Prof. Dr. Seza Reisoğlu (Prof. Dr. Seza Reisoğlu Armağanı), Ankara 2016, p. 353-392, for the assessment of the system in the Capital Markets Law and the Communiqué). Hence, we prefer to limit the scope of our paper with non-public and non-listed companies.

I. THE SOLUTION OF GERMAN LAW SYSTEM

As we have mentioned above, the specific source of subparagraph (f) of article 408/2 of TCC is article 179a of the German Stock Corporation Act (The "Aktiengesetz"). The first paragraph of the said article foresees that, sale of the entirety of assets of a company requires a general assembly resolution, even if it does not involve a modification in the objects of the company. Since the provision refers to art. 179 for the general assembly resolution, the meeting and decisions quorums for the general assembly resolution shall not be less than three fourths of the share capital, pursuant to paragraph 2 of article 179, unless the articles of association provide for a larger majority[7].

Art. 179a of German Stock Corporation Act does not make a distinction as to whether the company is in liquidation process or not, therefore the provision is applicable both in the pre-liquidation period and within the liquidation process[8]. The *ratio legis* of the provision is explained as protecting the interests of shareholders and preventing the *de facto (actual) liquidation* of the company[9].

It should be noted that, different than articles 408/2 (f) and 538/2 of TCC, art. 179a of German Stock Corporation Act does not refer to "wholesale of substantial part of company assets", but refers to "sale of entire assets of the company", therefore is solely applicable under such a scenario. Nevertheless, there are views in the doctrine that defend application of article 179a in cases where "substantial part of assets" or "nearly all the assets" are subject to sale[10].

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7 **Henssler, Martin/ Strohn**, **Lutz,** Gesellschaftsrecht, 3. Auflage, München, 2016, §179a, Nr. 7; **Hüffer, Uwe/ Koch**, **Jens,** Aktiengesetz, 12. Auflage, München, 2016, §179a, Nr. 8, 11.; for a more detailed examination regarding quorums, please see **Spindler, Gerald/ Stilz**, **Eberhald,** Kommentar zum Aktiengesetz, 3. Auflage, München, 2015, §179a, Nr. 21; **Hölters**, **Wolfgang,** Aktiengesetz, 2. Auflage, München, 2014, §179a, Nr. 7-10; **Münchener Kommentar zum Aktiengesetz ("MüKoAktG")**, 4. Auflage, München, 2016, §179a, Nr. 45-53.

8 Nevertheless, the provision is not applicable in bankruptcy situations. Please see **Spindler/ Stilz/Holzborn**, Kommentar zum Aktiengesetz, 3. Auflage, München, 2015, §179a, Nr. 12; **Hölters/Haberstock/Greitemann**, Aktiengesetz, 2. Auflage, München, 2014, §179a, Nr. 3; **Hüffer/Koch**, §179a, Nr. 24; MüKoAktG/Stein, §179a, Nr. 13.

9 **Spindler/Stilz/Holzborn**, §179a, Nr. 1; **Henssler/Strohn**, §179a, Nr. 1; **Hölters/Haberstock/ Greitemann**, §179a, Nr. 1; **Hüffer/Koch**, §179a, Nr. 1; **MüKoAktG/Stein**, §179a, Nr. 5-8.

10 **Spindler/Stilz/Holzborn**, § 179a, Nr. 19; **Henssler/Strohn**, §179a, Nr. 4; **Hölters/ Haberstock/Greitemann**, §179a, Nr. 4; **Hüffer/Koch**, §179a, Nr. 4. For criterions to determine "substantial part of company assets" please see **MüKoAktG/Stein**, §179a, Nr. 17-21; please compare with **Bredthauer**, **Jürgen,** "Zum Anwendungsbereich des § 179a AktG", Neue Zeitschrift für Gesellscahftsrecht, 2008, p. 817.

It is also defended in the doctrine that art. 179a shall be applied to limited liability companies by analogy, with certain dissenting opinions[11]. Lastly, in German law system, in cases where the general assembly resolution in terms of art. 179a does not exist, the sales agreement concluded by and between the company and the third party is considered as null and void, unless a subsequent ratification is granted by the general assembly[12].

II. THE SOLUTION OF SWISS LAW SYSTEM

The Swiss Code of Obligations does not contain any provision similar to art. 179a of German Stock Corporation Act and/or articles 408/2 (f) and 538/2 of TCC, which require a general assembly resolution in cases where wholesale of substantial part of or all of company assets is at stake, in the liquidation process or in the pre-liquidation phase. On the contrary, in the Law dated October 3, 2003, related with Mergers, Split-ups, Transformations and Asset Transfers (“*Loi fédérale sur la fusion, la scission, la transformation et le transfert de patrimoine*”- “*LFus*”), it is foreseen that in cases of asset transfer, the organ competent for resolution and concluding the contract is the board of directors in art. 70/1, and the general assembly shall solely be informed of such transfer (please see art. 74, paragraphs 1 and 2). Hence, Swiss Law does not contain a positive provision, which requires a general assembly resolution in cases where wholesale of substantial part of or all of company assets are subject to sale.

Nonetheless, the Federal Supreme Court of Switzerland, under the influence of German law, has cultivated the concept of “*de facto (actual) liquidation*” («*liquidation de fait*») in 1990[13]. Based on the second paragraph of article 736 of Swiss Code of Obligations, which requires a general assembly resolution for entering into voluntary liquidation process, the Federal Supreme Court held that, as a rule, board of directors is not authorized to sell the entirety of company’s assets, since such a transaction will be equal to “*de facto (actual) liquidation*” («*liquidation de fait*») if a general assembly resolution regarding this matter does not exist. The Federal Supreme Court has also ruled that such a transaction will be beyond the power of representation conferred to board of directors by article 718/1 of Swiss Code of Obligations[14]. However, the

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11 For opinions defending application by analogy, please see **Henssler/Strohn**, §179a, Nr. 2; MüKoAktG/Stein, §179a, Nr. 14; for the opposite view please see **Bredthauer**, p. 819.

12 **Henssler/Strohn**, §179a, Nr. 10; **Spindler/Stilz/Holzborn**, § 179a, Nr. 7, 16; **Hüffer/Koch**, §179a, Nr. 13; MüKoAktG/Stein, §179a, Nr. 40.

13 BGE 116 II 320, JdT 1991 I 373.

14 **Bahar** explains this outcome with diminution of competences of board of directors in favour of general assembly in de facto liquidation (“liquidation de fait”). Pursuant to the author, as it is the case for ordinary liquidation, for asset transfer transactions which are

Federal Supreme Court added that such kind of a transaction may be accepted within the power of representation of board of directors in exceptional cases, where the survive of the company urges immediate and radical precautions and summoning the general assembly will cause a delay, which will render the precaution inefficient[15].

In this award, the Federal Supreme Court has established two criterions for the concept of "*de facto liquidation*" ("*liquidation de fait*"). Pursuant to the first, different than article 408/2 (f) of TCC, in order to accept de facto liquidation, entire assets of the company shall be subject to sale. Partial sale of assets, even if the part at stake is substantial, does not trigger such an outcome. As a second criterion, transfer of assets in its entirety shall render the object of the company impossible. At this point, it shall be clarified that, sale of assets in its entirety does not render the object of the company impossible in every single case[16]. Nevertheless, we shall note that the company in the decision of Federal Supreme Court was insolvent, in other words in the technical bankruptcy situation. It is unclear whether the Federal Supreme Court would accept that transfer of entire assets of the company *per se* renders the object of company impossible, should the company were a solvent one. Therefore, in terms of Swiss law, it shall be assessed in a delicate manner in every concrete case whether transfer of assets in its entirety renders the object of the company impossible, or not. In cases where the object of the company is attainable despite the sale of assets in its entirety, "*de facto liquidation*" ("*liquidation de fait*") will not be the legal outcome.

As mentioned above, pursuant to the Federal Supreme Court, the assets of the company shall be transferred in its entirety, in order to accept existence

deemed to be equal to de facto liquidation, the company shall follow up the legal regime for ordinary liquidation and shall adopt a general assembly resolution. The author argues that, without preserving the assets essential for its on-going commercial activity, by transferring the entirety of its assets, the company demonstrates its will for liquidation, unless a new investment policy is at stake (**Bahar, Rashid,** Commentaire de la loi fédérale sur la fusion, la scission, la transformation et le transfert de patrimoine ainsi que des dispositions des lois fédérales modifiées par la LFus, 2005, p. 764-765 no. 43-46).

15 **O'Neill** criticizes the Federal Supreme Court for not responding the question regarding whether wholesale of entire company assets is *per se* beyond the power of representation of the board of directors, or does it make a difference if the board have a new and true investment plan (**O'Neill**, **Patrick,** Die faktische Liquidation der Aktiengesellschaft Vor dem Hintergrund des Verkaufs des gesamten Geschäfts durch die Verwaltung, SSHW No. 258, 2007, p. 67 no. 97).

16 For instance, a company in accommodation business may decide to sell its hotel, which is its sole asset, in order to purchase a new one in another region or a small company dealing with passenger transportation may decide to sell its sole asset, its old bus, in order to buy a new one. In such cases, sale of company assets in its entirety does not render the object of the company impossible.

of a "*de facto liquidation*" ("*liquidation de fait*")[17]. Nevertheless, under the influence of German doctrine, ***Böckli*** and some other authors defend that, transfer of substantial part of company assets shall be accepted as sufficient for "*de facto liquidation*" ("*liquidation de fait*")[18].

Finally, we shall underline that, in Swiss law, both the Federal Supreme Court and the doctrine accept that, the sales agreement concluded between the company and the third party is null and void ("*nullité*") in cases where a general assembly resolution does not exist[19]. However, subsequent ratification of the general assembly renders the agreement valid and binding[20].

III. DECISIONS OF THE TURKISH SUPREME COURT AND THE APPROACH OF THE TURKISH DOCTRINE

Turkish Supreme Court[21], in its established case-law, accepts that the general assembly resolution is a condition of validity in terms of articles 408/2 (f) and 538/2 of TCC. Therefore, pursuant to the Supreme Court of Turkey, the agreement between the company and the third party regarding wholesale of substantial part of company assets is null and void without a general assembly resolution.

The established case-law of Turkish Supreme Court is also supported by the Turkish doctrine with unanimity. We can say that the opinions of the authors in the Turkish doctrine are divided in two main streams, both arriving to the same conclusion with different argumentation. The first approach accepts that the agreement between the company and the third party regarding wholesale of substantial part of company assets is null and void; since the law does not permit such an asset transfer without a general

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17 **Bahar,** p. 765 no. 47-48.

18 **Böckli, Peter,** Schweizer Aktienrecht, 3. Aufl., Zürich vd., 2004, § 13 no. 499, § 17 no. 77; **Philippin, Edgar,** Le transfert du patrimoine commercial- Aspects du droit privé, Revue de droit privé et fiscal du patrimoine, 2009/83, p. 90. Pursuant to **Bahar,** partial sale of company assets is an administrative decision. Partial sale of company assets does not reveal the will of the company for liquidation and therefore, the organ competent for such a resolution is board of directors, as no will for liquidation is at stake (bkz. **Bahar,** p. 765 no. 47-48).

19 **Bahar,** p. 764 no. 45; **Blanc, Mathieu,** Aspects actuels du droit de la société anonyme, Travaux réunis pour le 20ème anniversaire du CEDIDAC, 2005, p. 317. Please see **Fischer**, **Marc Pascal,** Die Kompetenzverteilung zwischen Generalversammlung und Verwaltungsrat bei der Vermögenübertragung, SSHW No. 262, 2007, p. 151, for a view that alleges no material difference remained between German and Swiss law systems regarding this matter following the Federal Supreme Court decision in 1990 and the attitude occurred in the Swiss doctrine.

20 **Bahar,** p. 764 no. 45.

21 Please see the decisions of Turkish Supreme Court mentioned in footnote 2, supra.

assembly resolution, as articles 408/2 (f) and 538/2 of TCC have mandatory character[22]. Pursuant to the second approach in the doctrine, as a rule, the sales agreement between the company and the third party is null and void; however a subsequent ratification of the general assembly may render the agreement valid and binding[23]. In conclusion, we can say that both views in the doctrine define the sales agreement between the company and the third party as null and void, in the absence of a general assembly resolution.

IV. OUR PERSONAL ASSESSMENT

We believe that the absence of a general assembly resolution in terms of articles 408/2 (f) and 538/2 of TCC, shall not lead to invalidity of the sales agreement concluded between the company and the third party regarding sale of substantial part of company assets. Our opinion is based on two major arguments:

a) Primarily, in corporations' law, as a rule, the general assembly is an internal organ, that adopts resolutions with internal effects, that is to say with effects between the company, the organs of the company and the shareholders[24]. Article 408 of TCC aims to regulate the power and competences of the general assembly, therefore is related with the distribution of powers among the organs. The same determination is also accurate for article 538/2 of TCC, regarding the liquidation process. We shall underline that, when TCC prefers the general assembly resolution to have effect on the external relationship with a third party in exceptional cases, it clearly foresees so in the relevant provision. Article 356/1 of TCC is a good example for this assumption: "*Unless ratified by the general assembly and registered to the trade registry, the agreements concluded within two years following the registration of the company, concerning acquisition or lease of an enterprise or an asset by the company with a consideration exceeding one- tenth of the capital are null and*

[22] **Özdamar, Mehmet;** Anonim Ortaklığın Sahip Olduğu Malvarlığının Yönetim Kurulu Tarafından Topluca Devredilmesi, Selçuk University Law Faculty Review (Selçuk Üniversitesi Hukuk Fakültesi Dergisi), Volume: 14/ 2, Year 2006, p. 113-114; **Karahan, Sami;** Anonim Şirketlerde Tasfiye, Konya 1998, p. 199; **Kervankıran, Emrullah;** Anonim Şirketlerin Tasfiyesi, Ankara 2015, p. 239.

[23] **Biçer/Hamacıoğlu,** p. 47; **Dural,** p. 237-238; **Kırca, İsmail (Şehirali Çelik, Feyzan Hayal/ Manavgat, Çağlar),** Anonim Şirketler Hukuku Cilt:1,Temel Kavram ve İlkeler, Kuruluş, Yönetim Kurulu, Ankara 2013, p. 644-645; **Kırca, İsmail (Şehirali Çelik, Feyzan Hayal/ Manavgat, Çağlar),** Anonim Şirketler Hukuku Cilt: 2/2, Genel Kurul Kararlarının Hükümsüzlüğü, Ankara 2016, p. 257.

[24] **Tekinalp, Ünal;** Sermaye Ortaklıklarının Yeni Hukuku, İstanbul 2013, p. 183 no. 11-07; **Poroy, Reha/ Tekinalp, Ünal/Çamoğlu, Ersin;** Ortaklıklar Hukuku I, İstanbul 2014, p. 522 no. 714.

void."[25] Different than article 356/1 of TCC, articles 408/2 (f) and 538/2 do not designate the general assembly resolution as a condition of validity for the agreement between the company and the third party. Should the Turkish law-maker prefer such an outcome; the law-maker would have chosen a similar wording to article 356/1 in articles 408/2 (f) and 538/2. However, this is not the case. Hence the *ratio legis* of articles 408/2 (f) and 538/2 is not to render the general assembly resolution into a condition of validity for the agreement between the company and the third party. Accordingly, we believe that the said provisions, which aim to regulate the distribution of powers among the organs and which are set for the internal relationship within the company, shall not be extended in a way to cover the external relationships between the company and third parties and shall not be interpreted in a manner to effect the interests of third parties acting with good faith.

b) Secondly, the need for transaction security in commercial life urges protection of third parties that enter into contractual relationship with the company. It shall be noted that, the outcome of invalidity for the agreement of sale between the company and the third party in the absence of a general assembly resolution does not arise from a clear provision of law, but stem from the way of interpretation preferred by the courts and the doctrine in relation with the aforementioned provisions of TCC. But when validity of an agreement is at stake, the principles of contract law, including the famous principle of "interpretation in favour of validity" (*"in favorem validitatis")* shall apply.

As a matter of fact, some authors in Turkish doctrine severely criticize article 408/2 (f) of TCC, for being contrary to the representation regime accepted in corporations law and to the aim of protecting third parties[26]. Since the general assembly resolution regarding wholesale of substantial company assets will not be registered in the trade registry and will not be announced in the official trade gazette, how can a third party, who has the intention to purchase the said assets may learn whether a general assembly resolution concerning the transaction exists or not? In addition, how can we accept that the third party (that is to say, the potential purchaser), is under the burden of inspecting the total assets (the estate) of the company, before concluding the sales agreement, in order to determine if a general assembly resolution is required for the transaction or not? Imposing such a burden on the potential purchaser

[25] The source of article 356/1 of TCC is art. 52/1 of German Stock Corporation Act, which equally renders the agreement between the assignor and the company ineffective unless consent or subsequent ratification is given by the general assembly.

[26] **Kendigelen, Abuzer;** Türk Ticaret Kanunu, Değişiklikler, Yenilikler ve İlk Tespitler, İstanbul 2016, p. 308-309.

cannot be based on reasonable legal arguments and is not conceivable. Since general assembly resolution is out of purchaser's control and sphere of influence, and as the ratio between the total assets of the company and the assets to be transferred does not pertain to purchaser's interest, the purchaser shall not be under such kind of burden solely for being a potential buyer, who is ready to purchase the assets by paying a consideration. Moreover, unless the transferor company consents to a due diligence process, the purchaser does not have an investigation opportunity on the seller company's estate and therefore, is not in a position to determine entire assets of the seller and their total value[27]. Assuming that the potential purchaser, with the cooperation of the seller, has conducted such an inspection over the seller company's estate, how can the purchaser be supposed to decide whether the transferred assets compose a substantial part of the seller company's assets or not?

At this point, a serious problem in terms of transaction security reveals. This problem will lead the practice to an evident solution: in every single asset transfer transaction, where the transferor is a corporation, in order to avoid the risk of invalidity, the purchaser will demand a general assembly resolution regardless of the fact that it is indeed necessary or not. Pertaining to asset sale transactions where a general assembly resolution is not necessary, summoning the general assembly will cost time and money, and in some occasions it will end up with the loss of sales opportunity[28]. On the contrary, commercial life demands rapidity and security in commercial transactions.

Particularly in transactions where the seller is a small corporation with limited assets, the transaction security risk reveals more severely. For instance, we can imagine a small transportation company, established with the minimum capital provided for joint stock companies[29], with a sole truck, which is the only asset of the company. Since the truck is the sole property of the company, due to article 408/2 (f) of TCC, it is obvious that a general assembly resolution will be required in order to sell it. Nevertheless, we

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[27] In Turkish doctrine, **Biçer/Hamamcıoğlu** suggest that the potential purchaser may conduct such an inspection over the seller company's estate via a chartered sworn accountant or a certified public accountant, and the seller company shall be accepted under a burden to abide and support such an inspection (**Biçer/Hamamcıoğlu,** p. 47). **Aydın** opposes by mentioning such an inspection over the seller company's estate neither complies with the rapidity that commercial life demands, nor with the interests of the seller company, since it may reveal trade secrets of the said company [**Aydın, Alihan;** Anonim Ortaklık Yönetim Kurulunun Temsil Yetkisinin Sınırları ve Temsil Yetkisinin/Gücünün Kötüye Kullanılması Sorunu, Banking and Commercial Law Review (Banka ve Ticaret Hukuku Dergisi- Batider), Volume: XXX/ 1, Year: 2014, p. 165].

[28] **Aydın,** p. 166.

[29] The minimum capital requirement for joint stock companies is equal to 50.000 Turkish Liras, pursuant to article 332/1 of TCC.

really doubt whether anybody in practice will inquire existence of a general assembly decision while purchasing a second hand truck from a transportation company[30]. By changing the example in a slight manner, let's assume that the transportation company has two trucks and one of them will be sold. Is it a substantial part of the company assets? It is not possible to give a precise answer to this question; evidently the answer will be open to interpretation. Assuming that this company has two trucks and one pickup, in case one of the trucks and the pickup will be sold, can we say that substantial part of company assets is subject to sale? What would be the answer if two trucks are supposed to be sold in the last example? Do these transactions require a general assembly transaction under article 408/2 (f) of TCC? While neither the board of directors of the company nor commercial law experts can provide precise answers to these questions, it is not rational to impose the burden of such an assessment on the shoulders of the potential purchaser. In our opinion, it is the board of directors, that is to say the company, as a legal personality, who is in the best position to determine the ratio between the value of the assets to be transferred and the total value of all the assets (of the company) and to assess whether a general assembly resolution is required for the transaction or not. The legal consequences attached to nonfulfillment of an internal requirement for adopting a general assembly resolution on the part of company shall not be shifted to the potential purchaser. Thus, we believe that, in cases where a substantial part of company assets are sold without a general assembly resolution, the dispositions of the legal regime specific to representation of corporations, namely art. 371/4 of TCC[31] shall apply, and the sales agreement shall be deemed as valid and binding[32].

[30] We can imagine some cases where a subsequent ratification of the general assembly is not possible. Presuming that the small transportation company has two shareholders with even shares (50%-50%) and the shareholders are in dispute which leads the company into a deadlock situation, a subsequent ratification of the general assembly will not be probable. In such case, if we accept that the sales agreement is null and void, the purchaser will be forced to restitution of the truck for which he has already paid for. But will he be able to recover the consideration he paid for the truck? The answer of this question will depend on the financial situation of the company. We believe that, putting the third party who enters into a legal relationship with the company into such a position is contrary to justice & equity.

[31] Pursuant to article 371/4 of TCC, the acts of the authorized representatives bind the company, against third parties acting with good faith, even if they are contrary to the articles of association of the company or general assembly resolutions.

[32] **Aydın,** who examines article 408/2 (f) of TCC in terms of representation power of directors, concludes that the said provision sets forth a limitation for internal representation relationship and such limitation cannot be expanded to external representation relationship, therefore cannot be asserted against third parties acting with good faith (**Aydın,** p. 163-167).

CONCLUSION

Consequently, we believe that articles 408/2 (f) and 538/2 of TCC aim to regulate distribution of powers among the organs of the company and the general assembly resolutions required by these provisions, as to their legal nature, shall have an internal character. Therefore, we believe that inexistence of the general assembly resolutions required by the said articles shall not affect the validity of the sales agreement between the company and the third party. In cases where a substantial part of company assets are sold without a general assembly resolution, the dispositions of the legal regime specific to representation of corporations, namely art. 371/4 of TCC shall apply, and the sales agreement shall be deemed as valid and binding. The interest of the shareholders of the company can be protected with the liability of the board members who concluded the transaction without a general assembly resolution. Nonetheless, ignoring legitimate interests and expectations of third parties who entered into a sales agreement with the company, in order to protect the interests of the shareholders, is not acceptable. We believe that our critiques in relation with the Turkish law system also have academic value for German and Swiss law systems, which have similar solutions regarding the matter. Lastly, we shall underline that the conclusion we have reached for the scenario where a general assembly resolution is inexistent for sale of substantial part of company assets is also valid, by *argumentum a fortiori,* for the scenario where a general assembly resolution (which demonstrates the will of sale on the part of company) exists, but the sales transaction is somehow contrary to the limitations foreseen in the general assembly resolution.

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ANALYSIS OF THE CONCEPT OF “CONSENT” IN MEDICAL INTERVENTIONS FROM A CONTRACT LAW PERSPECTIVE

Tıbbi Müdahaleye Rıza Kavramının Sözleşme Hukuku Açısından Değerlendirilmesi

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ABSTRACT

The concept of *consent* in medical law generally has been subject to analysis in relation to whether an act of a medical practitioner constitutes a criminal offence or tort. However, consent is a statement of will and medical intervention usually leads to a contractual relationship between the physician and the patient. Therefore, the concept of consent must also be determined for the contract. Will declarations may establish or end a contract, as well as amend the contract in some cases. In medical intervention, even if the contract is already established, the physician must provide the patient’s consent before intervention. In this case, it can not be argued that a new and different contract was established with the patient’s consent. It is not the case that the patient amends the contract content by his consent. As a declaration of will, then it is not possible for the consent to establish a contract or change the contract. The consent we receive in practice appears before the physician’s medical intervention, and as a condition of his being able to do this intervention. Although the intervention of the physician in accordance with the law is made possible by the consent, there is another effect of the consent in terms of contract law. Since the medical service contract can be performed by intervening in the patient’s body, the patient must also participate in the performance phase. In our opinion, consent is a declaration of will, which means the participation of the patient in the performance phase and which is makes the performance possible.

Keywords: Contract law, medical law, medical service contract, Consent.

ÖZET

Tıp Hukukunda rıza kavramı genelde haksız fiil veya ceza sorumluluğu bakımından ele alınmaktadır. Oysa rıza bir irade beyanıdır ve tıbbi müdahale genelde hekim ve hasta arasında bir sözleşme ilişkisi meydana getirir. Bu yüzden rıza kavramının, sözleşmeye etkisinin de belirlenmesi gerekir. İrade beyanları, sözleşmeyi kurabilecekleri yahut sona erdirebilecekleri gibi bazı hallerde sözleşmeyi değiştirici etkileri de olabilir. Tıbbi müdahalede sözleşme daha önce kurulmuş olsa bile hekimin müdahaleyi yapmadan önce hastanın rızasını temin etmesi gerekir. Bu durumda hastanın rızasının sözleşmeyi kurduğu yahut rıza ile yeni ve farklı bir sözleşme kurulduğu ileri sürülemez. Hastanın rıza vermek suretiyle sözleşme içeriğini değiştirmesi de söz konusu değildir. O halde bir irade beyanı olarak rızanın sözleşme kurması veya sözleşmeyi değiştirmesi gündeme gelmez. Uygulamada karşılaştığımız rıza, hekimin tıbbi müdahalesinden hemen önce ve bu müdahaleyi yapabilmesinin bir şartı olarak görünür. Rıza sayesinde hekimin müdahalesi hukuka uygun hale gelse de sözleşme hukuku bakımından rızanın bir başka etkisi de bulunmaktadır. Tıbbi müdahale sözleşmesi, hastanın bedenine müdahale ile ifa edilebildiğinden, ifa aşamasına hastanın da katılması gerekir. Kanaatimizce rıza hastanın ifaya katılması anlamına gelen ve ifayı mümkün kılan bir irade beyanıdır.

Anahtar Kelimeler: Sözleşme Hukuku, Sağlık Hukuku, Tıbbi Müdahale Sözleşmesi, Rıza

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I. INTRODUCTION

The concept of *consent* in medical law generally has been subject to analysis in relation to whether an act of a medical practitioner constitutes a criminal offence or tort[1]. Indeed, it is emphasized that patient’s consent to medical intervention steers the intervening act away from illegality both in criminal law and tort law[2]. Such that doctor’s intervention is deemed legal instead of being considered as a tortious or criminal act.

Doctor’s act constitutes an actual intervention with the subject person’s physical and mental integrity, which therefore constitutes a violation of the person’s absolute rights. For such an act to escape a consideration of illegality, there needs to be justifying legal grounds. As such, the concept of “consent” comes to the rescue at that point.

The fact that “consent” has been predominantly analyzed within the realms of criminal law and tort law makes it an uneasy task to ascertain its character from the view point of contract law. As being a declaration (manifestation) of intent, this study aims to determine the equivalence of the concept of “consent” in contract law.

II. EFFECTS OF CONSENT ON CIVIL LIABILITY FOR MEDICAL INTERVENTION

As mentioned above medical intervention is an act of actual intervention with the subject person’s physical integrity. Any person’s physical integrity is subject of his or her absolute right. As long as there is no reason for compliance

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1 For example see **Çakmut Yenerer Özlem**, *Tıbbi Müdahaleye Rızanın Ceza Hukuku Açısından İncelenmesi (Analysis of Consent to Medical Intervention From A Criminal Law Perspective)*, Legal Publishing, January 2003; **Öztürkler Cemal**, *Hukuk Uygulamasında Tıbbi Sorumluluk, Teşhis, Tedavi ve Tıbbi Müdahaleden Doğan Tazminat Davaları (Claims of Medical Responsibility, Diagnosis, Treatment and Medical Intervention in Law Practice)*, Seçkin, Ankara 2006, p. 233 et al; **Koca Mahmut**, *Hekimin Taksirli Fiillerinden Doğan Cezai Sorumluluğu (Criminal liability arising from physician’s negligent acts)*, Medical Law Symposium, Yetkin, 2006, p. 89 et al; **Çeker, Mustafa**, *Tıbbi Müdahalelerde Hukuka Uygunluk Sorunu (The issue of Legality in Medical Interventions)*. p. 5 et al. (http://www.cu.edu.tr/insanlar/mceker/t%C4%B1bbim%C3%BCdahaleler.rtf, 27 November 2012); **Yahya Deryal**, *Tıbbi Müdahalenin Hukuka Uygunluk Şartı Olarak Hastanın Rızası (Patient’s Consent as a Compliance with Laws for Medical Intervantion)*, http://www.saglik.gov.tr/extras/hastahaklari/riza2.htm. Even publications on private law focus on consent as a legal concept that justify otherwise illegal acts, rather than discussing it from the perspective of a contractual relationship formed by the parties’ declarations of intent. For example see **Çilingiroğlu Cüneyt**, *Tıbbi Müdahaleye Rıza (Consent to Medical Intervention)*, Filiz Bookstore, Istanbul 1993, p. 35 et al.

2 **Emily Jackson**, *Medical Law*, Third Edition, Oxford Universty Press, 2013, p. 213 et al.; **Çilingiroğlu**, pp. 43-45.

with the law, the attack against the absolute right is considered to be against the law[3].

With the intervention made, the effect on the person's body comes to fruition. Distinguishing the medical intervention from any attack is because of medical purposes of the act. However, making it for medical purposes alone does not make any action lawful. Even in the case of a person's consent, automatically the action cannot be regarded as a medical intervention.

The right to intervene in the body for medical purposes has been exclusively granted to persons of a particular character by legal orders. They are required to pass a specific training and to complete the training successfully and finally to obtain approval for the performance of the profession[4]. Only these individuals, who we can address them as physicians, can claim that their intervention is for medical purposes and benefit from legal protection. Thus, non-physician practitioners, even if they act on the grounds of medical intervention, will be judged to be illegal, even if the patient's consent is found, since they will operate on an area where they are not legally approved. At this point, the patient's consent will not end the violation of the law; It will only be considered as the reason for the discount in compensation.

Even with regard to physicians, the intervention they have for medical purposes does not make the intervention automatically lawful. Physicians do not have the right to intervene because they are just physicians. Even their occupations are subject to certain rules. It is imperative condition to consider the medical intervention lawful that the intervention is in adequacy of the developed medical science and scientific techniques.

A further condition for physicians' medical intervention that is in adequacy of scientific techniques to be legally admissible is the condition in terms of the patient, which is subject to intervention. Because medical law has the principle of autonomy of the patient and the subject of intervention is the patient's absolute right, the intervention is legally possible only with his or her consent[5]. In the absence of the patient's consent, no matter how much

3 **M. Kemal Oğuzman/Özer Seliçi/Saibe Oktay-Özdemir**, *Kişiler Hukuku (Law of Persons)*, Filiz Bookstore, Istanbul 2016, p. 166 et al.; **Mustafa Dural/Tufan Öğüz**, *Kişiler Hukuku (Law of Persons)*, Filiz Bookstore, Istanbul 2016, p. 104.

4 For related explanations see **Yılmaz Battal**, *Hekimin Hukuki Sorumluluğu (Civil Liability of the Pshycian)*, Adalet, Ankara 2007, p. 3 -5. For clarification of the terms of medical profession see. **Yavuz-İpekyüz Filiz**, *Türk Hukukunda Hekimlik Sözleşmesi (Medical Service Contract in Turkish Law)*, Vedat Bookstore, İstanbul 2006, p. 17 et al.

5 **Yılmaz**, s. 29 vd.; **Yavuz-İpekyüz**, p. 27 et al.; **Jackson**, *Medical Law*, p. 165 et al.; **Doyal Len, Tobias Jeffrey S**., *Informed Consent in Medical Research*, DMJ Books, 2001, p. 63 et al.; **Marc Stauch**, "*Consent in Medical Law*", British Journal of Nursing, November 22 2014, Volume 7, Issue 2.

the intervention has been done by the physician and in accordance with scientific techniques, medical intervention will not be qualified as a lawful intervention. Thus, unless in the concrete case there is no case in which the patient’s consent is not necessary, the medical intervention can only be done with consent and the contrary will be unlawful[6].

Unlawful intervention brings the liability of the physician to the agenda. If the patient has suffered damage for this reason, the physician is liable for this damage. Physician is liable for both pecuniary loss or intangible damages and he shall be imposed on the basis of the compensation claim to be filed[7].

As it can be seen, patient’s consent is mainly considered as a decisive concept in terms of civil liability that whether the physician is responsible or not[8]. When the responsibility is approached from the point of view of law, consent is the function to lift the violation of the law and to prevent the physician from being liable[9].

III. THE NEED FOR ANALYZING THE CONCEPT OF CONSENT FROM A CONTRACT LAW PERSPECTIVE

One has to approach the matter from a contractual relationship perspective and ascertain what consent means in that domain. This is because a doctor-patient meeting (consultation), doctor’s intervention, and the fact that this intervention stems from the parties’ mutual representations and undertakings, point to existence of a contractual relationship. And if a contractual relationship exists, one has to ascertain the significance of the parties’ declarations of intent vis-a-vis that relationship. For if the parties enjoy certain authorities that can affect the contract, or the obligation, both prior and during, or even at the time of termination of, the contract, exercise of such authorities must be defined in terms of contract law.

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6 It should be reminded that in some cases there is no need for consent, as there is concern about the protection of public health or where the patient’s consent can not be provided and the intervention is deemed appropriate.

7 **Yılmaz**, p. 215 et al; **Yavuz-İpekyüz**, p. 145 et al.

8 It is important to remind that in order for the consent to have this effect, it must comply with a number of conditions: It is necessary that the patient’s consent is given with his free will. It is imperative that the patient is informed about the intervention to be done. The patient should be informed about the consequences of the medical intervention and the problems that may arise if the intervention is not done. Finally, when informed, a language that the patient understands should be preferred. See **Yavuz-İpekyüz**, p. 28-29; **Zeytin Zafer**, *Hasta-Hekim İlişkisinde Hekimin Aydınlatma Yükümlülüğü, Sağlık Hakkı* (Obligation to Inform of the Physician in the Patient-Physician Relation, Health Care), V. 3, November 2007, p. 165 et al.

9 Despite the presence of the patient’s consent, it should not be overlooked that the physician should perform medical intervention in accordance with the rules of the profession and the principles of medical informatics.

IV. SIGNIFICANCE OF CONSENT IN TERMS OF ITS EFFECTS ON THE CONTRACT

In contract law, declaration of intent forms, changes, completes or terminates a legal relationship. As a patient's consent to medical intervention constitutes a declaration of intent, its effect on the contract should be determined.

A. Consent at the Contract Formation Stage

A declaration of consent at the beginning of a relationship is easier to define. Patient's statement of complaint and request for treatment, and the hospital's undertaking to provide treatment at the visitation stage can in fact be explained by the conventional "offer-acceptance" concepts. This is because already at the beginning of the relationship there is a request or offer for the performance of a certain deed and a corresponding acceptance. These should be characterized as "*declaration of intent to form a contract*", in other words "*offer and acceptance*".

B. Consent at the Contract Performance Stage

1. Difficulty in Characterization

It should be noted that, in medical law, the contract formation stage is not the only instance where "consent" is required, and the issue is not that simple. This is because even after the patient applies to a hospital and the hospital accepts such application, the patient's consent must be obtained again prior to the actual intervention, which has been agreed to[10]. Examples of legislation where this is reflected are article 70 of the Law No. 1219 Concerning the Mode of Practice of the Art of Medicine and Medical Sciences, article 6 of the Population Planning Law, article 6 of the Law No. 2238 on Harvesting, Storage, Grafting, and Transplantation of Organs and Tissues, and article 24 of the Regulation on Patient Rights.

This is where characterization of the concept of "consent" is rather difficult because the contract has already been formed and, normally, the obligor (the doctor) no longer needs the consent of the obligee to perform his obligation (e.g. to perform an operation). In essence, for example in a work contract, a tailor does not need to obtain the consent of the employer immediately prior to sewing a shirt. Ultimately, once the contract is formed, the obligor must perform his obligation. And there is no mechanism that entails seeking the obligee's consent again for performing that obligation.

[10] The reason for the high degree of emphasis on consent in medical law is that the subject of intervention can be decisive upon the patient's life or healthy living, and the patient has the right to determine his future pursuant to the principle of patient autonomy.

Therefore, the equivalence of the consent separately sought at the performance stage of the medical intervention contract in medical law cannot be directly and easily ascertained.

It would not be correct to characterize such consent as offer or acceptance; because what is done is the performance of a contract, and no new contract is being formed at that stage. It would also not be correct to characterize it as a declaration ending the contract; because it is only a declaration resulting in the performance of the contract.

2. Characterization

I am of the opinion that there are two possible ways to explain a declaration of intent that procures performance of a contract. These two possibilities are examined below.

a. Principal’s Instructions under a Contract of Mandate

In a contract of mandate, the principal can give instructions to the agent, who is under an obligation to perform a certain transaction. In this context, the agent must act in accordance with the instructions he receives (Turkish Code of Obligations, TCO, article 505). A contract for medical intervention, by its nature, can be characterized as a contract of mandate[11]. Here, the doctor awaits or obtains the consent, in other words the instruction, of the principal - usually the patient - at the performance stage, for example prior to medical operation. Given the subject matter and sensitive nature of medical interventions, which sometimes can be the life of a human being, the doctor (agent) is conferred an obligation to act outside the patient’s (principal) declaration of intent by virtue of the latter’s instructions. Due to the principle of “*Patient autonomy”*, principal’s instructions gain significance, and, as a rule, agent can only intervene when instructed to do so[12].

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[11] **Kurşat Zekeriya**, *Eser ve Vekâlet Sözleşmelerinin Nitelendirilmesi Sorunu ve Nitelendirmenin Hükmü (The Problem of Characterizing Work and Mandate Contracts and the Force of Such Characterization)*, Istanbul University Law Faculty Journal, V. LXVII, Issue. 1-2, p. 152 et al.

[12] In situations where the patient is not a party to the contract, rather the contract has been formed to the patient’s benefit in the form of a “*contract in favor of a third person*”, it should be accepted that, as a rule, the patient has the power to give instructions equating to consent. Given that the subject matter of the contract represents a part of the patient’s personal rights, the patient should naturally be accepted to have a position to affect the performance of the contract as benefactor, even though he is not a party to the contract. *Şenocak*, who argues that consent and declaration of intent should, as a rule, be considered separately, contends that consent should, as a rule, be given by the patient. See **Şenocak Zarife**, *Küçüğün Tıbbi Müdahaleye Rızası (Minor’s Consent to Medical Intervention)*, Ankara University Law Faculty Journal, V. 50, Issue. 4, Ankara 2001, p. 67 et al.

Under this characterization, doctor's intervention in emergency situations without the patient's consent finds expression in the rule in TCC art. 505 regarding principal's instructions. Accordingly, *"…where it is impossible to obtain the consent of the principal, the agent may deviate from his instructions under circumstances where it is obvious that the principal would have consented had he known the facts*".

Where the patient is unconscious, the doctor's intervention is generally explained by the concept of "*presumed consent*", resulting in an instance of acting without mandate. As the patient is unconscious from the very beginning, which prevents him from forming a contract, it is natural to characterize this relationship as an instance of acting without mandate. However, where a contract is formed at the beginning, where the patient is conscious at the time of intervention, there is no need to resort to the rule of "*acting without mandate*". In such case, for example where the need for new intervention arises during the operation, the doctor can act within the framework of TCO art. 505/1/c.2.

In my opinion, the main impediment to this interpretation is that "instruction" is actually characterized as an instrument by which the principal manifests to the agent his intent with regard to how he wishes the agent to undertake the business transaction[13]. In other words, instruction constitutes an order from the principal to the agent. Yet, a patient is in no position to give orders as to the manner in which the transaction is to be performed. A patient can either accept or reject treatment, but cannot intervene in the manner of performance.

b. Obligee's Participation in Performance

As known, under certain circumstances, especially in contracts for delivery or performance of a thing, the obligee may be required to participate in the peformance contractual obligations. In some situations, obligor's performance is impossible unless the obligee participates. Moreover, obligee's failure to perform his side of the bargain results in the default of the obligee (TCO, art. 106), which may be deemed as a ground for termination especially in contracts for performance of a thing (TCO, art. 110).

In medical intervention contracts, the obligor (doctor) wishes to perform his obligation; however, as the subject of the intervention is the body or life of another person, the patient is required to make the intervention possible. In other words, the person needs to participate in the interference with his own

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[13] **Tandoğan Haluk**, *Borçlar Hukuku, Özel Borç İlişkileri (Law of Obligations, Special Obligation Relationships)* V. 2, Fourth Facsimile, Evrim, Ankara, 1989, p. 436 et al.

physical integrity[14].

Even if a contract has been formed earlier, performance is only possible if the person allows the required bodily interference. Due to the sensitive nature of the matter, performance is made possible by virtue of the subject's will instead of forced performance. This is because the person is both the subject and the object of the intervention. Therefore, even if he participates in the formation of the contract, he is further required to participate in the performance process.

Thus, it should be stated that a further "contract for performance" exists, or even required, in connection with a medical intervention contract. Given the rules against forced intervention and the need to obtain the patient's consent, it is very well possible to explain the situation by a contract for performance. We should note that, considering the legally controversial nature of performance[15], if one accepts performance as a material act (deed), consent becomes not an element of performance but an instrument thereof[16].

If the patient (obligee) does not undertake the act, that would have enabled performance, he will be in default. In principle, the obligee does not assume an obligation due to his own act, rather the obligor becomes entitled to terminate the contract. Thus, the doctor's obligation to intervene becomes extinct.

V. Conclusion

Consent in medical law is a significant concept, which not only justifies otherwise tortious or criminal interventions to patients, but also has reflections in contract law.

At the contract formation stage, consent can be characterized as the

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[14] In cases where medical intervention contracts are executed in favor of a third person, the patient, who is the person to accept performance or the person to whom the performance will be directed, should naturally be considered as the person who is required to participate in the performance. Therefore, in a contract for medical intervention executed with the employer, the consent must be obtained from the patient, not the employer.
Here you may find a definition of the consent as an obligation of the doctor to obtain it before his performance: **Ünal Er**, Sağlık Hukuku (Medical Law), Savaş Publishing, Ankara 2008, p. 77-78.

[15] See **İnceoğlu M. Murat**, *İfanın Hukuki Niteliği ve Borçlunun Edime Uygun Eyleminin İfa Teşkil Edip Etmeyeceği Sorunu (The Problem of the Legal Nature of Performance and Whether Obligor's Act in Conformance with the Agreed Consideration Constitute Performance)*, Ankara University Law Faculty Journal, 2005, p. 150 et al.

[16] Similar conclusion is adopted in terms of performance through assignment of claims. See **Tekinay S. Sulhi/Akman Sermet/Burcuoğlu Haluk/Altop Atilla**, *Tekinay Borçlar Hukuku, Genel Hükümler (Tekinay Law of Obligations, General Provisions)*, 7th Edition, Filiz Bookstore, İstanbul 1993, p. 760.

“offer” or “acceptance” that forms a medical intervention contract. However, existence of patient’s consent at the contract formation stage does not provide the doctor freedom to perform medical intervention. The doctor must obtain the patient’s consent prior to intervention.

The effect of the patient’s subsequent consent at the performance stage on the contract and its characterization within that framework is possible in two ways.

According to the first one, taking inspiration from the principal’s power to give instructions under a contract of mandate, the patient’s subsequent consent is a form of instruction. This way, the doctor (agent) needs to obtain the patient’s (principal) consent (instruction) in order to perform. Given the sensitive subject matter of medical intervention contracts, the agent’s instructions are extensive and necessary. However, the fact that instructions constitute orders as to the manner of performance weakens this approach.

The second approach is accepting patient’s consent as an act as part of obligee’s participation in performance. For the doctor to perform his obligation, in other words the medical intervention, the patient again needs to facilitate or enable performance due to patient autonomy. This constitutes a contract for performance entered into at the performance stage or, depending on the legal interpretation, an instrument facilitating performance. As the obligee is required to participate in the performance, any breach of this requirement may be interpreted as constituting a default on the part of the obligee.

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RECONCILIATION BETWEEN SOVEREIGNTY RIGHTS OF STATES PARTIES AND THE JURISDICTION OF INTERNATIONAL CRIMINAL COURT, IN LIGHT OF HISTORICAL PERSPECTIVE

Tarihsel Perspektif Işığında, Taraf Devletlerin Egemenlik Hakları İle Uluslararası Ceza Mahkemesinin Yargı Yetkisinin Uzlaştırılması

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ABSTRACT

Roma Statute was adopted on 17 July 1998 to establish an international permanent criminal court based on the obligation of the States to fight jointly against grave inhuman acts perpetrated all over the world and changes in the classical sovereignty perception of the modern States, in order to make a better future possible. The Court began functioning on 1 July 2002 following the completion of the procedures envisaged. Upon the establishment of International Criminal Court, international law has definitely begun to intervene in the criminal law which remained to be the only field of law that it does not intervene in before the national laws.

Legal arrangements so as to minimise the intervention of ICC to the sovereignty rights of States Parties as far as possible, were laid down in terms of increasing the number of States Parties to ICC Statute. Primarily, the crimes that fall into the jurisdiction of the Court are limited to four types as genocide, crimes against humanity, war crimes and crime of aggression. Additionally, through the adoption of the principle of complementarity, it is accepted that ICC will acquire the right of exercising jurisdiction, exclusively in cases where the State does not and is unable to carry out the proceedings or unwilling to do so.

Keywords: International criminal court, sovereignty rights of states, principle of complementarity, jurisdiction of international criminal court, modernity

ÖZET

Tüm dünyada insanlığa karşı işlenen en ağır suçlarla mücadele etmek adına Roma Statüsü 17 Temmuz 1998'de kabul edilmiştir. Bu gelişmenin yaşanmasında devletlerin klasik egemenlik anlayışlarında yaşanan değişimin de önemli etkisi bulunmaktadır. Mahkemenin kuruluşunun tamamlanması ise 1 Temmuz 2002 tarihinde mümkün olmuştur. Daimi bir uluslararası ceza mahkemesinin kurulmasıyla birlikte uluslararası hukuk, ulusal hukuk düzenleri içerinde müdahalede bulunmadığı yegane hukuk alanı olan ceza hukukuna da el atmıştır.

Statüde, Uluslararası Ceza Mahkemesi Statüsüne taraf olacak devlet sayısını arttırmak amacıyla, mahkemenin taraf devletlerin egemenlik alanına müdahalesi en az düzeyde tutulmaya çalışılmıştır. Bu bağlamda öncelikle mahkemenin yargı yetkisine giren suçlar dört suç tipiyle sınırlandırılmıştır. Ayrıca, tamamlayıcılık ilkesinin kabul edilmesi suretiyle, söz konusu suçların ilgili devletçe takibinin etkin olarak yapılmaması, yapılamaması ya da bu konuda isteksiz hareket edilmesi hallerine münhasıran Uluslararası Ceza Mahkemesinin yargı yetkisinin oluşacağı hükme bağlanmıştır.

Anahtar Kelimeler: Uluslararası ceza mahkemesi, devletlerin egemenlik hakları, tamamlayıcılık ilkesi, uluslararası ceza mahkemesinin yargı yetkisi, modernite

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INTRODUCTION

International Criminal Court which would have the jurisdiction over grave inhuman acts perpetrated against humanity in the world was finally established on 1 July 2002, following a hard and tough process.[2] Putting its functionality and the suspicions and discussions regarding its future status aside, it is a significant victory in terms of human history to establish such a permanent court. Humanity has won a great victory in terms of fighting against grave inhuman acts; however, this fight has not been over yet. International community has assumed significant roles in order to ensure that this court functions appropriately and becomes able to exercise jurisdiction over the reponsibles of the inhuman acts perpetrated in Third World countries as well as the responsibles of grave inhuman acts (in the field of war crimes particularly) perpetrated by the citizens of developed countries. Nonetheless it should be expressed that the point where we are standing now is a promising one in terms of the future.

The idea of establishing a permanent international criminal court has not arised in the current period.[3] Although there have been interventions for a very long time on this issue, the court can finally be established in the beginning of two-thousands. One of the most important reasons for the delay in the establishment of the court is that it was hard for the modern States to leave their classical perceptions of sovereignty. Actually, during the establishment process of the court, the nation-states extremely abstained from the idea of external intervention to their own jurisdiction in criminal matters even if it is exercised only in terms of specific acts and under specific conditions. Nevertheless, a consensus was reached and upon the establishment of International Criminal Court, international law definitely begun to intervene in the criminal law which remained to be the last field of national law that it does not fully intervene in before the nation-states.

In this study, the changes observed in the systems of modern thought and formed a basis for the establishment of a permanent international criminal court; the way of reconciliation between the sovereignty rights of nation States and jurisdiction of international criminal court and the limits agreed while preparing the Statute in terms of intervention of the Court to the sovereignty fields of States Parties are examined. Basic study method will be getting use of the views in doctrine and delivering our own opinion by paying attention to causality.

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[2] A. Nuhoğlu, Uluslararası Ceza Mahkemesi Tarafından Uygulanabilecek Yaptırımlar, *Uluslararası Ceza Divanı,* (Ed: Feridun Yenisey), İstanbul 2007, p.246; C. Ateş Ekşi, *Uluslararası Ceza Mahkemesinin İnsanlığa Karşı Suçlar Üzerindeki Yargı Yetkisi,* Ankara 2004, p.3.

[3] G. Alpkaya, *Eski Yugoslavya İçin Uluslararası Ceza Mahkemesi*, Ankara 2002, p.1

1. MODERN WAYS OF THINKING THAT AFFECT THE ESTABLISHMENT PROCESS OF INTERNATIONAL CRIMINAL COURT

1.1. General

There were interesting structures of thought dominating the modern process which stemmed from the Europe in seventeenth century and influenced the whole world afterwards, expressed the style of social life and organisation.[4] It is possible to examine each system of modern thought in details to understand the system as a whole. However, it will be appropriate to examine only the structures of modern thought which affect the establishment process of ICC since the above-mentioned items will stray off the subject matter and digress it largely. Two of the structures of modern thought dominating the modern process in the beginning will be examined below.

1.2. Thought of Better Future

Being hopeful and optimistic is one of the most significant characteristics of modern period thought. Modern thought always plans a better future and tries to make the required conditions established in order to reach that better future. Accordingly, a system of thought purported to be modern should have been promising a better future for the society and, in broader terms, for the humanity and looking ahead hopefully.[5]

There are three main reflections of the modern process. Firstly, industrialisation began in the economic field and production methods and relationships were completely differentiated from the conventional ones. Secondly, an innovation and differentiation started in arts, architecture and culture. The third reflection was observed in intellectual field. Rationalism stood out during this period, science was accepted as the only source of knowledge and enlightenment took place.[6] According to enlightenment thought, the best for the humanity will be identified with the help of science, scientific methods will be developed in order to reach this best and global happiness and well-fare will be achieved following the realisation of the objectives.[7] Thus, throughout the part of the history of humanity corresponding to modernity, the State undertakes to make people under its sovereignty become a society consisting of individuals acting in line with the laws enacted. Such a society established rationally and in a reasoned way is considered as the final aim of a modern state.[8]

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4 A. Giddens, *Modernliğin Sonuçları,* İstanbul 2004, p.11

5 H. Karakehya, Modern Cezalandırma Sistemlerinin Büyük Anlatıları, *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası,* C. LXVI, S.1, İstanbul 2008, p.87

6 Karakehya, 2008, p.89

7 G. Şaylan, *Postmodernizm,* Ankara 2002, p.113

8 Z. Bauman, *Modernlik ve Müphemlik*, İstanbul 2003, p.24

Within this scope, optimism and hope for a better future become the central point in modern systems of thought which have the recipes of happiness and welfare in global scale on the basis of scientific knowledge.

1.3. Thought of State Sovereignty being Absolute and Exclusive

It is mentioned hereinabove that the final aim of a modern state is to establish a society composed of individuals acting rationally and achieved a high level of welfare. According to this thought, a rational society can be established by being a competent and fully sovereign state which is also dominant over its society. That is why, during the development process of the modern period, modern states try to get structured as a state which is dominant and absolutely competent over their own country and as a state equal to others in the international fora.[9]

It is necessary, herein, to identify the sovereignty concept in so far as required by the topic. Sovereignty is a Latin root term derived from the concept, "superanus" (the highest).[10] When its meaning is examined, it is easily noticed that the concept is related to the issue of giving orders; the concept is not used in relationships within an ordinary organisation, rather it is only mentioned in relationships based on orders within the state. Thus, sovereignty reveals itself only in politicised societies.[11] It is seen that the concept of sovereignty has been used with varied contents throughout the historical process. The terms, "classical" or "absolute sovereignty" are used in order to imply its meaning of absolute, exclusive and sole power over the country, which was used at the beginning of modern period, while the expression, "limited sovereignty" is being used to imply its current meaning. Besides, there are distinctions such as "internal sovereignty" which means being the primary, sole, competent authority over the country without any need to further power and "external sovereignty" which means being treated equally with other states independently in international fora. In the light of these explanations, sovereignty can be defined as *a state's being the primary, sole competent power over its own country and being treated equally as the members of international community independently in international fora*. It should be also mentioned that whether the presence, at the UN, of five permanent members with veto power destroys the sovereignty of others is a critical discussion topic.[12]

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[9] Y. Ş. Hakyemez, Egemenlik Kavramı ve Tarihsel Gelişimi, *Küreselleşme ve Türkiye*, (Ed: Cevat Okutan), Ankara 2007, p.58

[10] S. Erdal, Uluslararası Ceza Mahkemesinin Ulus-Devlet Egemenliğine Etkisi, *Selçuk Üniversitesi Hukuk Fakültesi Dergisi,* C.18, S.1. 2008, p.151

[11] Hakyemez, p.49

[12] A. Ş. Kılıç, Uluslararası Ceza Mahkemesi ve Devletlerin Egemenliği Üzerine Ulusal Egemenlik Odaklı Bir İnceleme, *Ankara Üniversitesi Hukuk Fakültesi Dergisi,* C.58, S.3. 2009, p.636

The first formations of the modern state were the absolute kingdoms emerged following the transformation from the feudal structures into absolute monarchies. Absolute monarch exercises the sovereignty in these kinds of monarchies. We would like to shortly mention about Boudin who is one of the prominent representatives of sovereignty concept in classical approach and helped to conceptualise the sovereignty. The philosopher, who becomes the most important symbols of the transformation from the feudal system to absolute monarchies, defines sovereignty as "*the most high, perpetual power over the citizens"*. As it is clear from the definition, Bodin discusses the concept only in terms of internal sovereignty, in line with the requirements of that period. Indeed, his aim was to put an end to feudal structures and strengthen the absolute monarchies.[13] Sovereignty of monarch over the country and the people is absolute, exclusive and perpetual in accordance with this understanding. It is observed that the sovereignty is transferred from the monarchs to nations following the French revolution. Thus, nation-states emerged during the period of modernity which follows the French Revolution. Sovereignty is generally exercised by the representatives of the people acting on behalf of them in the structures in the form of republic. Sovereignty being sole and indivisible in this period means that "only nation is the source of sovereignty" from now on.[14] It is observed in the developing process that a relative fragmentation was started to be accepted with regard to the use of sovereignty which was defined as exclusive and indivisible at the beginning, and that the exercise of internal sovereignty was shared among the parliament, political power and the judiciary on behalf of the public.

2. REQIREMENT FOR AN INTERNATIONAL PERMANENT CRIMINAL COURT

2.1. General

Significant changes took place in thought structures, which are examined hereinabove and are among the important constituents of modernism, later in the modern period. An obligation to develop the international cooperation and establish a national permanent criminal court arised due to these changes. The changes observed in the basic thought structures during the modern process will be discussed below.

2.2. Change of the thought suggesting that the future is better

Throughout the history of humanity, the world has continuously witnessed to wars and hostile acts performed by the human beings against each other. Maybe no other creature on Earth harms its own kind the way that human

13 Hakyemez, p.68
14 H. E. Beriş, *Küreselleşme Çağında Egemenlik*, Ankara 2006, p.127

does. Certain philosophers, who observe such acts committed by human beings against the humanity and each other, even develop ideas suggesting that the human being is inherently evil.[15] However, inhuman acts witnessed all over the world have tremendously increased with the beginning of the modern period. Violent acts committed on the Earth in the last century, increase and diversity observed in the crimes committed against humanity have deeply damaged the modern point of view which suggests that the future will be better. As a matter fact, violent acts were committed in the last century that has never been seen on Earth before and the bloods of people were shed that have never been witnessed on Earth before.

As a result, the humanity recognised that the inventions and discoveries not only serve for the humanity but also give tremendous harms. Besides, being scientific was also employed as a serious means of legitimacy. As a matter of fact, the ruling ones vindicated themselves by emphasising their acts as being scientific, and tried to impose their most anti-democratic implementations on individuals through using this.

Both world wars, during which the heavy weapons developed by the help of mind and science had been used, created serious harms in terms of the history of humanity. In addition, invention of atom bomb, environmental harm caused by technological production and having carried out the Holocaust, which took place during the Second World War, through highly modern methods were the explicit indicators of how the science was abused for evil reasons.[16] Whole world has witnessed to cruel acts perpetrated by the human beings against each other particularly in the last century. Maybe no other creature on Earth harms its own kind the way that human does. These acts committed by human beings against the humanity and each other became so diversified and cruel that they would nearly legitimise Hobbes who was of the opinion that the human being is inherently evil. At the end of this process, it was really recognised that the imagination of the human being about being evil was far beyond the assumptions. Furthermore, scientific and technological developments not only ensured easy communication, access and production but also stealing easily and in large amounts, destroying and killing.[17]

Therefore, it was observed that modern developments within a time period did not only introduce welfare but also many problems.[18] One of the

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[15] T. Hobbes, *Leviathan,* (Translated by Semih Lim), İstanbul 1995, p.127

[16] Karakehya, 2008, p.91

[17] H. Karakehya, Gözetim ve Suçla Mücadele, *Ankara Üniversitesi Hukuk Fakültesi Dergisi,* C.58, S.2. 2009, p.351.

[18] Şaylan, p.112

most important problems among others was that fundamental rights were being violated in many regions of the World due to grave inhuman acts. Accordingly, one of the fundamental priorities of the international community was introduced as the protection of the human rights globally and the fight against grave acts that prick the conscience of whole international community. International community should have to act together in order to be successful in this fight. Indeed it was so explicit that unless a joint fight was carried out, the future won't be better in terms humanity, as assumed. One of the factors which paves the way for the establishment of International Criminal Court (ICC) is that international society recognises the obligation to step forward jointly against inhuman acts.

2.3. Change in the understanding of Sovereignty

Although the States accepted that they had to act jointly in order to protect the human rights universally, as mentioned above, each organisation to be realised together imposed obligations on states parties. However, these obligations did not correspond to the classical sovereignty concept in modern states sometimes. Within this scope, significant changes started to take place in the understanding of absolute sovereignty which was adopted by the modern states at the beginning. It would not be correct to say that the only element triggered this change was the intention to protect human rights internationally. Additionally, developing technology and competition environment were the other reasons that forced the states to act together.

Consequently, modern states waived somewhat their understanding of classical sovereignty and started to establish certain international unions and sign agreements. This new situation made it obligatory for the states to waive somewhat their sovereignty rights in classical sense. This was because the agreements they signed and the unions they established forced them to act in a certain way; the rulings of jurisdiction established through agreements sometimes had direct consequences on states parties and the decisions by the organs of international unions might sometimes be binding on domestic laws. The sovereignty understanding of the modern states started to change rather rapidly in particular through the international agreements signed after the World War II. The criterion laying down that a state should absolutely be sovereign over its own territories and should not recognise any power other than itself in order to be deemed as sovereign was no longer dominant. On the other hand, the states who waived somewhat their powers of legislation, execution and jurisdiction from time to time were started to be deemed as full sovereign.

With these changes, the intervention of international law to domestic laws started to increase gradually. In particular, recognition of foreign judgments by private laws became widespread. Nevertheless, effect of international law on states remained highly limited in the field of public law and in particular, criminal law. In fact, the states don't want to allow for intervention in their fields of sovereignty in terms of law, criminal law being the last to intervene. Nation states react too strongly especially when a citizen subject to incrimination is to be tried before a jurisdiction other than the national ones.

Due to this reason, whenever the international community attempted to take steps jointly against inhuman acts in the World, sovereignty concepts of the members of international community and their tendencies not to allow intervention particularly to their criminal laws, arised as an important obstacle.[19] However, the incidents during the World War II and those witnessed in regions such as Rwanda and Former Yugoslavia obliged states to abandon their understandings of sovereignty. Thus, international law has definitely begun to intervene in the criminal law which remained to be the only field of law that it does not intervene in before the national laws.

As a result, the Rome Statute which was an important development for establishing an international permanent criminal court to judge the grave international crimes threatening the existence of international community as a whole and hurting its conscience was adopted on 17 July 1998 with the participation of many countries, and opened for signature.[20] The court was established on 1 July 2002 upon the completion of accession and national ratification processes to the Statute which remained open for signature until 31 December 2000.[21]

3. CRIMES FALLING WITHIN THE SCOPE OF INTERNATIONAL CRIMINAL COURT'S JURISDICTION, AS A PREREQUISITE TO ITS INTERVENTION IN SOVEREIGNTY OF STATES PARTIES

Although ICC intervenes in the classical sovereignty rights of the states to a certain extent, it is ensured that the intervention shall be limited only to certain crimes. Nevertheless, it is the most significant achievement of the last period in terms of international law to convince states parties to allow the intervention of an international jurisdiction authority to their own criminal laws. Within this scope, it is decided through the ICC Statute that

[19] B. Yücel, 20. Yüzyılda Ulus Devletin Egemenlik Yetkisine Yapılan Son Müdahale: Uluslararası Ceza Mahkemesi, *Eskişehir Barosu Dergisi*, Haziran Sayısı, 2005, p.229

[20] J. F. England, The Response Of United States To The International Criminal Court: Rejection, Ratification Or Something Else?, *Arizona Journal Of International And Comperative Law,* C.18, S.3. 2001, p.941

[21] Ateş Ekşi, p.3

jurisdiction of ICC embraced four categories of crimes which seriously hurt the conscience of international community and make states parties meet on a common ground. These are *Genocide, Crimes against Humanity, War Crimes and Aggression*. The statute includes exhaustive legal arrangements regarding these crimes, excluding aggression; furthermore the scope of three of these crimes is arranged in details through Elements of Crime adopted as an attachment to the Statute.[22]

Definition of the crime of aggression was not included in the Statute since there was no international consensus on its definition. Articles 121 and 123 are referred to regarding this crime mentioned in Article 5/2 of the Statute. Accordingly, court's jurisdiction over this crime was suspended for a period of seven years after the entry into force of this Statute, until a definition was made and elements of this crime were laid down. The UN discussions on defining the scope of the crime of aggression continued and a definition was adopted by consensus at the ICC Review Conference held in Kampala, the capital of Uganda from 31 May to 11 June 2010. Having adopted a definition by consensus, the States Parties decided to allow the ICC to exercise jurisdiction over this crime after 2017. The main reason of this decision was to let the states, situation of which were problematic in terms of this crime, solve the problem.[23]

Proposal raised by Trinidad and Tobago in 1989 had a significant effect on revitalising the work, in 1992, which was carried out under UN during the establishment period of the ICC and suspended from time to time.[24] However, contrary to the possible estimations of today, the proposal of Trinidad Tobago to establish an international criminal court did not include the exercise of jurisdiction over war crimes, crimes against humanity and genocide but jurisdiction over crimes of narco-terrorism regarding drugs. Nevertheless, neither crimes of terrorism nor crimes of drug trafficking are explicitly included within ICC's jurisdiction today.[25] The facts that no generally acceptable definition of the crimes of terrorism was made and both crimes of terrorism and drug crimes constituted a serious problem only in terms of certain states not of the whole international community serve as the reason for

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22 P. Kirsch, The Work Of The Preparatory Commission, *The International Criminal Court: Elements Of Crimes And Rules Of Procedure And Evidence,* (Edited By Roy S. Lee), New York 2001, p.xlvii; R. M. Önok, UCD'nin Görev Alanı ve Uygulanan Hukuk, *Uluslararası Ceza Divanı,* (Ed: Feridun Yenisey), İstanbul 2007, p.241

23 G. Kurşun, *101 Soruda Uluslararası Ceza Mahkemesi,* Ankara 2011, p.14

24 A. Alibaba, Uluslararası Ceza Mahkemesinin Kuruluşu, *Ankara Üniversitesi Hukuk Fakültesi Dergisi,* C.49, S.1-4, 2000, s.188

25 S. R. Ratner, The International Criminal Court And The Limits Of Global Judicialization, *Texas International Law Jornual,* C.38. 2003, p.446; L. N. Sadat, *The International Criminal Court And The Transformation Of International Law,* New York. 2002, p.37

not including these crimes in the scope of this Statute which was established before September 11 attacks. However, crimes of terrorism became the first item on the agendas of western World, following the September 11 attacks and started to be considered as one of the main problems.

From this point of view, we would like to briefly mention about the stance of the USA, which is the most dominant state in the World in terms of politics, in order not to allow jurisdiction over its own citizens and soldiers and thus not to waive its right of sovereignty in classical sense. The USA participated actively in all stages of drafting the Statute during the establishment process of the Court, nevertheless it greatly disturbed the USA that there existed possibility for its own soldiers, who were at various locations in the World realising some operations, to be tried without the USA's consent.[26] This leading country of the World is not a party to the Statute due to this matter in particular and some other reservations of it.[27] The USA which forced the former Yugoslavia a lot to cooperate with International Criminal Tribunal for the former Yugoslavia of ad hoc status, has not agreed to become a party to an international permanent criminal court which will also have jurisdiction over its own citizens and soldiers.[28]

In addition to the crimes within the Statute, determining detailed elements of these crimes in the elements of crime document was rather problematic. Within this scope, it was never easy to lay down and develop the elements of crime or reaching a consensus over these. In fact, on one hand certain states wanted the elements of crime not to be further elaborated as was the case with international criminal courts established for former Yugoslavia and Rwanda, on the other, others delivered opinions stating that these should be especially elaborated.[29]

The main reason lying behind the reaction of certain states to further elaboration of the crimes in elements of crime document despite the existence of detailed descriptions of these within the Statute is the difference between the legal systems all over the World. Anglo-Saxon legal system is generally based on jurisprudences and the judges have a rather wide room for manoeuvre. It is naturally not possible to arrange the crimes categories in details in such criminal law systems. The concept of "elements of crime" was a rather strange term for most of the delegates from Common Law States whose legal systems function well without detailed arrangements regarding

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26 Alibaba, p.196; Y. Aksar, Uluslararası Ceza Mahkemesi ve Amerika Birleşik Devletleri (ABD), *Ankara Üniversitesi Hukuk Fakültesi Dergisi*, C.52, S.2. 2003, p.125

27 England, p.941

28 H. G. Cohen, The Amercan Challenge To International Law: A Tentative Framework For Debate, *The Yale Journal Of International Law*, C.28, 2003, p.551

29 Kirsch, p.xlvii

elements of crime. These states were relying upon their judges without having any details regarding the definitions of crimes such as "Injury", "Burglary" which are arranged through criminal laws. Furthermore, the judges of the former *"ad hoc"* courts also performed their duties without having the elements of crimes. According to those supporting this opinion, there are certain benefits of arranging the elements of crimes in details but the main problem is whether this mentality should be employed or not. This mentality reveals the lack of confidence towards the judges rather than the elements of crimes' being knowable.[30] On the other hand, the practice in Civil Law States is quite contrary when compared to Common Law states in consequence of the principle of formal legality. Due to this reason, civil law states do not intend for leaving such a room for manoeuvre for the judges of an international court since they don't leave such a wide room for manoeuvre for their own judges.[31] Within this scope, as mentioned time and again above, a significant amount of the States do not intend to easily transfer their sovereignty rights regarding punishment unless the limits of competence of the court is defined. On this basis, it became essential to arrange the categories of crimes in details and identify their elements individually.

Nevertheless, the USA's stance during this process is interesting. The USA which has military bases at many different regions of the World and carries out more military activities at international level as regards other countries, acted in a manner that supports arranging of the crimes falling within the jurisdiction of ICC although it adopted Common Law legal system and its legal system generally does not include detailed categories of crime.[32]

Consequently, the facts that jurisdiction of ICC is limited to four categories of crime which hurt the conscience of international community as a whole and elements of these are arranged in details in the elements of crime document became influential in terms of convincing the states who especially don't want to transfer their monopolies of exercising punishment on citizens. States who have many conflicting interests and various concerns regarding the court got the chance to meet on a common ground through further limiting the jurisdiction of ICC which was adopted being limited to these crimes, in line with complementarity principle to be discussed below. Thus, states parties would transfer their classical sovereignty rights within a more limited field.

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30 A. Pellet, Applicable Law, *The Rome Statute Of The İnternational Criminal Court: A Commentary,* Volume 2. 2002, 1060

31 M. Feyzioğlu, M. (2003). Uluslararası Ceza Mahkemesi, *Hukuk Merceği - 4,* Ankara 2003, p.763

32 Kirsch, p.xlviii

4. ANOTHER SIGNIFICANT BARRIER BEFORE INTERVENTION IN SOVEREIGNTY OF STATES PARTIES: PRICNIPLE OF COMPLEMENTARITY

While defining the jurisdiction of ICC, it could have been recognised unconditionally as the absolute judicial authority in terms of trying the disputes regarding the violation of four categories of crime inscribed in the Statute. However, this would create some fundamental problems. First of all, if a newly established court was authorised unconditionally to exercise jurisdiction over these categories of crimes all over the World, the court could soon be flooded with cases and become ineffective in terms of its function. What is more important than this is secondly, if states parties were directly passivized through unconditionally authorising ICC in terms of the crimes inscribed in Statute, there would have been a serious decrease in the number of signatories. Hence, if ICC became the direct judicial authority in terms of these categories of crimes, no other country would have a chance to settle the dispute without referring it to ICC, in terms of crimes committed in its own territory or by its own citizen. This would apparently result in abstention from being a party to the Statute in terms of the states who did not want to waive their rights of sovereignty regarding the exercise of punishment in terms of crimes committed in their own territory or by their own citizens.[33] Due to these reasons, the principle laying down that the ICC is complementary to national criminal courts and step in when there is a failure, impossibility or unwillingness to conduct a fair trial regarding the mentioned crimes.

Within this context, ICC is complementary to national criminal courts, as is it is mentioned in explicit provision of Article 17 of the Statute. Thus it will step in when the national authorities fail, or are unwilling or unable to act regarding the trial of the crimes falling within the Statute.[34] Thus, states parties who object to the trial of the perpetrators of its nationality and of the acts within their own field of sovereignty by international courts may hinder ICC's jurisdiction, through directly initiating the proceedings regarding the mentioned crimes and conducting a fair trial. By employing the complementarity principle, it becomes possible that intervention of ICC to the classical sovereignty rights of states parties remain limited in scope.

States parties have also been encouraged to adopt an effective stance in the fight against mentioned crimes through the principle of complementarity. Hence, it is an embarrassing situation in the international fora for a state to fail, to be unwilling or unable to act against an international crime committed within its territory or by its own citizen.[35] States parties, who do not want to

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[33] Erdal, p.171

[34] Feyzioğlu, p.764

[35] C. Başak, *Uluslararası Ceza Mahkemeleri ve Uluslararası Suçlar,* Ankara 2003, p.61

be on the hook, will do their best to ensure that the national courts conduct a fair trial over the perpetrators falling within the scope of statute to prevent the ICC from intervening.

On the other hand, states parties should harmonise their legal systems with ICC statute to be able to settle the disputes on crimes within the scope of the stature on a fair basis without referring them to ICC. Otherwise, ICC'S jurisdiction will arise.[36] Within this scope, legal arrangements done in domestic law regarding the mentioned crimes should correspond to the definitions inscribed in Statute and elements of crime document; statute of limitations should not be accepted in terms of these crimes, as mentioned in the Statute, exceptions should be made to the exemptions not involved in the statute such as legislative immunity in terms of arrangements on the mentioned crimes.

CONCLUSION

There were interesting structures of thought dominating the modern process which stemmed from the Europe in seventeenth century and influenced the whole world afterwards, expressed the style of social life and organisation. Two propositions such as the World in the future will be better and sovereignty of a modern state is absolute, exclusive and sole constitute the examples of these structures of thought. The cracks took place on these two propositions during the modern process had directly affected the establishment of ICC. Nevertheless, invention of atom bomb, environmental harm caused by technological production and having carried out the Holocaust, which took place during the Second World War, in a rational way and through highly modern methods, abuse of science for evil reasons were the explicit indicators showing that the World will not be better in the future as expected. Furthermore, significant changes had taken place in the understanding of absolute sovereignty which was adopted by the modern states at the beginning due to international unions established and agreements signed in order to protect the human rights at international level and become advantageous by forming unions in the developing environment of technology and competition.

Roma Statute was adopted on 17 July 1998 to establish a international permanent criminal court based on the obligation of the States to fight jointly against grave inhuman acts perpetrated all over the world and changes in the classical sovereignty perception of the modern States, and opened for signature. The court was established on 1 July 2002 upon the completion of

[36] F. Yenisey, Uluslararası Ceza Divanı Kabul Edildiği Takdirde Türk Uyum Kanunu Nasıl Düzenlenmelidir? *Uluslararası Ceza Divanı,* (Ed: Feridun Yenisey), İstanbul 2007, p.377

accession and national ratification processes to the Statute which remained open for signature until 31 December 2000. Upon the establishment of the Court, international law has definitely begun to intervene in the criminal law which remained to be the only field of law that it does not intervene in before the national laws

The Statute includes legal arrangements which will reduce the intervention of ICC in the sovereignty rights of the state parties in terms of increasing the number of states parties to ICC Statute. First of all, the crimes within the jurisdiction of the court are limited to four categories such as genocide, crimes against humanity, war crimes and the crime of aggression. In addition, the adoption of the principle of complementarity paves the way to the adoption of ICC's exclusive jurisdiction in cases where states parties fail, are unwilling or unable to act against the crimes falling within the statute. Thus, states parties who harmonise their domestic law with the Statute and conduct a fair trial over the crimes committed within their own territory or by their own citizens are enabled to settle the relevant disputes without ICC's jurisdiction, and intervention in sovereignty rights.

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REFLECTION OF MULTICULTURALISM IN LAW: THE OTTOMAN EXPERIENCE

Çokkültürlülüğün Hukuka Yansıması: Osmanlı Tecrübesi

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ABSTRACT

In the Ottoman state there were so many ethnic, religious groups that had different cultures. Contemporary advanced countries should take lessons from the Ottoman State experience because there were a lot of communities had different life style and culture in the Ottoman State like contemporary states and these communities lived in harmony with each other. Although contemporary doctrines are not agreed with the definition of multiculturalism, the different culture and life style in the Ottoman State correspond to the multiculturalism. These multicultural communities in the Ottoman State affect the Ottoman Law system. The Ottoman state showed respect to their diversity and allow them to carry out their own specific law to solve some conflicts between themselves. Especially civil law disputes such as family law, inheritance law etc. were completed in accordance with their own rules. Even the Ottoman State permitted them to establish their private courts. This kind of law system defined as legal pluralism in nowadays corresponds to Ottoman Millet System in Turkish Law History literature. In this presentation I will mention the details of Ottoman Millet System and argue how contemporary states dealing with multiculturalism can take lessons from Ottoman experience. I will apply primary sources such as Ottoman Judges (Qadı) records, state archives records in this study.

Keywords: Multiculturalism, Ottoman Law System, Millet System, Dhimmi

ÖZET

Osmanlı Devlet'inde farklı kültüre sahip birçok etnik dini gruplar vardır. Çağdaş gelişmiş ülkeler, Osmanlı Devleti tecrübesinden dersler çıkarmalıdır; zira Osmanlı Devleti'nde de çağdaş devletlerde olduğu gibi birbirinden farklı yaşam tarzları ve kültürü olan birçok topluluk mevcut olmuş ve bu topluluklar uzunca bir süre uyum içerisinde bir arada yaşamışlardır. Her ne kadar çağdaş literatür çokkültürlülüğün tanımı hususunda hemfikir olamasa da Osmanlı Devleti'ndeki farklı kültür ve yaşam tarzı çokkültürlülüğe tekabül etmektedir. Osmanlı Devleti'ndeki bu çokkütürlü yapı hukuk sistemini de etkilemektedir. Osmanlı Devleti farklılıklara saygı göstermiş ve farklı grupların kendi aralarındaki uyuşmazlıklarında kendi hukuklarının uygulanmasına müsaade etmiştir. Özellikle aile, miras gibi özel hukuk uyuşmazlıkları kendi hukuk kuralları çerçevesinde çözümlenmiştir. Hatta bu grupların kendi mahkemelerinin kurulmasına dahi izin verilmiştir. Türk Hukuk Tarihi literatüründe Osmanlı Millet sistemi olarak nitelendirilen bu sistem günümüzde çokhukukluluk olarak da zikredilmektedir. Bu çalışmada Osmanlı millet sistemi hakkında bilgi verilip, çağdaş devletlerin Osmanlı tecrübesinden ne gibi dersler çıkarması gerektiği üzerinde durulacaktır. Çalışmada kadı sicilleri, mühimme defterleri gibi birincil kaynaklardan yararlanılmıştır.

Anahtar Kelimeler: Çokkültürlülük, Osmanlı Hukuk sistem, Millet Sistemi, Zimmet

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INTRODUCTION

In our age, people and communities from different cultures live together in the same society. Civil wars, economic crises, political changes and technological developments force people to move to a different environment, leaving their own culture. Current conflicts in Syria can be an example of both political and civil war. Due to the need for labor in 1960s, Germany opened the doors for people from Italy, Spain, Portugal, Greece and Turkey. This is an example migration for economic reasons pushing people to move in different cultures.

The movements between cultures have unique economic, sociological, psychological and legal consequences. If the people are allowed to leave their state or if the target states selected for migration accept the coming people are examples of political problems aroused from such movements. Especially, the move of people who are occupied in the field of natural sciences has economical consequences for both the state where they leave from, and the state where they migrate to. Hosting a mass community from different cultures has also some sociological consequences. Moreover, these undesired movements affect the psychological state of newcomers.

The consequences of the coexistence of people from different cultures lead states to take necessary measures. States have to determine their position toward the involvement of communities with different cultures either by accepting, or by rejecting them. The literature indicates that states react in two ways on the basis of differences in their political strategies.[2] A number of states adopt exclusion strategies such as genocide, deportation, population exchanges, assimilation, division, separation and the right to self-determination, while other states constitute moderate policies for managing diversities, such as integration and coexistence.

The Ottoman Empire hosted many different cultures over the centuries. The coexistence of many societies with different religions, cultures, lifestyles, customs and traditions coexisted within the Ottoman Empire for a very long time without losing the features indicates that multicultural policies are a part of the political nature of Ottoman Empire and these policies yielded positive results for many years. The establishment of many states with their own religion, culture, language, and traditions after the collapse of the Ottoman Empire is evidence that the differences had been protected for centuries. The policy applied by the Ottoman Empire to manage differences in the social

2 McGarry, John & O'Leary, Brendan & Simeon, Richard 'Integration or Accomodation The Enduring Debate in Conflict Regulation' : Choudhry, Sujit (Editor) (2008) Constitutional Design for Divided Societies p. 46; Taylan Barın, Çokkültürcülük Teorisi ve Ulus-Devlet Anlayışına Etkileri, Gazi University, Department of Public Law, Master thesis, Ankara 2011, s. 28.

structure had some legal consequences.

This study focuses on the legal system formed by the Ottoman Empire to provide a suitable social, political and economic environment for individuals or communities with different cultures. The purpose of the study is to present the successful experiences of the Ottoman Empire in ensuring the coexistence of differences for over centuries. These experiences are very important for the states with multicultural society in our age.

The study starts with the definition of multiculturalism and then explains the multicultural structure of the Ottoman Empire. The legal system constituted by the Ottoman Empire to manage differences is discussed at the end of the study.

Multicultural Society and Its Features

Multiculturalism[3] as a term explains the relationships between groups with different cultures living together in the same society, and the reasons and consequences of this coexistence. The meaning of multiculturalism becomes clearer when used with the phrase “multicultural society,” because multiculturalism directly affects the structure and characteristics of a society.

A multicultural society is described as the “community”[4] composed of the people with different cultures who live together on the same piece of land and cooperate to provide for their basic needs. Based on this definition, in order to be called as a multicultural society, four basic factors must be present in that society. First, there must be a group of people with different cultures on the same piece of land. Second, those people must live together on the same land. Third, the purpose of this coexistence must be to provide for the basic needs. Finally, they must cooperate with each other for this purpose.

Multicultural societies certainly have the first two of the four basic factors, because the groups with different cultures live together on the same piece of land. However, their objectives of being on the same piece of land may vary.[5]

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[3] There are two terms in the literature as multiculturalism and multiculturalness. Multiculturalism refers a political meaning which indicates that the groups with different cultures are recognized by the main group; while multiculturalness refers to a state of being multicultural; Charles Taylor, Ed. Amy Gutman, Çokkültürcülük; tanınma politikası in “Terimler Hakkında”, İstanbul, Yapı Kredi Yay., 2005, p.9; Barın, master thesis, s. 18.

[4] “community”http://www.tdk.gov.tr/index.php?option=com_bts&arama=kelime&guid= TDK.GTS.58a024c9240721.11188005 accessed date: 12.02.2017.

[5] For example, in the multicultural groups formed as a result of mass migration, both the minority groups and the main group may feel their safety in danger. The possibility of the existence of persons among newcomers who previously overturned the public order by committing a crime is seen a threat to the public safety in the host society. Likewise, the newcomers with different cultures are concerned about their safety.

The differences in purpose may interfere with the cooperation between the groups of people with different cultures. The reasons pushing people to leave their societies and the host state policies generated about multiculturalism affect the agreement of the groups on the same purpose and accordingly, the cooperation between groups. Although there are some problems about common agreement and cooperation between groups, those groups become a "multicultural society" by living together on the same land.

As seen from the aforementioned issues, multiculturalism directly affects the basic elements of society. Based on the literature, multicultural society can be defined as follows: The society in which the groups of people with different cultures can live together regardless of their dominance; individuals are equally distant from the state; minorities benefit equally from the resources; and all ethnic and racial groups do not have to hide their cultural distinctiveness can be identified as multicultural society. In the multicultural societies are equally distant from the state. This kind of society provides minorities to take their fair share. All the sub societies can live in multicultural societies keeping their differences.[6]

According to this description there are many groups in multicultural societies and one of those groups is dominant over the others. The criterion used in identifying groups in society is "culture". However, religion, language, race, history, ideals and other differences are also effective in the formation of the aforementioned groups.[7]

The existence of many groups with different customs, traditions and values is not enough to be a multicultural society. There must be also a justice mechanism that all groups feel obliged to comply with. Considering that there is no dominant group in a multicultural society, no sense of justice alone should dominate the society and each should have equal conditions.[8] Thus, the literature emphasizes that no sense of justice can be preferred to another and none of them can be imposed on the whole society.[9] The crucial point here is whether a sense of justice interfere with others or not. Different concepts of justice should be applied together to provide a suitable social environment for all groups in a multicultural society.

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6 Barın, master thesis, p. 58; Will Kymlicka, Çağdaş Siyaset Felsefesine Giriş, p.515; Chandran Kukathas, "Nationalism and Multiculturalism", in Handbook of Political Theory, editors, Gerald F. Gaus and Vhandran Kukathas, London, Sage Publications, 2004, 19. Section, p. 251

7 Ertan Özensel, Çokkültürlülük Uygulaması Olarak Kanada Çokkültürlülüğü, Journal of Academic Research, volume 7, no 1, 2012, p. 59.

8 Ali Şafak Balı, Çokkültürlülük ve Sosyal Adalet, Çizgi Kitabevi, Konya 2001, p. 205.

9 D. Miller, Social Justice, Oxford 1972, p. 342.

Investigation of Ottoman Social Structure in terms of Characteristics of Multicultural Societies

The social structure of the Ottoman Empire was comprised of many communities that have different religion, culture, and values. Multicultural society is previously described as the "community" composed of the people with different cultures who live together on the same piece of land and cooperate to provide their basic needs. The factors involved in this definition are explained below.

As known very well, many groups with different values coexisted in the Ottoman Empire over the centuries. The question that should be asked here: what was the glue that held all the groups together in peace? The state had grouped the differences in social structure by considering their religions and sects.[10] In doing so, the state relied on the understanding of Islamic law. In this context, the groups were separated as Muslim and non-Muslim. Non-Muslims were called as the people of "Dhimmi".

It is possible to understand from the archives that groups with different cultures willingly live together in the Ottoman Empire. The state kept the records of the groups under its sovereignty in the books called "tahrir", "icmal", "avarız" and "mufassal". These books numerically include the heads of households who were taxpayers, the adult singles who had labor potential, and the raya who had tax-exempt legal status and their professional characteristics. These books are one of the records indicating that Muslims and Dhimmis lived together. The following tables reveal how many Muslims and Dhimmis lived in the neighborhoods of Komotini in 1701 and 1709.[11]

There are many records in the Ottoman archive similar to this example. This record evidently shows that different religious and sectarian groups lived together. From this record, it is understood that the primary factor determining the differences in the society was religion.

When classified as Muslims and non-Muslims, the Ottoman Sultans were committed to protecting the cultures of Dhimmi groups. This commitment took part in the edicts issued by the Sultans once they conquered the regions by depending on the understanding of Islamic law.

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10 Gülnihal Bozkurt, "Osmanlı Devleti ve Gayrimüslimler", *Türklerde İnsani Değerler ve İnsan Hakları Osmanlı İmparatorluğu Dönemi,* İstanbul, 1992, p. 282

11 For tables and the assays of the tables, see Turan Gökçe, Osmanlı Nüfus ve İskan Tarihi Kaynaklarından "Mufassal-İcmâl" Avârız Defterleri ve 1701-1709 Tarihli Gümülcine Kazâsı Örnekleri, Journal of History Research, volume XX, NO 1, July 2005.

Town Komotini's population in 1701

Neighborhood	Number of People	Public servant	Muslim	Folk		surplus	Estimated population	%
				Dhimmi	Family			
Câmi-Atik	31	7	18	6	5	-	155	7,95
Sabûni Ali	27	8	17	2	4,5	-	135	6,92
Debbağhâne	21	4	8	9	3,5	-	105	5,38
Koca Nasuh	18	3	12	3	3	-	90	4,62
Elhac Karagöz	11	11	-	-	2	-	55	2,82
İpekci Hacı	20	7	13	-	3	-	100	5,13
Dîvâne Ali	56	12	26	18	8	-	280	14,36
Elhac Yavaş	39	133	26	-	6,5	-	180	9,23
Şehrebüstü	36	10	26	-	6,5	-	180	9,23
Aşçi Hasan	8	3	5	-	1	1	40	2,05
Bağçeli	33	9	24	-	6	1	165	8,46
Yenice	28	7	21	-	3	1	140	7,18
Bergama	16	10	6	-	1,5	-	80	4,10
Arifâne	16	9	7	-	2,5	1	80	4,10
Cemâat-i Yahûdiyân	30	-	-	-	3	-	150	7,69
Total	390	113	209	38	59	4	1950	100

Religious groups population of town Komotini in countryside

Date	1701			1709		
Subdistrict	Number of People	Muslim	Dhimmi	Number of People	Muslim	Dhimmi
City	914	784	130	830	745	85
Ağırcan	1232	1091	141	1237	1065	172
Cebel	-	-	-	2019	2019	-
Total	2146	1875	217	4086	3829	257

The declaration of Fatih Sultan Mehmet in the Galata Edict issued after the conquest of Istanbul is as fallows: "... I ensure that local people (non-Muslims living in Istanbul) can perform their own rituals and traditions like they did before the conquest.[12] This statement indicates that non-Muslims under the sovereignty of the Ottoman Empire were completely free to perform their cultural, traditional and religious rituals.

The archival records also point out that non-Muslims had cultural autonomy given by the Sultans and Muslims respected the rights of non-Muslims to protect their culture, religion and tradition. For example, in the registry of the

[12] The original statement "… *Kabul eyledim ki kendilerin ayinleri ve erkânları ne veçhile cari ola-geldiyse, yine ol üslub üzere âdetlerin ve erkânların yerine getüreler*" in Paris Bib. Nat. ms. Fonds turc anc. N. 130/Vrk. 78; Ahmed Akgündüz, Pax Ottoman Osmanlı Devleti'nde Gayrimüslimlerin Yönetimi, Timaş Yayınları, İstanbul 2008, p. 32.

kadi (Muslim Judge) dated 2 June 1575, it was written that a woman called as Ali's daughter Hüma, who lived in the neighborhood Eşrefli in Bursa, hold the workers at the looms in her house responsible for any stolen items in the house. In the recording, it was indicated that the woman left home to attend the festival called as "Rose Festival (Gül Donanması)" celebrated by Jews in Bursa and that the workers also left home after the woman went out. This document proves the cultural autonomy of non-Muslims and the existence of a cultural contact between Muslims and non-Muslims.[13]

Even in the dress rules differentiating Muslims from non-Muslims, cultures of the communities were taken into account. On May 8, 1580, in the edict issued during III. Murat period, it was declared that Jews wear red hats, while Christians wear black hats.[14] At first, this obligation may lead to the impression that the Muslim population was under pressure. The hat had never been used in any Muslim country until the 19th century. However, forcing them to wear hats, which was a clothing style unique to non-Muslims, indicates that their cultures, traditions and customs were protected by the state.[15]

Muslims and Dhimmis living together in the Ottoman society cooperated to ensure their common fundamental interests. Security is one of those fundamental interests. In this context, the archival records indicate that Dhimmis also provided support for military needs. For example, it was stated in Eyüp Records (No 3) that the non-Muslim persons, Manoli, Isterlot, Apostle and Gabriel, supplied timber and other materials needed by the army during the war.[16] These records prove the cooperation among different groups with common interests in the Ottoman society.

These records and examples illustrate that different communities coexisted in the Ottoman Empire in harmony by cooperating with each other to provide for their common interests.

The Ottoman Empire Multicultural Society System

As mentioned before, the Ottoman society was divided into two groups as Muslims and non-Muslims (Dhimmis). Dhimmis were also classified according to their sects. These classifications made the Ottoman Empire a multicultural society.

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13 Osman Çetin, Sicillere Göre Bursa, p. 61. Narrated by Mehmet Şeker, Anadolu'da Birarada Yaşama Tecrübesi, DİB yayınları, Ankara 2002, p. 172. For other examples of cultural interaction see Yavuz Ercan, Osmanlı Yönetiminde Gayrimüslimler, Turhan Kitabevi, Ankara 2001, p. 290.

14 Ahmet Refik, Onbirinci Asr-ı Hicride İstanbul Hayatı, İstanbul 1917, p. 74. Narrated by Ercan, p. 184.

15 Ercan, p. 184.

16 EYÜB03 volume: 22, page: 53, Verdict no: 8, Original document no: [3b-2].

The reasons that made the Ottoman state a multicultural society are very important to understand the dynamics for a peaceful multicultural environment. The rules of Islamic law constitute the base for these dynamics. Islamic law allows non-Muslims to live in Islamic lands.[17]

The statement "Judaism is for Jews, Islam is for Muslims" in the Article 25 of the Medina Constitution implemented during the period of the Prophet Mohammed demonstrates that Jews and Muslims can live together with a relative religious freedom. Likewise, the Prophet Mohammed stated in the letter sent to Najran inhabitants that Dhimmis could live in Islamic lands without any security concerns.[18] This letter also proves that non-Muslims had the freedom of religion and conscience in the Islamic society.

"Life, goods, lands, tribes, worships, worship houses, and all other staff of Najran inhabitants and their relatives were under the protection of the Prophet Mohammed, besides the almighty Allah. No matter what they are, their rites and denominations are performed by their metropolitans and priests. This cannot be changed and prevented by anyone. These terms specified in the agreement are valid as long as they (Najran inhabitants) do not betray Islam and do not oppress others. This agreement is under the protection of the Prophet Mohammed, besides the almighty Allah."[19]

These data and other cases in the history of Islamic law demonstrate that assimilation efforts and violations of the cultural autonomy of non-Muslims were not allowed in the Islamic State. The dynamics of the Ottoman Empire Multicultural Society System was primarily built on this approach.

The system constituted by the Ottoman Empire for different communities was defined as a "Religious Community System (in Turkish-Millet Sistemi)" or "Spiritual Land Tenure System (in Turkish-Ruhani İltizam Sistemi)".[20] In this system, stated as the further application of the multiculturalism by some scholars[21], every sect was as seen as a distinct social layer with their own religious rituals,[22] because Islamic law accepts "the release of non-Muslims in

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17 Arshi Khan, Osmanlı İmparatorluğu: Çokkültürlülüğün Doğulu Mimarı, Osmanlıdan Günümüze Ermeni Sorunu, ED. Hasan Celal Güzel, Yeni Türkiye Yayınları, Ankara 2000, p. 172.

18 M. Akif Aydın, "Eski Hukukumuzda Gayrimüslimlerin Din ve Vicdan Hürriyeti", İslâm ve Osmanlı Hukuku Araştırmaları, İstanbul 1996, p. 230.

19 Ebu Yusuf, Kitâb'ül Harac, (Translator Mehmet Ataullah Efendi, Abbreviator: İsmayil KARAKAYA), Ankara 1982, p. 195–196.

20 Macit Kenanoğlu, Osmanlı Millet Sistemi Mit ve Gerçek, Klasik Yayınları, İstanbul 2004, p. 59.

21 Khan, p. 173.

22 H. A. R. Gibb, Harold Bowen, Islamic Society and the West, Vol. II, London, 1969, p. 211–212.

what they adopted as the religious activities”.[23]

Adopting the freedom of religion and conscience paves the way of living with different cultures, values, traditions and lifestyles. Some scholars accept religions and sects as important factors of culture.[24] Therefore, this freedom emerges as the most important factors that remain multicultural society.

There are spiritual leaders chosen by the community and approved by the Ottoman State for each religious group. The community interrelated with the state via its leader and the leaders were held responsible for taxes and other liabilities to the Sultan and the officials. There is a lot information in the practice (the assignment decisions) related to the person appointed to the “archbishop” “Metropolitan” is responsible for the works related to the metropolitan, that everybody in the region should accept him as a metropolitan, that they are authorized to conduct marriage and divorce proceedings, that metropolis-owned lands and vineyards will be managed as it was before, and that rituals in the case of the death of a priest or monk will be pursuant to his will.[25] Religious leaders were not discharged unless they commit a major crime such as abusing spiritual or religious beliefs of the community and high treason.[26] Once such an abuse occurred, members of the community could directly submit their complaints about the leader to officials.[27]

Analysis of the Multicultural Structure of the Ottoman State in terms of Legal Branches

As mentioned previously, some theorists propose that the communities should be treated with their own sense of justice. In fact, it is possible to see this approach in the Ottoman practices. The Ottoman state took necessary legal measures in order to provide a peaceful multicultural social environment.

The Ottoman state released some religious communities from some legal branches, because these branches were recognized as the rituals of their own

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23 Kenanoğlu, p. 31.

24 Barın, master thesis, p. 9.

25 For the example that Metropolitan Timotyos was appointed to the place of Metropolitan Tenolidos who were authorized in Gebze, Kadıköy and Kuzguncuk, see ÜSKÜDAR84 volume: 10, page: 520 Verdict no: 1019 Original document no: [96a-2]

26 Bozkurt, Gayrimüslim, p. 29;

27 For the complaint of Gabrova Dhimmis about The Tırnova Metropolitan’s demand for more money, see BOA, CTA, No: 75, t: 1135 (1722); For the application of Kayseri inhabitants indicating their demand to get back the more money paid to the Metropolitan Teofilis, see BOA, CTA, No: 74, t: 1134 (1721); For the complaint of metropolitans about the mean behaviors and misconducts of Patriarch Enrüman, see BOA, HHT, No: 3627313–B t: 1239 (1823).

religion. Dhimmis had much freedom in the field of private law. On the other hand, they had some special competences in the field of public law. More details about legal sub-branches are provided in the next section.

Dhimmis in terms of family law

The Ottoman Empire was almost never been involved in the issues regarding to family law. Those issues were entirely left to the authority of their religious leaders. For an example, the religious leaders were authorized to judge in the disputes in marriage and divorce matters between Dhimmis.[28] Issues such as marriage, termination of marriage, dowry, bride wealth, alimony were counted from the religious rules, and the religious leaders were authorized to apply their own religious laws in these issues.[29] Ottoman Empire often sent orders in these matters to the imams in villages and districts, stating that they did not have authorization in performing non-Muslims' marriage ceremonies.[30]

Community courts resolved the disputes concerning Dhimmis' family issues, but they could also apply to the state courts (in Turkish, Şer'iyye Mahkemeleri), if they wish. There are many examples of these practices in the court records.[31] However, if one of the parties were a Muslim, state courts would handled the case. These legal applications provide a clear understanding about the differences in the Ottoman family law.

Dhimmis in terms of Inheritance law

Most of the scholars in the literature point out that Dhimmis were also subject to their own religious law in inheritance law issues as in the family law.[32] There were provisions on this issue in the edict given to the Armenian patriarch by Yavuz Sultan Selim.[33] Heritage related disputes were resolved in the community courts. However, there are many records indicating that Dhimmis applied to kadi, who is the judge in state courts, for the resolution

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[28] "If a Dhimmi woman divorce from her husband or a Dhimmi man marry a Dhimmi woman or divorce from a Dhimmi woman, nobody except the priest, who they are subject to, comes between them." BOA, Kamil Kepeci Tasnifi, Piskopos Mukataası 2539, p. 3,4; Ercan, s. 204. More examples are available.

[29] Bozkurt, Gayrimüslim, p. 14. In Ottoman Turkish "*akd-i nikah, fesh-i nikah ve münāza'aün fih olan iki zimmi arasına başkalarının girmemesi"* For the document see C.ADL., nr. 3580, tarih 1251; Külliyat-ı Kavanin, v. 5, nr. 2617, date 1260; Kenanoğlu, p. 245.

[30] C.ADL., nr. 4047, date 1220; C.ADL., nr. 4077, date 1230.

[31] For the example, see EYÜB19 volume: 24, p. 181 Verdict no: 175 Original document no: [25(2)b-3, Arabic].

[32] For the different arguments about this issue, see Kenanoğlu, p. 251;Bertam Anton-Young J.W.A., The orthodox Patriarchate of Jerusalem, London, 1926, p. 203.

[33] BA, KPT, Piskopos Mukataası 2539, a. 2; Ercan, p. 207.

of heritage related disputes.[34] In those cases, rules of Islamic law were implemented, rather than rules of communities own rules.[35] The primary constraint for Dhimmis in inheritance law was religious differences, because Muslims and Dhimmis could not be heir with each other under Islamic law. That is, neither a Muslim man married to a non-Muslim woman could leave a legacy to his wife, nor could be her heir.

Dhimmis in terms of Procedural Law

In terms of procedural law, Dhimmis had their own community courts, which were duly authorized in the issues regulated in their religion. They could apply to their community courts for cases related to family law and inheritance law. The statements found in the archival documents support this point:[36] " ...the cases was commanded to be seen by the patriarchate."[37] However, if one of the parties was a Muslim, the case must be seen in the state courts (sharia courts), and the provisions of Islamic law was implemented to the case. Dhimmis could also apply to the state courts or the Sultan's court (Divan-ı Hümayun) for any case. Many recorded examples are available in the court achieves.[38]

Dhimmis in terms of the Criminal Law

Dhimmis living in the Ottoman Empire were subject to the provisions of the Ottoman criminal law. The procedures related to crime and punishments were the same for Muslims and Dhimmis with some exceptions. The rules of law did not change in any case, even if the parties had different religious beliefs.[39] For an example, in the case of wounding, the same provisions of the Ottoman criminal law were implemented to give a verdict about the compensation which was payable to the victim.[40]

The exceptions related to the actions that Dhimmis should do or should not do according to their religion. For example, drinking alcohol was a crime according to Islamic law and there was a definite penalty for this crime. However, drinking alcohol was not specified as a crime for Dhimmis, because it was free in their religion. There are available records indicating that some

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34 RUMELİ56 volume: 14, page: 171 Verdict no: 166 Original document no: [31a-2]

35 For the fetwa given by Ebu Suud Efendi, see Ertuğrul Düzdağ, Şeyhülislam Ebussuud Efendi Fetvaları Işığında 16. Asır Türk Hayatı, İstanbul 1972, s. 99-100.

36 "The edict on the dispute can be resolved through Patriarchate"

37 For examples, see A.DVN. File no: 15, Document nr: 2, date: 1262.

38 BOA, Mühimme Book No 7, volume II, Ankara 1999, Verdict no 1280, p. 54.

39 For examples, see BOA, Adliye ve Mezahib İradeleri Kataloğu, No: 221, General No: 624, Special No: 6, date: 16 Ra 1311 (1893); Ercan, p. 186.

40 Aydın, Gayrimüslim, p. 231; Mehmet Akif Aydın, Türk Hukuk Tarihi, İstanbul 1999, p. 148.

Muslims felt themselves uncomfortable when drunken Dhimmis passed around the mosque.

It was determined by the rules of the criminal law that the fines to be paid by Dhimmis were the half of the fines to be paid by Muslims for some types of crimes. In the laws issued by the Sultan Suleiman, it was indicated that in the cases of wounding and murder, retaliation will not be applied if the perpetrator is a non-Muslim person and half of the blood money will be taken from the Dhimmi perpetrator: "...if this stated crime was committed by a Dhimmi, half of the blood money must be taken from him."[41]/[42] The rationale for this rule can be attributed to different causes. In my opinion, the state wanted Dhimmis to be economically more comfortable. On the other hand, the state followed the taxes payable by Dhimmis very well. The state did not see Muslims and Dhimmis were in an equal situation. This can be the other justification of this legislative provision.

Even though some privileged fine legislative regulations were executed for dhimmis, some other criminal legislative regulations did not protect them as Muslims. For an example, one of the elements of libel of chastity (hadd-i kazf in Ottoman Turkish) was that the person who was defamed must be Muslim. If the person who was defamed was Dhimmi, he was punished with a different type of punishment, the punishment "taz'īr" rather than "hadd"[43].[44]

The system created by the State resulted in that Dhimmis could be punished by the religious leaders.[45] It is understood from the appointment decisions that the religious leaders were authorized to do so.[46] The records indicate that the spiritual leader punished Dhimmis with a couple of penalties such as exile and imprisonment.[47] These kinds of penalties are explained as disciplinary punishments for Muslims in the literature.[48]

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41 Kanunname-i Al-i Osman, TOEM edition, p. 3; Ercan, p. 189.

42 Ömer Lütfi Barkan, Kanunnameler v. 1, III. Türk Tarih Kongresi Zabıtları, Ankara 1948, p. 394.

43 Hadd penalites were the fixed punishments, however taz'îr punishments can be changed according to the case, time etc. For detail information see Uriel Heyd, Studies in Old Ottoman Criminal Law, Clarendon Press, Oxford 1973, p. 340.

44 Yusuf Fidan, İslâm Hukukunda Ehl–i Kitab Kavramı ve Hükümleri, Konya 1998 (Unpublished doctorate thesis), p. 239.

45 Bozkurt, Gayrimüslim, p. 293; BOA, CTA, No: 4205, t: 11/R/1204, (1789).

46 Kudüs-i Şerif Beratı dated as 29 July / 8 August 1850; Ermenilerin Berat Def. 9, p. 59-60; Ercan, p. 197, 198.

47 Kenanoğlu, p. 221.

48 Kenanoğlu, p. 224.

Dhimmis in terms of Tax Law

Dhimmis were held liable to pay two more tax types, beside the taxes given by Muslims. The first one is "cizye" which was paid due to the fact that Dhimmis did not do military service. The ones, who were capable of doing the military service, but did not, paid this tax. Clergymen, disabled and elderly women were exempt from this tax.[49] The second tax paid by Dhimmis was "harāc" collected from the landowner Dhimmis. Some other taxes were taken from the Dhimmis with high status.[50]

Conclusion

As a result of the study, the following conclusions were reached.

1. The reasons that make a society a multicultural society directly affect the measures to be taken by the state in order to sustain public order.
2. It is possible to see that all the necessary for a multicultural society existed in the social system of the Ottoman Empire.
3. The Ottoman Empire did not assimilate the different groups in the society, but successfully provided a moderate social environment for them.
4. Depending on the rules of Islamic law, the State accepted the different communities as they are.
5. The State classified the groups according to their religion and sects. These criteria provided a safe and peaceful environment including different religions, cultures, traditions, customs and languages.
6. The State ensured the applications of Dhimmis' special legal systems by giving authorization to the spiritual leaders.
7. The State imposed some limitations on the applications of Dhimmis' special legal system and on the authorization of their courts.

As a result, the cultural autonomy given to Dhimmis sustained the multicultural social structure of the Ottoman Empire.

[49] Ercan, p. 251.
[50] Ercan, p. 268.

RESOURCES

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ARBITRATORS ACTING AS AN AMIABLE COMPOSITEUR UNDER INTERNATIONAL COMMERCIAL LAW

Uluslararası Ticaret Hukukuna Göre Amiable Compositeur "Dostane Arabuluculu" Olarak Hakemlerin Hareket Etmesi

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ABSTRACT

International arbitration is considered as an alternative way to resolve the disputes, particularly the commercial disputes. However, parties may seem the arbitration process risky and ambigious interms of resolving the dispute in equity. In order to reassure the parties that the dispute will be resolved in equity, the authorisation of "amiable compositeur" should be clearly given to the arbitrator/arbitrators.

Keywords: amiable compositeur, ex aqua et bono, Model Law, international arbitration

ÖZET

Uluslararası tahkim, anlaşmazlıkların özellikle de ticari anlaşmazlıkların çözümü için alternatif bir yol olarak değerlendirilmektedir. Ancak, taraflar tahkim sürecini uyuşmazlığın adil bir şekilde çözümü için riskli ve de belirsiz olabileceğini düşünebilir. Tarafların, uyuşmazlığın hakkaniyete uygun olarak çözüldüğüne ilişkin güvenini sağlamak için hakem/hakemlere verilen "dostane arabulucu" yetkisi açık bir şekilde verilmelidir.

Anahtar Kelimeler: dostane arabulucu, hakkaniyet ve nıfset, Model Kanun, uluslararası tahkim

I. INTRODUCTION

In brief history, principle of amiable compositeur is derived from the French jurisprudence and is accepted in most of the European countries. Article 1497 of the French Code of Civil Procedure allows international commercial arbitrators to rule "*ex aqua et bono*" if the agreement between the parties gives clearly[2] this authority[3]. In French law, the term of amiable composition

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2 *Some reference is also made to the fact that the reference to general principles of law and justice did not, in itself, empower the arbitrators as amiable compositeurs; it was treated as a reference only to the general principles of law, but not to equity" ICC Award No. 3380* ***in 1980 (29 November) Enterprise (Italy) v Enterprise (Syria)*** *(*http://0-international.westlaw.com.) (1.1.2015)

3 *Karyn S. Weinberg, Equity in International Arbitration: How Fair is "Fair"? A Study of Lex Mercatoris and Amiable Compostion, Boston University International Law Journal, 04/1994, Volume 12, pp. 231, Article 1497 (Decree n°81-500 of 12 May 1981, Official Journal of 14 May 1981, amendment JORF of 21 May 1981) The arbitrator will decide as an amicable compounder if the agreement between the parties gives him this assignment. (www.legifrance.gouv.fr); Louis Dreyfus SAS v Holding Tusculum BV (No.1) Unreported December 8, 2008 (Quebec), The Superior Court granted the motion:"The Valuation and Buyout Remedy was improperly fashioned according to the Tribunal's own perception as to*

is considered as a decision made *ex aqua et bono*[4]. In Phocéenne decision[5], it is stated that *"in principle, the amiable compositeur may decide without having to strictly follow the law".* Even in international arbitration amiable compositeur and *ex aqua et bono* are considered as different terms[6], it is possible to say in France both term are synonym.

In case the parties authorize the arbitrator/arbitrators to decide on the dispute in equity without depending on the strict application of rule of law, the arbitrator/arbitrators can proceed the case in a manner as flexible as they can do[7]. But it does not mean that arbitrator who decide as an amiable compositeur can disregard all legal principles and decide issues on his/her personal pleasure[8]. Resorting to the "*amiable compositeur*" or equity might seem a reasonable alternative for the parties. Nonetheless, there are several ways and justification for parties to apply the principle of "*amiable compositeur*". Also, having competence of *amiable compositeur* do not authorize the arbitrator/arbitrators to decide on the dispute without limit. Their competence is limited with the general principles of law such as equal treatment of the parties, rigth of defence[9].

what was fair and equitable, rather than by respecting the scope of the mandate consented and agreed to by the Parties. More particularly, by so doing, the Tribunal: (i) violated the audi alteram partem rule; (ii) dealt with a dispute which was not contemplated by the parties and decided matters beyond the scope of the Terms of Reference; (iii) failed to observe applicable arbitration procedure; (iv) rendered an award that is contrary to public order; and (v) ***engaged in a transformation of roles from that of arbitrators to that of amiables compositeurs, without the required express consent of the parties."*** *Sophie Nappert, International Arbitration Law Review, Case Comment 2009, Int. A.L.R. 2009, 12(2), p. 23-24 ,(http://0-international.westlaw.com.)(1.1.2015)*

4 *Mauro Rubino-Sammartan, International Arbitration: Law and Practice, Kluwer Law International, 2001, p. 463.*

5 *Phocéenne du depot v. Dépots petroliers du Fos, Court of Appeal, Paris, April 28, 1988, Rev. Arb. 1989, 280. (Rubino - Sammartan, p. 464.)*

6 *Mauro Rubino-Sammartano, "Amiable compositeur" (Joint Mandate to Settle) and Ex Bono et Aequo (Discretional Authority to Mitigate Strict Law): Apparent Synonyms Revisited, 9 (1) JIA 5-16 (1992).*

7 *Alan Redfern/Martin Hunter, Law and Practice of International Commercial Arbitration, Second Edition, Sweet Maxwell, London, 1991, p. 121, Ziya Akıncı, Milletlerarası Tahkim, Ankara 2003, p. 163.*

8 *S. I. Strong, Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?, Vanderbilt Journal of Transnational Law, October 1998, p. 7.*

9 *Akıncı, 2003, p. 163-164; Philippe Fouchard, Fouchard, Gaillard, Goldman on International Commercial Arbitration, Kluwer Law International, 1999, p. 23.*

II. NOTION OF THE AMIABLE COMPOSITION

Firstly, it should be highlighted that amiable composition refers to the substantive law of the dispute, not procedural law[10]. An arbitrator, having the power of "*amiable compositeur*, is able to decide according to the *justice* and *fairness*[11]. The parties recourse to *amiable compositeur* in order to abstain from the strict application of law. In some cases, the parties choose applicable law to the case and also ask the arbitrator to act as an *amiable compositeur* and also in some cases the arbitrator decides on the case according to equity and good conscience[12] Nevertheless, in order that an arbitrator render a decision based on principles of fairness or equity, it is not necessarily power of *amiable compositeur* is granted; equitable principles are already incorporated into the substantive law of many legal systems[13].

With respect to the international commercial arbitration, in some countries, power to act as *amiable compositeur* is granted to arbitrator. This power allows arbitrators to resolve the dispute depending on the notion of justice and fairness. In order to avoid the injustice due to the strict application of law, amiable compositeur do not have to apply strict rules of law and has authority to recourse to the equity and justice. For example, in case arbitrators are named as *amiable compositeur*, they could give effect to a technically invalid agreement on condition that the parties are willing to be bound by that agreement[14]. Although the arbitrators are not bound with the strict application of law, *amiable compositeurs* do not have the same characteristics with the mediation or conciliation. The decision rendered by the *amiable compositeur* is binding for the parties[15].

It is expected that an *amiable compositeur* resolves the case in equity but also an *amiable compositeur* often applies the legal rules. *Amiable composition* allows arbitrators to decide cases in accordance with customary principles of equity and international commerce rather than in strict conformity with legal rules. However, it is accepted that *amiable compositeurs* avoid

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10 *Jean François, Pudret; Sebestian Basso, Comparative Law of International Arbitration, 2007, Sweet & Maxwell, p. 625.*

11 *"The Arbitral Tribunal resorted to its power of amiable composition, granted to it by the parties in the Terms of Reference, to fix the quantum of incidental damages. The Tribunal, when acting as amiable compositeur, was entitled to judge according to principles of fairness and equity." Awards in Case No. 4567 in 1984 (June) and 1985(May) Purchaser (a West African country) v Supplier* ***(USA)*** *(http:// international.westlaw.com)*

12 Weinberg, 1994, p. 232

13 Weinberg, 1994, p. 232

14 *Chukwumerije, Okezie, Choice of Law in International Commercial Arbitration, Greenwood Press, 1994, pp. 118.*

15 *Chukwumerije, 1994, p 118.*

appliying strict legal principles only when the application of the law would be unfair or inequitable[16]. They recourse to the notion of justice and fairness where it is necessary. Although they are not bound with the strict application of legal priciples, it is accepted that they could not apply the legal principles and resolve the dispute in equity in case the strict application of law lead to unfair solution[17]. In addition, *amiable compositeurs* generally may not disregard mandatory provisions of substantive law or the public policy of the forum state. If an *amiable compositeur* does disregard such laws, there is a risk for the parties who want to enforce the decision granted by the amiable composituer[18].

III. METHOD

Since we mentioned that the parties are able to give the arbitrators to act as an *amiable compositeur*, they could empower them by an arbitration clause or in the Terms of Reference consented prior to the arbitration. In cases where the parties wish to grant an arbitrator the discretion to decide on the dispute in equity, they shall write in their arbitration agreement[19]. Also, they may refer to the several arbitral institutions, such as International Chamber of Commerce ("ICC") or UNCITRAL Model Law ("Model Law").

The Article 21/3 of ICC rules of arbitration state that **"***The arbitral tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers."*

Article 28(3) of the Model Law deals with cases in which the parties empower the arbitrators to "do the right thing"to resolve the dispute on the basis of equity and fairness[20]. The Article 28/3 of Model Law states that *"The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so."*[21]

16 *S. I. Strong, 1998,p 7.*

17 *Chukwumerije, 1994, p 118.*

18 *S. I. Strong, 1998, p 7.*

19 *Chukwumerije, 1994, p. 119.*

20 *Christopher R. Drahozal, The making of the award: comments on case law developments under the UNCITRAL Model Law, Int. A.L.R. 2005, 8(5), 183-190*

21 *Explanatory note of Uncitral Model Law "Article 28 (3) recognizes that the parties may authorize the arbitral tribunal to decide the dispute ex aequo et bono or as amiables compositeur. This type of arbitration (where the arbitral tribunal may decide the dispute on the basis of principles it believes to be just, without having to refer to any particular body of law) is currently not known or used in all legal systems. The Model Law does not intend to regulate this area. It simply calls the attention of the parties on the need to provide clarifi cation in the arbitration agreement and specifi cally to empower the arbitral tribunal. However, paragraph (4) makes it clear that in all cases where the dispute relates to a contract (including arbitration ex aequo et bono) the arbitral tribunal must decide*

The article 31/3 of the International Dispute Resolution Procedures of the American Arbitration Association ("AAA") states that *"The tribunal shall not decide as amiable compositeur or ex aequo et bono unless the parties have expressly authorized it to do so."*

Article 21/3 of the ICC Rules, article 28(3) of the Model Law and article 31/3 AAA allow the arbitrators to act as *amiable compositeur*s, only if the parties empowers them.

According to the ICC Rules and Model Law, the ability to provide for amiable composition does not depends on whether the procedural law of the seat of arbitration would permit such use.

The China International Economic and Trade Arbitration Commission ("CIETAC") Arbitration Rules is silent on amiable compositeur. Only Article 49/1 of the CIETAC Arbitration Rules seems to provide (indirect) evidence. It reads: "*The arbitral tribunal shall independently and impartially render a fair and reasonable arbitral award based on the facts of the case and the terms of the contract, in accordance with the law, and with reference to international practices.*" It may be considered that "*a fair and reasonable arbitral award*" relates to amiable composition. It will be said that arbitrators may decide the case as *amiable compositeurs,* even if the parties have not so authorized them. In other words, arbitrators can decide to act as *amiable compositeurs* on their own initiative even though they are not empowered in the arbitration agreement by the parties[22].

Furthermore, a number of state adopting the Model Law expressly state the principle of "*amiable compositeur*" including Turkey. Article 12/C/III of the Turkish International Arbitration Code states that *"The arbitrator or arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so."*[23] But it shall be highlighted that this has two conditions. Namely, The arbitration has been authorized in this direction and the law to be applied must have allowed it to do.

in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction." (http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf) 1.1.2016

22 *Hong-lin Yu, Some thoughts on the legal status of a-national principles in China Int. A.L.R. 1998, 1(6), 185-187,*

23 *Before the Revision of Turkish Code of Civil Procedure Law in relation to the arbitration regulation, Turkish Supreme Court Assembly of Civil Chambers decided that since the parties did not decide the substantive law applicable to the case, therefore, the arbitrator shall resolve the case in accordance with the principle of ex et bono and the Court is able to examine the decision rendered by the arbitrators whether they decide regarding the ex aqua et bono. (Yargıtay Hukuk Genel Kurulu, E. 2005/15-728,K. 2006/1,T. 25.1.2006) (www.kazanci.com)*

Also in Turkish Law, the amiable compositeur clause frees the referees from strictly adhering to a rule of law and allows them to consider the need for justice in determining the rights and obligations of the parties[24]. Appointment of experts to the arbitration committee and granting amiable compositeur authority both saves time for the solution of the mismatch and satisfies the expectations of the parties[25]

For investment disputes, even the notion of "*amiable compositeur*" is not expressly stated, article 42/3 of the International Centre for Settlement of Investment Disputes ("ICSID") Convention states that *"The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequo et bono if the parties so agree."* Based on this provision, the parties also empower the arbitrators to act as amiable compositeur for the investment disputes[26]. In Agip v Congo decision of ICSID, the Congolese government proposed that the Tribunal should act as informal *amiable compositeur*. The counter party Agip did not agree. As a result, the Tribunal had to decide with the applicable law and not as an *amiable compositeur*[27]. In Benvenuti v Congo case[28], the parties did not choose applicable law. The claimant proposed in the course of arbitration proceeding that the Tribunal decide *ex aequa et bono* and the respondent refused this proposal. The parties agreed to authorize the Tribunal *"to render its award as quickly as possible by judgment ex aqua et bono".* After the failure of the negotiations, the Tribunal proceeded to apply the article 42/3 of the ICSID Convention and decided the arbitration *ex aqua et bono*. Therefore, it is possible to say that if there is no agreement between the parties in relation to the *amiable compositeur*, the arbitral tribunal does not take into consideration the said principle.

IV. EFFECTIVENESS OF THE AMIABLE COMPOSITEUR

In complex disputes which require knowledge of science, such as disputes in relation to the engineering or design agreement, the technical expert will be more useful than the legal expert. In cases where the technical experts instead

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[24] *Şanlı, Cemal, Milletlerarası Ticari Tahkimde Esasa Uygulanacak Hukuk, (İstanbul Üniversitesi Hukuk Fakültesi, Doktora Tezi, 1985, Yayın no: 181, Ankara Sevinç Matbaası, 1986, p. 370; Köseoğlu, Özdemir, Uluslararası Ticari Tahkimde Uyuşmazlık Çözümünün Uygulanacak Hukuk Bakımından İncelenmesi, Yüksek Lisans Tezi, İstanbul, 2015, p. 141 (www.tez.yok.gov.tr , 19.06.2017)*

[25] Köseoğlu, p. 140-141

[26] *Trakman, Leon, Ex Aequa et Bono: Demystifying an Ancient Concept, Chicago Journal of International Law, Winter 2008, 8, 2, p. 633.*

[27] *Award, 30 November, 1979, ICSID report 388 (Christoph H. Schreuer, The ICSID Convention: A Commentary : a Commentary on the Convention, Cambridge University Press, 2001, p 636); Agip v Congo, the dispute arose out of nationalization of an oil distribution compnay owned by Italian company.*

[28] *ICSID case No ARB/77/2, Award, 8 August, ICSID Report 330 (Leon, 2008, p. 634)*

of the legal experts are appointed by the parties as arbitrators, provision of amiable compostion seems very useful. Since technical experts generally do not have legal background, they may rely on their technical konowledge in resolving the dispute.

V. LIMITS OF POWERS:

A. Public Policy: The limits of *amiable compositeur* is vague for most legal systems to the effect that it is not clear that whether *amiable compositeur* is allowed to disregard every provision of law such as public policy. It is generally accepted that they are bound to apply the public policy[29]. In case public policy or mandatory rules is not taken into consideration while resolving the dispute even if the dispute is resolved in equity, there is a risk for the parties who wants to enforce the decision granted by the amiable compositeur[30]. One tribunal notes that *amiable compositeur* is *"not authorized to make a decision contrary to constraining law, particularly the rules concerning public order or morals"*[31]*.* Therefore, it is clear that *amiable compositeur* is bound by the public moral rules.

According to the application of European Community ("EC") law, a distinction is traditionally made between the "capacity" and the "duty" of arbitrators. Even though arbitrators are empowered by the parties, they are considered as a part of a larger legal order and, thus, have a duty to safeguard the principles on which this order is built. Accordingly, arbitrators, even those acting *as amiable compositeurs*, should respect the rules of public policy[32].

B. Contractual provisions*:* It is accepted that amiable compositeurs do not have the authority to rewrite the provision of the contract or disregard the clear provision of the contract while resolving the dispute in equity and fairness unless the parties expressly granted them such power. In ICC decision[33], it is

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29 *Horacio A. Grigera Naon, Choice-Of-Law Problems in International Commercial Arbitration, Mohr Siebeck, 1992, p. 97.*

30 *Chukwumerije, 1994, p. 119.*

31 *Chukwumerije, 1994, p. 120, ICC case no: 1677 (1978) Y. Comm. Arb. Chapter 6 examines the kinds of mandatory rules.*

32 *Maud Piers, HOW EU LAW AFFECTS ARBITRATION AND THE TREATMENT OF CONSUMER DISPUTES: THE BELGIAN EXAMPLE, Dispute Resolution Journal, November, 2004-January, 2005 (p. 77-84)*

33 *ICC Decision no: 3444 (1981); In ICC arbitral award case No 3267 of 197921 the tribunal concluded that although some legal writers have expressed the opinion that the arbitrators sitting as amiables)compositeurs may disregard the provisions of the agreement between the parties, this view has not been accepted in international arbitration. On the contrary, it is a generally accepted principle in international commercial arbitration that the paramount duty of the arbitrator, even the amiable compositeur, is to apply [] the contract of the parties, unless it is shown that the provisions relied on are clearly against the true intent of the parties or violate a basic commonly accepted principle of public policy. In the view of*

stated that *"it is a generally accepted principle of international arbitration that the first duty of arbitrator, even if he is an amiable compositeur, is to apply the contract entered into between the parties, unless it is established that clauses which are quoted to him are manifestly contrary to the real intention of the parties or that they break a principle of public policy which is generally accepted."* Therefore, it is possible to deduce from the ICC decision that the arbitral tribunal shall take into consideration the clear contractual provisions. This approach is also in line with the principle of *party's autonomy.* Article 28/4 of the Model Law also clearly express that "*In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.*". The article 21/2 of the ICC rules also states that "*The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.*".

VI. CONCLUSION

In summary, it shall be highlighted that even if the arbitrators have powers of amiable composition and the decision rendered by the *amiable compositeur* is binding for the parties[34], it does not mean that arbitrator who decide as an amiable compositeur can disregard all legal principles and decide issues on his/her personal pleasure[35]. Also, *they could not alter the specific regulations provided by the terms of the contract, which resulted directly from the parties' common intention*[36]*.* Competence of *amiable compositeur* is limited with the general principles of law such as equal treatment of the parties, rigth of defence.

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the arbitral tribunal, this principle is a basic requirement for the security of international trade. It is furthermore binding in ICC arbitrations, in view of Article 13 of ICC Rules [NB subsequently Article 17 of the ICC Rules (1998 version) and currently Article 21 of the ICC Rules (2012 version)], that makes it clearly a duty to ICC arbitrators to apply the provisions of the contract in any case, even if they have the powers of amiables compositeurs". In its award, the arbitral tribunal held that "the arbitrator sitting as amiable compositeur is entitled to disregard legal or contractual rights of a party when the insistence on such rights amounts to an abuse thereof".

[34] *Chukwumerije, 1994, p 118.*

[35] *S. I. Strong, Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or a Proper Equitable Measure?, Vanderbilt Journal of Transnational Law, October 1998, p. 7.*

[36] *Award in Case No. 3938 in 1982 Buyer (France) v Supplier (The Netherlands) "Powers of amiable composition were chiefly designed to mitigate hardship which might result from the strict application of the law to particular facts. Arbitrators were nevertheless still bound by the contract and its terms, both generally and as a result of Art 13(5) of the ICC Rules. While the tribunal might correct the application of rules of law to the facts of the case in hand, it could not alter the specific regulation provided by the terms of the contract, which resulted directly from the parties' common intention." (http://-international.westlaw.com) (1.1.2015)*

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INTERPRETATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması'nın Yorumlanması

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ABSTRACT

There are three principles for the interpretation of United Nations Convention on Contracts for the International Sale of Goods, which are formulated in article 7(1). According to these principles, the CISG is interpreted having regard to the international character of the Convention. Moreover, the uniformity in its application needs to be promoted and the principle of good faith in international trade has to be observed.

Although United Nations Convention on Contracts for the International Sale of Goods formulates the principles for the interpretation of the Convention, there are no rules regarding the methods for the interpretation of the Convention. According to the principles for the interpretation, the courts and arbitral tribunals interprets the Convention independently from the rules of domestic law. However, the methods for the interpretation of the Convention are not within the scope of the principles. The courts and arbitral tribunals can use any methods within the boundaries of autonomous interpretation.

Keywords: Interpretation, the international character of the Convention, the uniformity in its application, the principle of good faith.

ÖZET

Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması'nın yorumuna ilişkin olarak, Antlaşma'nın 7(1). maddesinde üç tane prensip bulunmaktadır. Bu prensiplere göre, CISG uluslararası niteliği dikkate alınarak yorumlanır. Ayrıca, Antlaşma'nın yeknesak uygulanması teşvik edilmeli ve milletlerarası ticaretteki dürüstlük kuralı gözetilmelidir.

Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması'nda, Antlaşmanın yorumuna ilişkin prensipler yer almasına rağmen, yorum metodlarına ilişkin olarak herhangi bir kural bulunmamaktadır. Antlaşma'nın yorumuna ilişkin prensiplere göre, mahkemeler ve hakem heyetleri Antlaşmayı yerel hukuktaki kurallardan bağımsız olarak yorumlamalıdır. Ancak, Antlaşma'nın yorumunda uygulanacak yöntemler bu prensiplerin kapsamı içerisinde yer almamaktadır. Mahkemeler ve hakem heyetleri, otonom yorumun sınırları içinde kalmak kaydıyla, herhangi bir yorum yöntemini kullanabilir.

Anahtar Kelimeler: Yorum, Antlaşma'nın uluslararası karakteri, yeknesak uygulanma, dürüstlük kuralı.

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INTRODUCTION

The main aim of the United Nations Convention on Contracts for the International Sale of Goods (hereinafter the CISG or the Convention) is to unify international sales law and promote the development of international trade. In order to achieve this goal, the drafters of the Convention made serious efforts to reach a reasonable compromise on the wording of the Convention during the negotiations. However, the uniform and neutral wording of the Convention is not solely sufficient for the uniform application, because each signatory country can interpret and apply the Convention in different ways[1]. For this reason, the interpretation is also an important constituent of the uniform application of the Convention. Article 7(1) of the CISG establishes principles for the interpretation of the Convention. The main purpose of this article is to scrutinize the interpretation of the CISG within the scope of Article 7(1). In this context, principles and methods for the interpretation of the Convention will be analysed.

I. PRINCIPLES FOR THE INTERPRETATION

Article 7 of the CISG includes two significant rules. The first paragraph of the article establishes basic principles for the interpretation of the CISG. The second paragraph deals with the gap filling. Both paragraphs can also be used for developing the CISG to solve new problems regarding technological and economic issues, which have not been foreseen by the drafters[2].

There are three principles for the interpretation of the CISG in article 7(1)[3]. These principles are as follows: having regard to the Convention's international character, the aim of promoting uniformity in the Convention's application and the observance of good faith in international trade.

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1 Until today, the Convention has been adopted in eighty-four countries.

2 **Ingeborg Schwenzer/Pascal Hachem**, Commentary on the UN Convention on the International Sale of Goods**,** Edited by Ingeborg Schwenzer, Third Edition, New York, Oxford University Press, 2010, Art. 7 para. 5; **Ingeborg Schwenzer/Pascal Hachem**, Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması (Viyana Satım Sözleşmesi) Şerhi, Editors: Ingeborg Schwenzer/Pınar Çağlayan Aksoy, 1. Edition, İstanbul, On İki Levha Press, 2015, Madde 7 para. 5.

3 **Article 7**: " *(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.*
(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

A. The International Character of the Convention

The first principle for the interpretation of the CISG is that regard is to be had to international character of the Convention. The meaning of this principle is to interpret terms of the Convention independently from domestic prejudices and principles of domestic laws[4]. In other words, this principle seeks to secure autonomous interpretation of the Convention.

As mentioned above, the primary purpose of the Convention is to unify international sales law. In order to achieve this goal, during the negotiations of the Convention, the drafters endeavoured to reach a compromise between several legal systems and use neutral and non-domestic terms in the wording of the CISG. This approach of the drafters brings the international character of the Convention to the fore and simplifies the interpretation the Convention from the international perspective.

The interpretation and application of the CISG is the duty of courts or arbitral tribunals[5]. When the courts and arbitral tribunals resolve a dispute regarding the CISG, they have to research both domestic and other signatory countries' judgements and doctrine about the CISG[6]. However, there are some serious issues regarding the access to the foreign judgments and doctrine. The first of them is concerning electronic databases. At the present time, there

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4 **Schwenzer/Hachem**, CISG, Art. 7 para. 8; **Schwenzer/Hachem**, Viyana Satım Sözleşmesi, Madde 7 para. 8; **Zafer Zeytin**, Milletlerarası Mal Satım Sözleşmeleri (CISG) Hukuku**,** Ankara, Seçkin Press, 2011, p. 67; **Franco Ferrari**, "Uluslararası İçtihat Hukuku Işığında CISG'da Yorum ve Boşluk Doldurmaya İlişkin Meseleler" Milletlerarası Satım Hukuku, edited by Doç. Dr. Yeşim M. Atamer, İstanbul, On İki Levha Press, 2008, s.41-42; **Michael Bridge**, The International Sale of Goods, Second Edition, New York, Oxford University Press, 2007, p. 531-532; **Peter Schlechtriem/Petra Butler**, UN Law on International Sales The UN Convention on the International Sale of Goods, Berlin, Springer Verlag, 2009, p. 49; **Ulrich Magnus**, J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen, Buch 2, Recht der Schuldverhältnisse, Wiener UN-Kaufrecht, Neubearb. 2013, Berlin, de Gruyter, 2013, art. 7 para. 12.
Furthermore please look at: "Commentary on the Draft Convention on Contracts for the International Sale of Goods", Prepared by the Secretariat, Document A/CONF. 97/5, 14 March 1979, United Nations Conference on Contracts For The International Sale Of Goods Vienna, 10 March-II April 1980, Official Records**,** New York, 1991, p.17-18. (Online) https://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf,01.01.2017. According to Commentary on the article 6, there are significant differences between national rules on the law of sale of goods. Thus in the interpretation of the CISG, it is very important to avoid differing constructions of the provisions of this Convention by national courts.

5 **Zeytin**, CISG, p. 67.

6 **Zeytin**, CISG, p. 68; **Ferrari,** Uluslararası İçtihat Hukuku Işığında CISG'da Yorum ve Boşluk Doldurmaya İlişkin Meseleler, p. 48; **Schlechtriem/Butler**, UN Law on International Sales The UN Convention on the International Sale of Goods, p. 49.

are several electronic resources, which include the cases from other signatory countries (judgements and arbitral awards) regarding the CISG. These are, for example, CISG-ONLINE[7], UNCITRAL Digest of case law on the United Nations Convention on the International Sales of Goods[8], UNILEX[9] and Pace University CISG Database[10]. The courts and arbitral tribunals can access most of the cases concerning the CISG online through these mentioned databases. Another issue regarding the access to the case law is about language[11]. The cases and doctrine, which are from other signatory countries, are in foreign language. For this reason, interpretation of them can be difficult for the people who interpret the cases and doctrine. In this sense, the databases, which include the translation of cases from other signatory countries, can help to overcome this obstacle.

In some exceptional situations, the CISG may include a term, which belongs to a domestic law system. For example, the principle of foreseeability rule in Article 74 is a principle, which comes from English Law system. The interpretation of such terms is widely discussed in doctrine. According to the first opinion, in the interpretation of such terms, the original meaning of the term in the domestic law should be considered[12]. According to the second opinion, the function and original meaning of such terms should not be considered in the interpretation of CISG[13]. It should be interpreted within the context of the CISG[14]. The second view is more accurate, since the second view complies with the main purpose of the CISG.

B. Uniformity of Application

The second principle for the interpretation is to promote uniformity in the application of the CISG. This principle should not be considered independently

7 www.cisg-online.ch, (Online) 07.03.2017.

8 http://www.uncitral.org/pdf/english/clout/CISG_Digest_2016.pdf , (Online) 07.03.2017.

9 http://www.unilex.info/, (Online) 07.03.2017.

10 http://iicl.law.pace.edu/cisg/cisg, (Online) 07.03.2017.

11 **Ferrari,** Uluslararası İçtihat Hukuku Işığında CISG'da Yorum ve Boşluk Doldurmaya İlişkin Meseleler, p. 49.

12 **Zeytin**, CISG, p. 69; **Gözde Kasap**, "Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması'nın Yedinci Madde Hükmünün Türk Hukuku ile Karşılaştırmalı Olarak İncelenmesi", Milletlerarası Özel Hukuk Çerçevesinde Milletlerarası Mal Satımına İlişkin BM. Sözleşmesinin Uygulama Alanı (CISG 1-12. Maddeler), edited by Günseli Öztekin Gelgel/Faruk Kerem Giray, İstanbul, Beta Press, 2014, p. 117-118.

13 **Schwenzer/Hachem,** CISG, Art. 7 para. 9; **Schwenzer/Hachem**, Viyana Satım Sözleşmesi, Madde 7 para. 9; **Ferrari,** Uluslararası İçtihat Hukuku Işığında CISG'da Yorum ve Boşluk Doldurmaya İlişkin Meseleler, p. 41-42.

14 **Schwenzer/Hachem**, CISG, Art. 7 para. 9; **Schwenzer/Hachem**, Viyana Satım Sözleşmesi, Madde 7 para. 9.

from the principle of having regard to international character of the CISG since, both principles completes each other[15]. Moreover, the necessity of the autonomous interpretation is a mutual result of the international character and the uniformity in the application of the CISG[16].

In order to ensure the uniformity in the application of the CISG, initially, the courts and arbitral tribunals should interpret the Convention independently from national laws. Furthermore, the judgements or arbitral awards regarding the CISG should have international character in order to serve as a model for other signatory countries[17]. In order to achieve uniformity in the application of the CISG, the courts or arbitral tribunals should interpret the CISG with having regard to the cases and doctrine from other signatory countries[18]. As mentioned above, there are several online resources, which contain cases from other signatory countries regarding the CISG. The courts and arbitral tribunals can access cases regarding the CISG through the mentioned databases. In this sense, the most famous decision belongs to the Tribunale di Vigevano (the Italian Court)[19]. In this case, the Italian Court referred to nearly forty foreign court decisions and arbitral awards. This attitude of the Italian Court shows that the decision reflects international character and uniformity in the application of the Convention[20]. In other words, this decision complies with the principles for the interpretation of the Convention, which has been stipulated in Art. 7 (1).

The uniform interpretation of the Convention is also very significant for the uniformity of application. The Convention has been written in six official languages[21]. In addition to them, it has been translated in the languages of other signatory countries. However, courts or arbitral tribunals may sometimes confront some problems about the interpretation of a term in a language,

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15 Zeytin, **CISG**, p. 70.

16 **Alexander S. Komarov**, "Internationality, Uniformity and Observance of Good Faith as Criteria in Interpretation of Cisg: Some Remarks on Article 7(1)", Journal of Law and Commerce, Vol. 25:75, 2005-2006, p. 78.

17 **Zeytin**, CISG, p. 70.

18 **Zeytin,** CISG, p. 70; **Schwenzer/Hachem**, CISG, Art. 7 para. 10; **Schwenzer/Hachem**, Viyana Satım Sözleşmesi, Madde 7 para. 10; **Ferrari,** CISG'da Yorum ve Boşluk Doldurmaya İlişkin Meseleler, p. 48. ff.

19 Italy 12 July 2000 District Court Vigevano (Rheinland Versicherungen v. Atlarex), http://cisgw3.law.pace.edu/cases/000712i3.html, (online) 23.11.2016; For the review of case: **Francesco G. Mazzotta,** "The International Character of the UN Convention on Contracts for the International Sale of Goods: An Italian Case Example ", 2003, http://www.cisg.law.pace.edu/cisg/biblio/mazzotta.html, (online) 23.11.2016.

20 **Mazzotta,** "The International Character of the UN Convention on Contracts for the International Sale of Goods: An Italian Case Example ".

21 These are English, French, Russian, Spanish, Arabic and Chinese.

which is not one of these six official languages. In this situation, court or arbitral tribunal should interpret the term independently from the function and meaning in domestic law[22]. This term should be interpreted by taking into consideration of the meaning in English, since most of the Commission's sessions have been conducted in English during the preparatory works of CISG[23].

Another issue, which should be clarified under this title, is the bindingness of decisions and arbitral awards. According to the prevailing view in doctrine[24], well-reasoned decisions and arbitral awards have persuasive authority and therefore courts and arbitral tribunals should follow them. Furthermore, there are not any hierarchical relationships between courts and arbitral tribunals, which apply the Convention[25]. For this reason, the court does not have to follow a decision regarding the CISG, which has been made in another signatory country. As a result, decisions and arbitral awards are not binding, only advisory for signatory countries[26].

C. The Observance of Good Faith in International Trade

The third principle for the interpretation of CISG is the observance of good faith in international trade. The meaning and scope of the reference to "good faith" is considerably controversial in doctrine. There are several and different interpretations regarding the role of "good faith" principle in the Convention.

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[22] **Kasap,** "Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması'nın Yedinci Madde Hükmünün Türk Hukuku ile Karşılaştırmalı Olarak İncelenmesi", p. 119-120.

[23] **Kasap,** "Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması'nın Yedinci Madde Hükmünün Türk Hukuku ile Karşılaştırmalı Olarak İncelenmesi", p. 120.

[24] **Schwenzer/Hachem**, CISG, Art. 7 para. 13; **Schwenzer/Hachem,** Viyana Satım Sözleşmesi, Madde 7 para. 13; **Ferrari,** Uluslararası İçtihat Hukuku Işığında CISG'da Yorum ve Boşluk Doldurmaya İlişkin Meseleler, p. 60; **Kasap,** "Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması'nın Yedinci Madde Hükmünün Türk Hukuku ile Karşılaştırmalı Olarak İncelenmesi", p. 120-121; **Zeytin,** CISG, p. 71;

[25] **Zeytin,** CISG, p. 71;

[26] **Zeytin,** CISG, p. 71; **Kasap,** "Milletlerarası Mal Satımına İlişkin Sözleşmeler Hakkında Birleşmiş Milletler Antlaşması'nın Yedinci Madde Hükmünün Türk Hukuku ile Karşılaştırmalı Olarak İncelenmesi", p. 120; **Camilla Baasch Andersen**, Uniform Application of the International Sales Law, Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions of the CISG, The Netherlands, Kluwer Law International, 2007, p.50-53.For opposite view please look at: **Larry A. DiMatteo**, "The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings", 22 Yale Journal of International Law, 1997, (online) http://cisgw3.law.pace.edu/cisg/biblio/dimatteo.html, 24.01.2017, p. 138. Dimatteo defends that "national courts have an obligation to recognize foreign court decisions by stating that the Convention should be interpreted with regard to its "international character and to the need to promote uniformity in its application."

According to the first view[27], the role of good faith principle is merely interpretative. In this sense, courts and arbitral tribunals have to observe the principle of good faith in the interpretation of the CISG. In addition to this, the parties to a contract of sale are not obliged to act in good faith[28]. According to the second view[29] [30], the function of good faith should not be limited to the interpretation of the Convention. Courts and arbitral tribunals should observe the principle of good faith also in the interpretation of the contract of sale. In addition to this, the rights and obligations of the parties should be interpreted and concretised within the scope of good faith[31]. Supporters of this view regard the principle of good faith as a general principle on which

[27] **Uli Foerstl,** The General Principle of Good Faith under the CISG**,** Saarbrücken, Verlag Dr. Müller, 2011, p. 58; **Troy Keily**, "Good Faith and the Vienna Convention on Contracts for the International Sale of Goods (CISG)", Vindobona Journal of International Commercial Law and Arbitration, Issue 1 (1999), N. 6, (online) http://www.cisg.law. pace.edu/cisg/biblio/keily.html, 01.01.2017. **E. Allan Farnsworth,** "Duties of Good Faith and Fair Dealing under The Unidroit Principles, Relevant International Conventions, and National Laws ", 3 Tulane Journal of International and Comparative Law, 1995, p.56-57 (online) http://tldb.uni-koeln.de/php/pub_ show_ document. php? pubdocid=122100, 24.01.2017.

[28] Court of Arbitration of the International Chamber of Commerce Case No. 8611 of 23 January 1997 (online) http://cisgw3.law.pace.edu/cases/978611i1.html, 04.12.2016: *"…observation by arbitrator that the principle of good faith mentioned in Article 7(1) is applicable to the interpretation of the CISG only, and is not to be referred to as a source of the parties' rights and duties with respect to performance of the contract…"*

[29] **Zeytin**, CISG, p. 71; **Ferrari,** Uluslararası İçtihat Hukuku Işığında CISG'da Yorum ve Boşluk Doldurmaya İlişkin Meseleler, p. 66; **Schwenzer/Hachem**, CISG, Art. 7 para. 17; **Schwenzer/Hachem**, Viyana Satım Sözleşmesi, Madde 7 para. 17; **Magnus,** Staudinger's Kommentar Wiener Kaufrecht, Art. 7 para. 4, 10, 29; **DiMatteo,** The CISG and the Presumption of Enforceability: Unintended Contractual Liability in International Business Dealings, p. 144-145; **Ulrich Magnus**, "Comparative Editorial Remarks on the Provisions Regarding Good Faith in CISG Article 7 (1) and the UNIDROIT Principles Article 1.7", An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law, Edited by John Felemegas, New York, Cambridge University Press, 2007, p. 45-46. The writer (Ulrich Magnus) is of the opinion that under both the CISG and Unidroit Principles of International Commercial Contracts, the principle of good faith has two functions: It governs the meaning of both the abstract law rules and the individual contracts. There are some differences between the wording of the CISG and UNIDROIT Principles regarding the wording of the principle of good faith. However, the differences between them are slight and can be ignored. Moreover, in some situations, the UNIDROIT Principles provide assistance for the interpretation of the principle of good faith in the CISG.

[30] For another view regarding the meaning of good faith: **Schlechtriem/Butler**, UN Law on International Sales The UN Convention on the International Sale of Goods, 50. According to the this view, the difference between several opinions about the meaning of good faith is only of minor importance, since general principle can be developed in accordance with article 7 (2).

[31] **Schwenzer/Hachem**, CISG, Art. 7 para. 17; **Schwenzer/Hachem**, Viyana Satım Sözleşmesi, Madde 7 para. 17.

the Convention is based[32]. They also defend that the principle of good faith explicitly appears in some articles of the Convention[33].

The last view that describes good faith as a principle for the interpretation of the CISG, the rights and obligations of the parties is more accurate. It is obvious that the CISG expressly refers to the principle of good faith as an instrument for the interpretation. However, the reference to the principle of good faith should not be interpreted literally and narrowly since, the role of good faith under the Convention is broader than its wording. In some articles of the Convention, there are implicit references to the principle of good faith. Article 16 (2) (b) is one of the examples for the appearance of good faith in the Convention. According to this article "*an offer cannot be revoked if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer*". The key word of the article is the term of "reasonableness". In order to determine the extent of "reasonableness", the article should be interpreted in terms of good faith. For this reason, it is obvious that this article 16 (2) (b) is based on the principle of good faith. However, the principle of good faith in article 7 (1) of the Convention cannot be used as a source for additional rights and obligations[34]. It is only used for the interpretation of the Convention and the rights and obligations of the parties, which are already determined within the scope of the CISG. In the contrary case, during the interpretation of the Convention, each court or arbitral tribunal would establish an additional right or obligation on the basis of good faith. Furthermore, the principle of good faith should be interpreted independently from domestic law. Otherwise, the uniformity in the application of the CISG would not be achieved.

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[32] For the writers who defends this view please look at: **Ferrari**, Uluslararası İçtihat Hukuku Işığında CISG'da Yorum ve Boşluk Doldurmaya İlişkin Meseleler, p. 66 footnote 170-173.

[33] For these articles please look at: "Commentary on the Draft Convention on Contracts for the International Sale of Goods", Prepared by the Secretariat, Document A/CONF. 97/5, 14 March 1979, **United Nations Conference on Contracts For The International Sale Of Goods Vienna, 10 March-II April 1980, Official Records,** New York, 1991, p. 18. (Online) https://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf, 01.01.2017. According to the commentary on article 6, the principle pf good faith explicitly appears in some articles. However, "the principle of good faith is broader than than these examples and applies to all aspects of the interpretation and application of the provisions of this Convention".

[34] **Schwenzer/Hachem**, CISG, Art. 7 para. 19; **Schwenzer/Hachem**, Viyana Satım Sözleşmesi, Madde 7 para. 19; **Ferrari**, Uluslararası İçtihat Hukuku Işığında CISG'da Yorum ve Boşluk Doldurmaya İlişkin Meseleler, p. 66; **John Felemegas,** "Comparision Between the Provisions Regarding the Concept of Good Faith in CISG Article 7 and the Counterpart Provisions oft he PECL", An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law, edited by John Felemegas, New York, Oxford University Press, 2007, p. 272.

In practice, the courts generally interpret "good faith" as a principle on which the CISG is based[35]. In connection with this, the courts see the principle of good faith as an instrument for the interpretation of the CISG and the rights and obligations of the parties.

II. METHODS FOR THE INTERPRETATION

Article 7 (1) of the CISG formulates basic principles for the interpretation of the Convention; on the contrary, the Convention does not contain any rules concerning the methods of interpretation. In this context, it is controversial whether or not the courts and arbitral tribunals follow any methods for the interpretation, which are the methods of the Forum State or the place of business of one of the parties[36]. As mentioned above, in the application of the CISG, the courts and arbitral tribunals have to interpret the CISG independently from domestic law. However, this rule pertains to the meaning of interpretation. In other words, the method for the interpretation is not within the scope of this principle. For this reason, in the application of the CISG, the courts and arbitral tribunals can follow any methods for the interpretation[37]. However, the courts and arbitral tribunals are not totally free to choose the method. The method, which will be chosen for the interpretation of the CISG by the court or arbitral tribunals, should comply with the principle of autonomous interpretation and international character of the CISG. Next subtitles will deal with the methods for the interpretation, which are common to all legal systems.

A. Wording of the Convention

In the interpretation of the CISG, initially, the literal meaning of provisions should be regarded[38]. The literal interpretation is a method in which the precise meaning of a provision is determined by having regard to the literal

[35] SARL BRI Production "Bonaventure" v. Société Pan African Export, Appellate Court Grenoble, 22 February 1995 France (online) http://cisgw3.law.pace.edu/cases/950222f1.html, 24.01.2017; Oberlandesgericht Hamburg, 28 February 1997 (online) http://cisgw3.law.pace.edu/cases/970228g1.html, 24.01.2017; Dulces Luisi, S.A. de C.V. v. Seoul International Co. Ltd. y Seoulia Confectionery Co., Compromex Arbitration, 30 November 1998 Mexico (Online) http://cisgw3.law.pace.edu/cases/981130m1.html, 24.01.2017. For more cases please look at: Ferrari, Uluslararası İçtihat Hukuku Işığında CISG'da Yorum ve Boşluk Doldurmaya İlişkin Meseleler, p. 66 footnote 178.

[36] **Schwenzer/Hachem,** CISG, Art. 7 para. 20; **Schwenzer/Hachem**, Viyana Satım Sözleşmesi, Madde 7 para. 20.

[37] **Schwenzer/Hachem,** CISG, Art. 7 para. 20; **Schwenzer/Hachem**, Viyana Satım Sözleşmesi, Madde 7 para. 20; **Zeytin**, CISG, p.73.

[38] **Schwenzer/Hachem**, CISG, Art. 7 para. 20; **Schwenzer/Hachem**, Viyana Satım Sözleşmesi, Madde 7 para. 20.

meaning of the each word in the provisions, grammatical rules and sentence structure of the provision[39]. The literal interpretation is very significant for the CISG since, it can promote the uniform application of the Convention[40].

As mentioned above, the text of CISG has been written in six official languages. The literal interpretation can be made considering the texts of the CISG in these official languages[41]. However, in the case of discrepancy between official language versions, English text of the CISG should be regarded as a basis for the literal interpretation[42]; since, the preparation works and negotiations were carried out in English. For this reason, English text represents the essence and spirit of the CISG better than other versions[43].

B. Purpose of the Convention

The literal interpretation is the basic method for the interpretation of the Convention. However, it is not solely a sufficient method to understand the precise meaning of provisions in the Convention. In order to understand the exact meaning of the provisions, the literal meaning of the provisions should be interpreted considering the purpose of the provisions and the Convention. There are several materials by which the purpose of Convention can be understood. For example, official records of the negotiations and UNCITRAL Yearbooks, which include the works of the Commissions and their Working Groups, can be read in order to understand the purpose of the CISG.

C. Comparative Law and Uniform Projects

The use of comparative law in the interpretation of a legal instrument is a method in which the courts or arbitral tribunals come to a solution by comparing the solutions from different legal systems. The comparative law method may seem as an inappropriate method for the interpretation of the CISG because, in essence, the comparative law method does not comply with the autonomous interpretation and uniform application of the CISG. However, by following the comparative law method, the courts and arbitral tribunals

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39 **Kemal Oğuzman/Nami Barlas**, Medeni Hukuk, 18. Edition, Istanbul, Vedat Kitapçılık, 2012, p. 74; **Mustafa Dural/Suat Sarı**, Türk Özel Hukuku Cilt I Temel Kavramlar ve Medeni Kanunun Başlangıç Hükümleri, Istanbul, Filiz Kitabevi, 2013; para. 10.4.3.2.3.1.

40 **Zeytin**, CISG**,** p. 74 and the writers which are stated in footnote 211.

41 **Schwenzer/Hachem**, CISG, Art. 7 para. 21; **Schwenzer/Hachem**, Viyana Satım Sözleşmesi, Madde 7 para. 21; Zeytin, **CISG**, 74.

42 **Schwenzer/Hachem**, CISG, Art. 7 para. 21; **Schwenzer/Hachem**, Viyana Satım Sözleşmesi, Madde 7 para. 21; **Zeytin**, CISG, p. 74.

43 **Schwenzer/Hachem**, CISG, Art. 7 para. 21; **Schwenzer/Hachem**, Viyana Satım Sözleşmesi, Madde 7 para. 21; **Zeytin**, CISG, p. 74; **Magnus,** Staudinger's Kommentar Wiener Kaufrecht, Art. 7 para. 17, 33.

can compare the manner of application of CISG from signatory countries[44]. This attitude of the courts and arbitral tribunals undoubtedly promotes the uniformity in the application of the CISG.

Another issue, which should be discussed under this title, is the role of uniform projects in the interpretation of the CISG. In this sense, the Principles of European Contract Law and Unidroit Principles of International Commercial Contracts are two of the most important uniform projects. The main aim of these uniform projects is to set forth general rules for contract law. However, these uniform projects are based on different political and legal backgrounds and do not comply with the legal system of some signatory countries of the CISG[45]. For this reason, within the boundaries of the autonomous interpretation, such uniform projects should be used only as supporting arguments for the interpretation of the CISG[46].

CONCLUSION

The main purpose of the CISG is to create a uniform law for the international sale of goods. However, the desire to create a uniform law can be fulfilled in a long process. In this process, first of all, the purpose of the Convention and the desire of drafters should be determined and interpreted precisely. For this reason, interpretation of the CISG is the initial and most significant stage of this long process.

In the interpretation of the CISG, there are three main principles. According to the first principle, the courts and arbitral tribunals have to regard international character of the Convention. In this sense, they should interpret the CISG independently from domestic laws and follow court decisions and arbitral awards from other signatory countries regarding the CISG by using electronic resources.

According to the second principle for the interpretation, the uniformity in the application of the Convention needs to be promoted. There is a strong relationship between this principle and the principle of having regard to international character of the CISG and these principles complete each other. The necessity of the autonomous interpretation is the result of both principles.

The last principle for the interpretation is the observance of good faith in international trade. The role of good faith is not limited to interpretation of

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[44] **Zeytin**, CISG, p. 75 and footnote 221.

[45] **Schwenzer/Hachem**, CISG, Art. 7 para. 26; **Schwenzer/Hachem**, Viyana Satım Sözleşmesi, Madde 7 para. 26.

[46] **Schwenzer/Hachem**, CISG, Art. 7 para. 26; **Schwenzer/Hachem**, Viyana Satım Sözleşmesi, Madde 7 para. 26.

the CISG. Courts and arbitral tribunals should observe the principle of good faith also in the interpretation of the contract of sale. However, the principle of good faith in article 7 (1) of the Convention cannot be used as a source for additional rights and obligations. It is only used for the interpretation of the Convention and the rights and obligations of the parties, which are already determined within the scope of the CISG.

The Convention does not contain any rules concerning the methods of interpretation. For this reason, the courts and arbitral tribunals can apply any methods for the interpretation of the CISG. However, the method, which will be chosen for the interpretation of the CISG by the court or arbitral tribunals, should comply with the principles for the interpretation in the CISG.

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STATE RESPONSIBILITY IN CYBERSPACE: THE PROBLEM OF ATTRIBUTION OF CYBERATTACKS CONDUCTED BY NON-STATE ACTORS

Siber Ortamda Devletlerin Sorumluluğu: Devlet Dışı Aktörlerce Gerçekleştirilen Siber Saldırıların Atfedilebilirliği Meselesi

Dr. M. Emrah TANYILDIZI[1]

ABSTRACT

This paper assesses the effectiveness of international law in ensuring the responsibility of states for the cyber activities of non-state actors. In particular, it addresses the most critical international legal question of whether states can be held responsible for wrongful acts committed by non-state actors in or through cyberspace. The aim is to identify and apply the law of international responsibility and attribution models in order to help make the cyber world safer for all.

This paper introduces a categorical analysis for the attribution of private conduct to a state by formulating attribution models in two main settings, *de facto organ theory* (agency-based attribution) and *control theory* (control-based attribution). This categorization offers a theoretical framework with which to validate legally consistent and practically applicable models of attribution. Both attribution theories characterize the legality of a state operation that is seemingly private conduct and transform the conduct of a physical person or entity into an "act of state." This paper highlights the current models in the doctrine of attribution that correspond to the International Law Commission's (ILC) articles and international case law concerning the responsibility of states for internationally wrongful acts.

ÖZET

Bu makale uluslararası hukukun işlevselliği ve etkinliği bağlamında devlet organı olmayan özel kişilerin siber aktiviteleri ve bu konuda devletlerin sorumluluğunu doğuran esasları irdelemektedir. Hususi olarak; özel kişilerin siber-uzaydaki haksız eylemlerinden dolayı devletlerin sorumlu tutulup tutulamayacağı hususu hukuki bir sorunsal olarak ele alınmaktadır. Burada amaç, daha güvenli bir siber dünya için devletlerin uluslararası sorumluluğunu düzenleyen uluslararası normların açıklığa kavuşturulması ve bu normlara bağlı atfedilebilirlik kurallarının uygulamasını tanımlamaktır.

Devlet organı olmayan, devlet dışı aktörlerin günümüz politik ve askeri çatışma ortamında gittikçe artan etkisi yadsınamayacak noktadadır. Bir kısım devletler bunu kendi avantajlarına kullanmak suretiyle, özel kişileri aracı kılarak işledikleri haksız eylemlere rağmen kolayca sorumluluktan kaçınabilmektedirler. Siber-uzaydaki haksız eylemler ve bu konuda sponsor olan devletlerin hukuk karşısında hesap verebilmeleri için katı veya esnek delillere başvurulup başvurulmayacağı, devletlerin uygulamasıyla ancak netlik kazanacaktır.

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Since non-state actors have assumed a prominent role in modern day conflicts, states may elude responsibility by acting through them. If the requirement for attribution is set relatively high, states can simply evade responsibility. While it remains unclear whether state practice will adopt the lower or higher standards of proof in terms of accountability for sponsorship of cyber attacks, this paper is nevertheless able to examine the applicability of the two theories of attribution for state responsibility as applied to cyber attacks.

Keywords: State responsibility, accountability, cyber attack, attribution, non-state actors, ILC articles

Bu çalışmada atfedilebilirlik kuralları kategorik bir analize tabi tutulmuş ve *de facto organ teori* ile *kontrol teori* olmak üzere iki ana başlık altında irdelenmiştir. Atfedilebilirlik kurallarına ilişkin bu kategorik sınıflandırma hukuken uygulanabilir, pratik ve fakat teorik bir çerçeve sunmaktadır. Her iki teori de özel kişilerin eylemlerinden oluştuğu izlenimi veren fakat gerçekte uluslararası hukuk bağlamında devlete özgü faaliyetlerden sayılan ve yine özel kişilerin eylemlerinin devlet faaliyeti sayıldığı esasları tanımlamaktadır. Makalede mevcut atfedilebilirlik kuralları, Uluslararası Hukuk Komisyon'u tarafından kodifiye edilen uluslararası haksız eylemlerden devletlerin sorumluluğunu düzenleyen çalışması ve uluslarararası mahkeme kararlarına paralel olarak irdelenmiştir.

Bu çalışmada söz konusu atfedilebilirlik kuralları esas alınarak siber-uzaydaki devletlerin sorumluluğunu doğuran hususların belirlenmesi ve açıklığa kavuşturulması amaçlanmıştır.

Anahtar Kelimeler: Devletlerin sorumluluğu, hesap verilebilirlik, siber saldırı, atfedilebilirlik ilkesi, devlet organı olmayan aktörler, Uluslararası Hukuk Komisyonu (ILC)

1. Introduction

This paper assesses the effectiveness of international law in ensuring the responsibility of states for the cyber activities of non-state actors. In particular, it addresses the most critical international legal question of whether states can be held responsible for wrongful acts committed by non-state actors in or through cyberspace. Although the legal consequences of such action vary, this paper is of interest regarding the extent to which cyber activities fall under the international responsibilities of states. The aim is to identify and apply the law of international responsibility and attribution models in order to help make the cyber world safer for all.

In fact, cyberspace and relevant international law has remained to develop further for today's needs, it lacks clearness for the applicable law. In the context of responsibility one has to recall that substantive and evidentiary issues differ in its scope. The issues of evidence and the issues of substance of law are different in nature. One has to examine first the applicable law to the facts related with cyber activities before reviewing the standard of

proof.[1] States for a long time avoided from making any assertion and swift conclusion on the responsibility of another state evidencing involvement for a certain cyberattack. However, recent developments indicate that the capacity of tracking those perpetrators and holding them accountable has been potentially materialized.[2] Since attribution in cyberspace is rather difficult to challenge its evidential value, the paper focuses on the substance of law and its potential application.

This paper highlights the current models in the doctrine of attribution that correspond to the International Law Commission's (ILC) articles and international case law concerning the responsibility of states for internationally wrongful acts. Moreover, it introduces a categorical analysis for the attribution of private conduct to a state by formulating attribution models in two main settings, de facto organ theory (agency-based attribution) and control theory (control-based attribution). This categorization offers a theoretical framework with which to validate legally consistent and practically applicable models of attribution. Both attribution theories characterize the legality of a state operation that is seemingly private conduct and transform the conduct of a physical person or entity into an "act of state." De facto theory requires the specifics of complete dependence, specific operation, and instruction. Control theory, on the other hand, prioritizes the specifics of control, organizational capacity, and extraterritorial context in its application.

Since non-state actors have assumed a prominent role in modern day conflicts, states may elude responsibility by acting through them. If the requirement for attribution is set relatively high, states can simply evade responsibility. While it remains unclear whether state practice will adopt the lower or higher standards of proof in terms of accountability for sponsorship of cyber attacks, this paper is nevertheless able to examine the applicability of the two theories of attribution for state responsibility as applied to cyber attacks.

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1 Kuba Macák, *Decoding Article 8 of the International Law Commission's Articles on State Responsibility: Attribution of Cyber Operations by Non-State Actors,* J. Confl. & Sec. L. Vol. 21 (3), 405-428 (2016), at 408. ILC maintained the divide between substantive and evidentiary rules in its articles on the responsibility of States.

2 Id., at 410. According to US officials, the US have the capacity to track those perpetrators and hold them accountable.

2. Identifying Cyber Attacks

Cyber attacks,[3] whether they are to be considered armed attacks or not,[4] have become increasingly sophisticated and are increasingly characterized by considerable organizational competence, command, and control.[5] Hackers are becoming more skilled, and the technology to conduct cyber operations is readily available.[6] These cyber activities bring threats against online infrastructure, even as the new technologies that hackers exploit bring considerable benefits.[7]

Hacking activities include mining and stealing information, erasing computers, incapacitating electrical networks, disabling bank networks, jamming radar systems, and destroying nuclear centrifuges.[8] Many countries have modified their military protocols in order to deal with this new and

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3 *See generally,* Michael N. Schmitt (ed.), Tallinn Manual International Law Applicable to Cyber Warfare (2013); Michael N. Schmitt, *Classification of Cyber Conflict,* J. Confl. & Sec. L. Vol. 17 (2), 245–260 (2012); Yoram Dinstein, *The Principle of Distinction and Cyber War in International Armed Conflicts,* J.Conflict & Sec L. Vol. 17 No. 2, 261–277 (2012); Nicholas Tsagourias, *Cyber Attacks, Self-defence and the Problem of Attribution,* J.Conflict & Sec L. Vol 17 No 2, 229-244 (2012); Scott J. Shackelford, *State Responsibility for Cyber Attacks: Competing Standards for a Growing Problem,* Geo. J. Int'l L. 42, 971-1016 (2011); Nikhil D'Souza, *Cyber Warfare and State Responsibility: Developments in International Law,* (May 16, 2011) *available at* http://ssrn.com/abstract=1842984 (visited September, 2016).

4 Daniel Bethlehem, Sandesh Sivakumaran, Noam Lubell, Philip Leach, Elizabeth Wilmshurst, *Classification of Conflicts: The Way Forward* (1 October 2012) *available* at http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20 Law/011012summary.pdf (visited October, 2016) "Technological developments, such as the use of unmanned drones and cyber operations, require a reassessment of the traditional paradigm of armed conflict."

5 Michael N. Schmitt, *Cyber Operations and the Jus Ad Bellum Revisited,* Vill. L. Rev.Vol. 56, 570-600 (2011) at 572.

6 Damian Paletta, Danny Yadron & Jennifer Valentino-Devries, Cyberwar Ignites a New Arms Race, October 11, 2015, http://www.wsj.com/articles/cyberwar-ignites-a-new-arms-race-1444611128 "Getting into the cyberweapon club is easier, cheaper and available to almost anyone with cash and a computer." available at http://www.wsj.com/articles/cyberwar-ignites-a-new-arms-race-1444611128. (last visited October 2016)

7 Russel Buchan & Nicholas Tsagourias, *Cyber War and International Law*, J. Confl. & Sec. L. Vol. 17 (2), 183 (2012), at 183.

8 *Supra* note 6. Some types of attacks that could be used in cyberwarfare are denial of service (Iran allegedly flooded U.S. bank websites with messages to disable financial networks), sleeper malware (U.S. allegedly implanted malware to secretly control foreign networks at a later date), phishing (mass emails to trick employees into revealing passwords), tricking radar (malware could show false targets on radar or disable air-defense systems) and infrastructure sabotage (the U.S. and Israel allegedly used Stuxnet worm to destroy Iranian nuclear centrifuges).

unprecedented threat,[9] often inaugurating defensive and offensive facilities that weaponize cyber activities.[10]

2.1. Some featured cyber incidents

2007 Estonia case

In May 2007, the country of Estonia fell victim to far-reaching computer network attacks.[11] The incident began after the government's decision to remove a Soviet war memorial from the center of Tallinn.[12] It is believed that these attacks were driven by ethnic Russian hackers.[13] Targets included government and commercial Internet infrastructure and information systems.[14] Most of the attacks originated in Russia, including from a number of Russian government institutions, though some were conducted from elsewhere.[15] After this attack, NATO accelerated its effort to confront cyber

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9 *Id.* "Many cybersecurity experts, however, consider the U.S. government to have the most advanced operations... U.S. Cyber Command now has nine National Mission Teams with plans to build four more. These each comprise 60 military personnel that will conduct full-spectrum cyberspace operations to provide cyber options to senior policy makers in response to attacks against U.S."; Josh Chin, Cyber Sleuths Track Hacker to China's Military, September 23, 2015, "China's army has divisions devoted to cyber attacks, and recent evidence shows links between the country's military and hackers who appear to be pressing the country's interests abroad." available at http://www.wsj.com/articles/cyber-sleuths-track-hacker-to-chinas-military-1443042030 http://www.wsj.com/articles/cyber-sleuths-track-hacker-to-chinas-military-1443042030 (visited October, 2016)

10 *Id.*; *See* also, Danny Yadron & Jennifer Valentino-Devries, Cataloging the World's Cyberforces, October 11,2015, available at http://www.wsj.com/articles/cataloging-the-worlds-cyberforces-1444610710?tesla=http://www.wsj.com/articles/ cataloging-the-worlds-cyberforces-1444610710 (visited October, 2016) "More than 60 countries have or are developing tools for computer espionage and attacks...In total, at least 29 countries have formal military or intelligence units dedicated to offensive hacking efforts... Some 50 countries have bought off-the-shelf hacking software that can be used for domestic and international surveillance. The U.S. has among the most-advanced operations."

11 Ian Traynor, Russia Accused of Unleashing Cyberwar to Disable Estonia, The Guardian (London, 17 May 2007) available at https://www.theguardian.com/world/2007/may/17/topstories3.russia http://www.theguardian.com/world/2007/may/17/topstories3.russia, (visited September, 2016).

12 For a detailed information of the cyber attacks against Estonia see NATO's documentary 'Six Colours: War in Cyberspace' at < http://www.nato.int/ebookshop/video/six_colours/SixColours.html >, (visited September, 2016).

13 Schmitt, *supra* note 5, at 570.

14 Mark Landler & John Markoff, Digital Fears Emerge After Data Siege in Estonia, May 29, 2007, available at http://www.nytimes.com/2007/05/29/technology/29estonia.html http://www.nytimes.com/2007/05/29/technology/29estonia.html?pagewanted =all&_r=0, (visited October, 2016).

15 Schmitt, *supra* note 5, at 570. Their origin was also traced to at least 177 other countries. Initially, they came from private IP addresses.

attacks and initiated policies and capacity designed to create a safer cyber environment.[16]

2010 Stuxnet

An alleged U.S.-Israeli attack on Iran, discovered in 2010, that deployed the Stuxnet computer worm in an effort to destroy Iranian nuclear centrifuges[17] appears to be the most advanced and destructive cyber attack to date.[18] Neither country has confirmed or denied involvement,[19] but experts have referred this attack as very likely a state-sponsored cyber attack rather than a case of cyber terrorism.[20]

Stuxnet is a key example of the shift from financial motivations for the conduct of cyber attacks toward the aim of disrupting critical infrastructure.[21] Cyber attacks have become an instrument in states' attempts to gain political, economic and military advantages, for which reason states will probably continue to sponsor them.[22] It remains unclear whether the Stuxnet attack constitutes an unlawful use of force because no physical damage has been confirmed.[23]

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16 NATO Strategic Concept 2010, updated May 2012, "Cyber attacks continue to pose a real threat to NATO and cyber defence will continue to be a core capability of the Alliance." available at http://www.nato.int/cps/en/natohq/official_texts_68580.htm http://www.nato.int/cps/en/natohq/topics_78170.htm (visited October, 2016).

17 Siobhan Gorman, U.S. Team and Israel Developed Iran Worm, June 1, 2012, available at http://www.wsj.com/articles/SB10001424052702304821304577440703810436564 (visited November 2016)http://www.wsj.com/articles/SB1000142405270230482130457744

18 Peter Beaumont, Stuxnet Worm Heralds New Era of Global Cyberwar, September 30, 2010, available at https://www.theguardian.com/technology/2010/sep/30/stuxnet-worm-new-era-global-cyberwarhttp://www.theguardian.com/technology/2010/sep/30/stuxnet-worm-new-era-global-cyberwar, (visited September 2016).

19 *Supra* note 17.http://www.wsj.com/articles/SB10001424052702304821304577440703810436564

20 Josh Holliday, Stuxnet worm is the 'work of a national government agency', September 24, 2010, available at https://www.theguardian.com/technology/2010/sep/24/stuxnet-worm-national-agency, http://www.theguardian.com/technology/2010/sep/24/stuxnet-worm-national-agenc,, (visited September, 2016) "Kaspersky Lab, told the Guardian: We think that Stuxnet's sophistication, purpose and the intelligence behind it suggest the involvement of a State."

21 *Id.*

22 *Id.*

23 Russell Buchan, *Cyber Attacks: Unlawful Use of Force or Prohibited Interventions,* J. Confl. & Sec. L. Vol. 17 (2), 211 (2012), at 216.

2014 Sony attack

Computer files and records at Sony Corporation's Hollywood film division were destroyed by cyber attacks in 2014,[24] allegedly in retaliation for *The Interview*, a comic movie about an attempt to assassinate North Korean leader Kim Jong Un.[25] The breach is considered one of the most successful state-sponsored attacks. The FBI has claimed that North Korea successfully implanted malware on Sony computers that enabled the theft and destruction of company records.[26] North Korea has also been accused by South Korea of attempting to hack into a nuclear reactor, television networks, and banks.[27]

These three incidents make clear why states are turning to military solutions to their cyber security concerns.[28] An effective legal response to an attack depends on international cooperation. A problem immediately arises, however, with regard to the definition of such basic concepts as cyber attack, cyber crime, and cyber warfare.[29] International cooperation is necessary to form the basis for information sharing, evidence collection, and criminal prosecution of those involved in cyber attacks. A new international law of cyberspace is evolving under these conditions. [30]

2.2. How states react: two main perspectives

Whether defensively or offensively, states have begun to react to international cyber threats in two main ways. Some states pursue peaceful measures, such as sanctions or new treaties. Other states tend to see the problem as one step in an arms race.[31] Although international law includes

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24 Michael Schmitt, *International Law and Cyber Attacks: Sony v. North Korea,* (December 17, 2014) *available at https://www.justsecurity.org/18460/international-humanitarian-law-cyber-attacks-sony-v-north-korea/* http://justsecurity.org/18460/international-humanitarian-law-cyber-attacks-sony-v-north-korea/ (visited September, 2016).

25 Carol E. Lee & Jay Solomon, U.S. Targets North Lorea in Retaliation for Sony Hack, January 3, 2015 available at http://www.wsj.com/articles/u-s-penalizes-north-korea-in-retaliation-for-sony-hack-1420225942 http://www.wsj.com/articles/u-s-penalizes-north-korea-in-retaliation-for-sony-hack-1420225942, (visited September, 2016).

26 *Id.* "The Obama administration renewed a U.S. campaign of financial pressure against North Korea, imposing sanctions against the country's lucrative arms industry in what American officials said was a first step in retaliation for Pyongyang's alleged cyberattack on Sony Pictures Entertainment."

27 *Supra* note 6.

28 Mary Ellen O'Connell, *Cyber Security without Cyber War,* J. Confl. & Sec. L. Vol. 17 (2), 187 (2012), at 189.

29 Oona A. Hathaway, Rebecca Crootof, Philip Levitz, Haley Nix, Aileen Nowlan, William Perdue and Julia Spiegel, *The Law of Cyber-Attack,* 100 Calif. L. Rev. 817, (August 2012), at 818.

30 *Id.*

31 *Supra* note 7, at 183.

various rules that apply to cases in which a state breaches its international obligations, cyber activities complicate the situation by introducing such extra elements as the active participation of non-state actors, technological developments, and a state's ability to conduct military operations.[32]

In regard to the application of the law, one should recognize that "cyber space is international space."[33] Cyber activities must therefore comply with relevant international law. The two perspectives outlined above allow for parallel international inquiries that can offer insights into the ways in which international law reacts to cyber threats. First, there is an obvious need to regulate the cyber activities on both the domestic and international levels.[34] Second, interpretation and application of the existing international law is necessary to establish an effective course of legal action for countering cyber threats.[35]

2.3. Legal questions arise

Prior arguments have privileged such legal inquiries as whether a cyber attack constitutes an unlawful use of force or an armed attack, how the *jus ad bellum* and *jus in bello* rules apply to cyber activities, whether a cyber attack violates the non-intervention principle[36] or triggers the right of self defense, and whether the sponsoring State is responsible for such activity etc. …Though these questions all fall within the scope of the obligations of States and the sequence of the relevant primary rules, the problem remains regarding how cyber activities can best be attributed to the responsible party or parties.

Military methods and related legal inquiries may fail to provide an effective course of action because such discussions are based on an analogical rationale that potentially fails to point to clear definitions. [37] Application of the law may suffer if these discussions are limited to the use of force paradigm.[38] Instead,

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[32] *Id.*

[33] *Supra* note 28, at 189.

[34] There are no treaty provisions that directly deal with cyber 'warfare', and also no precise customary rules to apply since its scope is limited on State practice and opinion juris. *See supra* note 3, Schmitt, *Classification of Cyber Conflict,* at 264.

[35] *Supra* note 28, at 187. This could be done by characterizing cyber activities "primarily as a sphere of economic and communication activity where civil law enforcement officials have primary jurisdiction…., alternatively, be characterized as primarily under the jurisdiction of military defence authorities."

[36] *Supra* note 23, at 213.

[37] For a detailed discussion see O'Connell, *supra* note 28. The development of State practice is so much important because the most crucial question is do States need to observe international law rules with respect to the cyber activities. States follow "the Cold War strategy of threatening enemies with overwhelming force and preparing to act on these threats."

[38] *Supra* note 23, at 213.

such legal norms as responsibility, non-intervention, and countermeasures can help to solve cyber problems effectively.[39] In addition, it is important not to overlook the risks involved in militarizing cyber security.

The use of force paradigm defines the legal status of cyber attacks under Article 2(4) of the U.N. Charter, according to which an "effects-based prohibition" requires physical damage resulting from an unlawful act.[40] Cyber attacks may not always, however, cause physical damage, though they may still constitute unlawful attacks in that they violate customary international law.[41]

In an effort to go beyond discussions of whether cyber attacks constitute a use of force, I argue that they in any case amount to unlawful acts, and that existing law can be subject to an "interpretive reorientation"[42] in order to arrive at a new, effective, and comprehensive legal framework.[43] In this respect, I submit that the attribution principles in the law of international responsibility can help to identify the author of an internationally wrongful act and can adequately assign responsibility to this party. These findings can serve as a legal basis for various applications of the law, including the use of force, non-intervention, and self-defense paradigms.[44]

2.4. States are not the only players

In times of privatization of State functions and delegation of sovereign activities, how States react to the impairment of their interest is a crucial consideration that affects their responsibilities under international law. Holding States and individuals legally accountable for their conduct is deemed significantly valuable as part of a "general direction toward good governance and transparency."[45]

Since "the law of international responsibility is based on a realistic concept of accountability, which disregards legal formalities,"[46] this legal framework is expected to provide practical formulations that enhance the accountability of States for wrongful acts committed by non-state actors in

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39 *Supra* note 28, at 189.
40 *Supra* note 23, at 212.
41 *Id.*
42 Mathew C. Waxman*, Cyber Attacks and the Use of Force: Back to the Future of Article 2(4),* 36 Yale J. Int'l L. 421, (2011), at 437.
43 Comprehensive legal framework at both the domestic and international levels is needed to more effectively address cyber-attacks. *See supra* note 29, at 818.
44 Tsagourias, *supra* note 3, at 240.
45 André Nollkaemper & Dov Jacobs, *Shared Responsibility in International Law: A Conceptual Framework,* Mich. J. Int'l L. 34 (2), 359-438 (2013), at 360.
46 Prosecutor v. Tadić, ICTY Appeal Chamber Judgment Case No IT-94-1-A (July 15, 1999) (hereinafter ICTY Appeal Chamber Tadić Judgment), at para. §121.

or through cyberspace. A broader conception of accountability[47] expands the scope of the inter-state paradigm as it is conceived in the law of international responsibility.[48]

3. Attribution in the System of International Responsibility

The primary subjects of international law are naturally States that are obliged to comply with it.[49] In this context, breaches of international law by a State depend on the actual content of that state's international obligations.[50] Thus it has been said that "There is no such thing as a uniform code of international law, reflecting the obligations of all States."[51] The above discussions of cyber activities have not taken into account the fact that the international obligations of States vary markedly and that this variation is a significant concern when it comes to confronting such a new and unprecedented threat.

There remains the problem of establishing a system of cyber law and identifying the scope of States' international obligations in the context of cyberspace. Though these obligations may vary, there are certain concepts underlying States' responsibilities—attribution, breach, and consequences—that "are assumed and . . . apply unless excluded."[52]

Such "standard assumptions of responsibility," then, are generally applicable.[53] Thus, since no special rules of international law address cyber

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47 Rüdiger Wolfrum, *State Responsibility for Private Actors: An Old Problem of Renewed Relevance, in* Maurizio Ragazzi (ed.), International responsibility Today: Essays in memories of Oscar Schachter, 423, 423-434 (2005), at 431. "States cannot circumvent the international rules on State responsibility by either transferring competences, generally exercised by State officials, or by tolerating the take-over of such functions by private groups by claiming these groups were meant to or acted independently. International law on State responsibility does not honor the withdrawal of a State from its genuine responsibility." *See also* Jutta Brunnée, *International Legal Accountability through the Lens of the Law of State Responsibility,* Netherlands yearbook of International Law, Vol. 36, 3-38. (2005), at 22. "Norms have evolved that push beyond the traditional State-centric outlook of international law to obligate and entitle a range of other actors."

48 Brunnée, *Id.*, at 4.

49 James Crawford, *The System of International Responsibility, in* James Crawford; Alain Pellet, Simon Olleson & Kate Parlett (eds.), The Law of International Responsibility, 17-24 (2010), at 17.

50 *Id.,* at 20.

51 *Id.*

52 *Id.* Lex Specialis: Article 55 of the International Law Commission's Articles on State Responsibility of State for Internationally Wrongful Acts. "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of International law."

53 *Supra* note 49, at 20.

activities and there is no clear definition of an internationally wrongful cyber act or its legal consequences, these general standards of responsibility would seem to apply.[54] The establishment of state responsibility is crucial for considering remedies to be sought for past breaches and ways to prevent internationally wrongful conduct in the future.[55]

3.1. Attribution is the crux of the legal issues

States and non-states alike are made up of natural persons. While both perform activities with the help of natural persons,[56] in order to consider the conduct of a natural person to be an act of a State, this conduct must of course be legally attributable to that State.[57] Persons who do not have either *de jure* or *de facto* organ status are considered private persons.[58] In this respect, the circumstances under which the acts of private persons and entities are attributable to a State are clarified by the particular attribution standards in the law of international responsibility.[59]

Cyber activities usually appear to be private activities, raising the questions of when subjects of international law bear responsibility for seemingly private conduct[60] and how to attribute wrongful acts committed by non-state actors

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54 Article 55 of the International Law Commission's Articles on State Responsibility of State for Internationally Wrongful Acts.

55 *Supra* note 49, at 20.

56 James Crawford, State Responsibility: The General Part (2013) at 113: A State, as the conventional and main international actor, is a corporate entity that functions on the reliance of involvement of individuals and entities, who might have private or public capacity while acting.

57 U.N. 56th Sess., International Law Commission, *Report of the International Law Commission on the work of its fifty-third session: Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries,* U.N. Doc. A/56/10 (August 10, 2001), reprinted in the Yearbook of the International Law Commission Vol. II, Part Two (2001) (hereinafter *The ILC Articles on State Responsibility*); *see also* Ian Brownlie, State Responsibility (System of the Law of Nations) (1983), at 132-133; Claus Kress & Luigi Condorelli, *The Rules of Attribution: General Considerations, in* James Crawford; Alain Pellet, Simon Olleson & Kate Parlett (eds.), The Law of International Responsibility, 221-235 (2010), at 220-223.

58 Christian Tomuschat, *The Responsibility of Other Entities: Private Individuals, in* James Crawford; Alain Pellet, Simon Olleson & Kate Parlett (eds.), The Law of International Responsibility, 318-329 (2010), at 318.

59 Alexander Kees, *Responsibility of States for Private Actors, in* Rudiger Wolfrum (ed.), Max Planck Encyclopedia of Public International Law, 959-964 (2011), at 960.

60 Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law,* N.Y.U. J. Int'l L. & Pol. 36, 265-305 (2004), at 302: This question is related with another that where the law of international responsibility will go in the future? In other words, do we experience a critical shift in the international order as well as in the relation between State and individual?

in or through cyberspace to a sponsoring state. Attribution of cyber attacks remains one of the most difficult tasks in identifying a perpetrator and assessing responsibility.[61]

It could be argued that attribution is a problem concerning the probity of cyber evidence during the conduct of cyber investigations. It is not only, however, a tool for identifying the origin of a specific cyber attack, but it also assigns the attack to an author.[62] Attribution is critical not only "for the effectiveness of the counter-action but also for its lawfulness."[63]

3.2. A problem of evidence or a problem of attribution

Attribution of cyber attacks is, then, an extraordinarily difficult process, and is likely to become more so as the complexity of information technologies continues to increase.[64] The identification of a cyber attacker is particularly important in cases where hackers aligned with a foreign country have engaged in espionage directed against the computers of opposing forces and then used stolen tactical information and intelligence in the ongoing armed conflict.

Again, the threshold of attribution required for a political response to a cyber attack may differ from that required for legal responsibility.[65] In the light of differing standards of attribution, technical issues give rise to concerns regarding how best to prepare cyber evidence for a legal determination of attribution. As to the availability of such evidence, a problem arises regarding how to tie material proof to a specific perpetrator.[66]For such purposes, varying regimes exist for attribution under the law of international responsibility.

3.3. ILC articles on attribution

As stated by the ILC, "attribution of conduct to the State as a subject of international law is based on criteria determined by international law and

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[61] Paul Cornish, David Livingstone, Dave Clemente and Claire Yorke *On Cyber Warfare,* A Chatham House Report (November 2010) *available at* http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Security/r1110_cyberwarfare.pdf "Cyber attacks take place at different levels of sophistication and can be driven by a wide variety of political, ideological, economic and even frivolous motives." (visited September, 2016)

[62] Tsagourias, *supra* note 3, at 233. "Attribution is thus critical but is a very demanding and complicated exercise in the context of conventional attacks - as the case of terrorism demonstrates - and even more so in the case of cyber attacks, because of the nature of the cyber domain."

[63] *Id.* at 230.

[64] *Id.* "Cyber attacks take place at different levels of sophistication and can be driven by a wide variety of political, ideological, economic and even frivolous motives."

[65] *Id.*

[66] *Id.*, at 234.

not on the mere recognition of a link of factual causality."[67] In other words, "attribution constitutes a question of law before being a question of fact… [I]t can only occur in the application of rules and fixed criteria of international law."[68]

There are two main aspects of the classification of state organs according to the ILC Articles on State Responsibility, which describe the circumstances under which individuals or entities are classified as *de jure* or *de facto* state organs. With regard to the first, Articles 4 through 7 present the fundamentals of attribution in terms of organs and agencies of state that exercise sovereign authority.[69]

As for the second aspect, Article 8 articulates another consideration about the creation of a *de facto* organ or agent through the direction and instruction of another entity.[70] This form of attribution has garnered significant attention in the context of the activities of non-state actors for determinations of state responsibility.[71] Despite the rejection of a similar identification of a *de facto* organ in the articles relating to the first aspect, Article 8 nevertheless posits a *de facto* organ theory—by utilizing instruction and direction notions—that includes the basic understanding found in Articles 4 through 7.[72]

Article 8 refers to a third autonomous element, "control," in addition to the notions of instruction and direction. The latter notions call for classifying individuals as *de facto* organs depending on whether they act according to the instruction and direction given by the intervening state, and they thereby indicate a separate consideration for attribution in which "control" plays an independent role. The ILC does not formulate the elements of "control." It establishes a conceptual distinction between a subjective condition of attribution ("effective" or "overall" control) and an objective condition (one involving a factual link, "instruction" or "direction").[73] Thus, "The only notable difference is in fact temporal: in one case a factual link at a particular point, while in the other, 'control' constitutes a continuous factual link."[74]

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[67] ILC Articles on State Responsibility, Introductory Commentary to Part One, Chapter II, para 4.

[68] Olivier De Frouville, *Attribution of Conduct to the State: Private Individuals, in* James Crawford; Alain Pellet, Simon Olleson & Kate Parlett (eds.), The Law of International Responsibility, 257-280 (2010), at 269.

[69] Crawford, *supra* note 56, at 115.

[70] *Id.,* at 116

[71] Kress & Condorelli, *supra* note 57, at 227.

[72] *Id.*

[73] De Frouville, *supra* note 68, at 271.

[74] *Id.*

3.4. Existing attribution standards

Attribution[75] is, then, the process of assessing the conduct of a natural person or entity that possesses private or public competence in order to determine the legality of a particular state operation.[76] In other words, the legal function of attribution is to consider whether the conduct of a natural person or entity has a public dimension that is identical to an "act of state."[77] Thus Christenson argued that attribution allocates responsibility between the public and private orbit in regard to substantive international obligations of states.[78] Similarly, Crawford observes that "the rules of attribution play a key role in distinguishing the 'State sector' from the 'non-State sector' for the purposes of responsibility."[79]

The issue of legal differentiation between state action and private conduct has long been a concern of international tribunals, which have presented substantial but varying interpretations of the attribution process.[80] A case concerning Nicaragua that was brought before the International Court of Justice (ICJ),[81] for example, used an attribution standard called an "effective control test" in order to assess the responsibility of the United States for crimes committed by the *contras*. ICJ re-examined the already established standard at its more recent case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) in 2007. [82] In another widely cited

75 For a detailed discussion *see* Daniel Bodansky & John R. Crook, *Symposium: The ILC's State Responsibility Articles: Introduction and Overview,* Am. J. Int'l L. 96, 773-787 (2002). Milan Plücken & Joern Griebel, *New Developments Regarding the Rules of Attribution? The International Court of Justice's Decision in Bosnia v. Serbia,* Leiden J. Int'l L. 21, 601-622 (2008).

76 *Supra* note 46, at para. §117.

77 *See generally* Brunnée, *supra* note 47.

78 Gordon A. Christenson, The Doctrine of Attribution in State Responsibility, in Richard. B. Lillich (ed.), International Law of State Responsibility for Injuries to Aliens, 322-360 (1983), at 345.

79 James Crawford, *First Report on State Responsibility,* U.N. Doc. A/CN.4/490 and Add. 1–7, reprinted in Yearbook of the International Law Commission, Vol II (1) (1998), at para. §154.

80 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, I.C.J. Reports 1986 (hereinafter *ICJ Nicaragua Case*); International Criminal Tribunal for Former Yugoslavia: Prosecutor v. Tadić, ICTY Appeal Chamber Judgment Case No IT-94-1-A (July 15, 1999); Loizidou v. Turkey, European Court of Human Rights, (Judgment) Application No 15318/89 (18 Dec 1996) ECHR Rep 1996-IV, 2216 (1996) (hereinafter ECHR *Loizidou v Turkey*).

81 *Id.,* ICJ, *Nicaragua Case.*

82 Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (hereinafter ICJ *Genocide case*).

international suit, the Tadić Appeals Chamber case, the attribution criterion of an "overall control test" was established by the International Criminal Tribunal for the former Yugoslavia (ICTY).[83] The process of attribution was also examined by the European Court of Human Rights in the cases of Loizidou v. Turkey and Behrami v. France, in which an "effective-overall control test"[84] and "ultimate authority and control test" [85] were established, respectively. Unfortunately, each test includes its own criteria for determining the factual and control relationships between states and private actors.

3.4.1. ICJ and the *'effective control'* test

The *Nicaragua* case was concerned with the relationship between the United States and the armed groups operating in the territory of Nicaraguan state between 1981 and 1984.[86] The International Court of Justice (ICJ) took into consideration the acts attributable to the United States including; mining of ports, attacks on oil installations and other objectives, over flights, support of armed bands opposed to government of applicant State, encouragement of conduct contrary to principles of humanitarian law and economic pressure.[87]

The *contras* were one of the armed opposition groups operating against the Nicaraguan government.[88] They were a trained fighting force, operating along the borders of Nicaragua.[89] According to the Court's records, it was clear from the official statements by the President and high United States officials, that the United States Government had been giving support to the *contras*.[90]

As acting on behalf of (US) government

The ICJ was asked to answer whether the intervention by the United States into the conflict in the territory of Nicaragua would establish the United

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83 ICTY Apple ChamberTadić Judgment, *supra* note 46.

84 ECHR, Louizidou v Turkey, *supra* note 80.

85 Behrami and Saramati v France and Others (ECtHR Merits Judgment) App No 71412/01 and 78166/01 (2 May 2007) (hereinafter ECHR Behrami and Saramati case) *available at* http://hudoc.echr.coe.int /sites/eng/pages/search.aspx?i=001-80830#{"itemid":["001-80830"]}.

86 ICJ, *Nicaragua Case*, *supra* note 80.

87 *Id.,* at para. §21.

88 *Id.*, at para. §23, According to Nicaragua, the *contras* had given rise to significant material harm and extensive loss of life. Nicaragua also claimed that *Contras* had committed such acts as the killing of prisoners, indiscriminate killing of civilians, torture, rape and kidnapping. The United States of America did not plead on the merits and was also not represented at the oral proceedings. No submissions on the merits were presented on its behalf.

89 *Id.*, at para. §20.

90 *Id.*, at para. §20. "In 1983 budgetary legislation enacted by the United States Congress made specific provision for funds to be used by United States intelligence agencies for supporting 'directly or indirectly, military or paramilitary operations in Nicaragua'."

States' responsibility, because of the relationship of her own officials and the non-state actors engaged in the conflict.[91]

Although the Court acknowledged that the assistance of United States officials for the activities of the *contras* took different forms during the conflict[92], it found that it was not convincing that all the operations launched by the *contras* force, displayed strategy and tactics only developed by the United States.[93] However, on the other hand, the Court held that the financial support given by the United States to the military and paramilitary activities of the *contras* in Nicaragua was an entirely established fact.[94] Since the Court had to clearly examine the character of the relationship between the United States and *contra*s forces, it devised a test to determine whether the *contras* forces acted on behalf of the United States or were considered an organ of the United States.

The ICJ established the 'effective control test' in order to determine whether the acts of the *contras* were attributable to the United States.[95] The Court formulated the test as follow;

> "Whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government."[96]

From the court's point of view, the degree of control necessitates the potential for control inherent in the degree of the *contras'* dependence on aid in order to equate the *contras* with an organ of the United States Government.[97] It appears that the given aid by the United States was not sufficient enough to consider *contras* forces were solely dependent on it;

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91 *Id.*,at para. §21. There are two aspects with regard to this relationship for the purposes of international responsibility. First, the responsibility of the United States arising from its officials' conduct, and secondly the responsibility arising from the conduct of armed opposition groups. For the latter inquiry, the Court looked into the doctrine of attribution in order to clarify in which degree the Unites States' engagement with these armed oppositions groups prompts its responsibility.

92 *Id.*, at para. §106. "[S]uch as logistic support, the supply of information on the location and movements of the Sandinista troops, the use of sophisticated methods of communication, the deployment of field broadcasting networks, radar coverage, etc."

93 *Id.*, at para. §106. "The Court found it clear that a number of military and paramilitary operations by this force were decided and planned, if not actually by United States advisers, then at least in close collaboration with them…"

94 *Id.*, at paras. §107, 108.

95 *Id.*, at paras. §109- 121.

96 *Id.*, at para. §109.

97 *Id.*, at para. §109.

rather, the *contras* continued to 'constitute an independent force'.[98] The Court relied on the evidence that after the cessation of aid by the United States, the *contras* continued to operate in Nicaragua.[99]

The *contras* were not created, and military strategy and tactics were not entirely developed by the United States. In this respect, the Court found that the aid given by the United States was not satisfying[100] to conclude that the *contras* were not completely dependent to the United States, which could not be considered as acting on behalf of the United States.[101]

A single test or more

In regard with the ICJ formulation of the effective control test the literature and some other international courts mostly indicate to one single test.[102]

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98 *Id.*, at para. §109.

99 *Id.*, at para. §110. "[T]he evidence available to the Court indicates that the various forms of assistance provided to the *contras* by the United States have been crucial to the pursuit of their activities, but is insufficient to demonstrate their complete dependence on United States aid." Such formulation comes after the Court reiterated that there was no sufficient evidence to conclude that the United States "created" the *contras* force in Nicaragua. Likewise, the evidence was not satisfying that the United States gave "direct and critical combat support" to *contras*.

100 *Id.*, at para. §115, 109.The effective control test holds a high threshold for the attribution of conduct by non-State actors to a State. It requires evidence that the *contras* held a partial autonomy where the United States could only participate in the crimes committed by *contras*, unless it had directed or enforced such crimes. The Court came to the conclusion that the Nicaraguan government failed to prove that the United States "actually exercised such a degree of control in all fields as to justify treating the *contras* as acting on the United States' behalf"; thus, the actions of the *contras* could not be attributed to the United States.

101 *Id.*, at paras. §93-110, at para. §116: The Court concluded that it "…does not consider that the assistance given by the United States to the *contras* warrants the conclusion that these forces are subject to the United States to such an extent that any acts they have committed are imputable to that State. It takes the view that the *contras* remain responsible for their acts, and that the United States is not responsible for the acts of the *contras*, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the *contras*."

102 Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia,* EUR. J. INT'L L. 18 (4), 649-668 (2007), at pp 649-653; *see also* Alison Elizabeth Chase, *Legal Mechanisms of the International Community and the United States Concerning State Sponsorship of Terrorism*, VA. J. INT'L L. 45 (Fall), 41-137 (2004); Davis B. Tyner, *Internationalization of War Crimes Prosecutions: Correcting the International Criminal Tribunal for the Former Yugoslavia's Folly in Tadić,* FLA. J. INT'L L. 18, 843-885 (2006) at 843,850; Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers,* HARV. INT'L. L. J. 51 (1), 113-192 (2010); Stephanie A. Barbour & Zoe A. Salzman, *The Tangled Web: The Right of Self-Defense Against Non-State Actors in the Armed Activities Case,* N.Y.U. J. INT'L L. & POL. 40, 54-106 (2008) at pp 70-79; Dermot Groome, *Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?,* FORDHAM INT'L L.J. 31 (4), 911-989 (2007) at pp. 923, 947-948.

Cassese argued that the effective control test portrays one single 'exacting test' in the circumstances for acts performed by private individuals where a State is involved to perform specific illegal acts in the territory of another State.[103] In such instances specific instructions concerning the performance of each action are required in order to attribute the private action to the instructing State.[104] Cassese further contends that the 'effective control' test is applicable exclusively in situations of single individuals acting on behalf of a State.[105]

Barbour and Salzman point out that "[t]he effective control test is an "all-or-nothing" approach to State responsibility that leaves no room for the more complex forms of State involvement…"[106] Furthermore, Tyner draws attention to the "effective control" as a single standard set out in Nicaragua case, which "was among the first articulations of a test to determine when actions of non-state actors could be attributed to a State."[107]

Two distinct tests in Nicaragua

However there are some exceptions in the case law and literature, which argue that the ICJ in fact established two distinct tests.[108] Some writers argue that the attribution of conducts of de facto organs to a State concerns two distinctive elements in the light of the Nicaragua case. These are the notions of 'complete dependence' on, and 'control' of, the State over the non-state groups. Abass points out that the purpose of the "control test" is to clarify

103 Cassese, *The Nicaragua and Tadić Tests Revisited*, *supra* note 105, at 657.

104 ICJ, *Nicaragua Case*, *supra* note 80, at paras. §118–119, 141.

105 Cassese, *The Nicaragua and Tadić Tests Revisited*, *supra* note 105, at pp. 657, 653: "[B]y 'effective control' the Court intended either (1) the issuance of directions to the *contras* by the US concerning specific operations (indiscriminate killing of civilians, etc.), that is to say, the ordering of those operations by the US, or (2) the enforcement by the US of each specific operation of the *contras*, namely forcefully making the rebels carry out those specific operations."

106 Barbour & Salzman, *supra* note 105, at 74.

107 Tyner, *supra* note 105, at 850.

108 Stephan Talmon, *The Responsibility of Outside Powers for Acts of Secessionist Entities,* I.C.L.Q. 58, 493- 517 (2009), at pp. 493-517; Marko Milanovic, *State Responsibility for Genocide,* Eur. J. Int'l L., 17 (3), 553-604 (2006), at pp. 553–604, 576; Ademola Abass, *Proving State Responsibility for Genocide: The ICJ in Bosnia v. Serbia and the International Commission of Inquiry for Darfur,* Fordham Int'l L.J., 31 (1), 871-894 (2008), at pp. 890-896; Crawford, *State Responsibility: The General Part*, *supra* note 21, at 125. "In truth it created two tests: one of 'complete control' in the context of what would become ARSIWA [the ILC Articles for the International Responsibility of State for International Wrongful Act], Art. 4, and one of 'effective control' for entities under the direction and control of a State in the context of what would become ARSIWA, Art.8"; *see also* dissenting opinion of Judge McDonald in The Prosecutor v Tadić, ICTY Trial Chamber Judgment, 7 May 1997, Case No.IT-94-1-T (ICTY).

whether the non-state entity acts under the instruction of a foreign State.[109] 'Complete dependence', on the other hand, puts forward specification on whether the persons or entities that committed the wrongful acts had such ties with the foreign State that they can be deemed to have been completely dependent on it.[110] In fact, the ICJ employed such terminology when questioning: "whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one hand and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government..."[111]

Talmon argued that there are two distinct tests with regard to the *Nicaragua* case.[112] He points out that this approach was approved one more time in the latter *Genocide* case, before the ICJ.[113] The ICJ formulated the attribution in the *Nicaragua* case, in the opinion of Talmon, by utilizing the intercorrelation between dependency and control. From one side, control is the consequent of dependence, from the other side, "dependence generates the potential for control."[114] "Dependence and control are thus two sides of the same coin."[115]

Talmon discusses that the Court put forward the question of responsibility as a question of 'degree'; in other words, the 'degree of dependency' on the outside power. It is parallel with the question of the outside power's 'degree of potential control' over the non-state entity.[116] According to Talmon, The ICJ distinguished two degrees of control and dependency—strict control based on complete dependence and effective control in cases of partial dependence, in his words, the 'strict control' and 'effective control' tests.[117]

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109 Abass, *supra* note 111, at 892.

110 *Id.,* at 891.

111 ICJ, *Nicaragua Case*, *supra* note 80, at para. §109.

112 Talmon, *supra* note 111, at 497-498. "According to the ICJ, control results from dependence or, looking at it from the other side, dependence creates the potential for control. Dependence and control are thus two sides of the same coin. For the Court, the question of responsibility is a question of 'degree', namely the secessionist entity's 'degree of dependency' on the outside power, which, in turn, is indicative of the outside power's 'degree of potential control' over the secessionist entity, and the 'degree of control' the outside power actually exercises over the secessionist entity. The ICJ distinguishes two degrees of control and dependency—strict control based on complete dependence and effective control in cases of partial dependence—which, in turn, give rise to two control tests which may be referred to as the 'strict control' and 'effective control' tests."

113 *Id.,* at 497.

114 ICJ, *Nicaragua Case*, *supra* note 80, at paras. §106-115; *see also,* ICJ Genocide case, *supra* note 82, paras. §375, §391, §393.

115 Talmon, *supra* note 111, at 497.

116 In the words of the ICJ: "the potential for control inherent in the degree of the *contras'* dependence on aid" ICJ, *Nicaragua Case*, *supra* note 80, at para. §109.

117 Talmon, *supra* note 111, at 498.

Strict control test

Talmon admits that the term 'strict control' can be used interchangeably with 'dependence and control test' and 'agency test'. The strict control test advocates equating the authorities of the non-state entities and the outside power that acts on its behalf. The strict control test is formulated according to the relationship between "so much one of dependence on the one side and control on the other." Consequently, the relevant evidence should indicate the conditions where the outside power exercises such strict control over the non-state entity's authorities.

According to Talmon, in the *Nicaragua* case, the ICJ recognized three requirements of strict control: first of all, there should be a complete dependence on the outside power. Secondly, all activities of the non-state entity should be covered by this complete dependence criterion. Finally, because of the potential for control is inherent in that complete dependence, outside power must have employed a particularly high degree of control. In the instances where these three requirements are fulfilled non-state entities can be equated as a de facto organ of the outside power.[118]

On the other hand, in the effective control test, in regards to the relationship between the intervening State and the non-state actor, the focal point is not the question of dependence anymore. It is a question of control.[119] Talmon submits that the 'effective control' test is a subsidiary test. The ICJ formulated it for the instances where the agency relationship (strict control) cannot be proved.[120] The 'effective control' test is not only a test to decide whether a person or group of persons qualifies as a de facto organ of a State, but also for the determination of the responsibility for specific conduct on a case-by-case basis. In this regard, there is partial dependency of the non-state actor. The relevant conduct to identify is not the one exercised by the non-state actor, but rather the one employed by de jure organs of the intervening State over the non-state actor. Therefore, "the object of control is no longer the secessionist entity but the activities or operations giving rise to the internationally wrongful act."[121]

Effective control test revisited in Genocide Case

In 1993, the Government of the Republic of Bosnia and Herzegovina filed an application initiating proceedings against the Federal Republic of Yugoslavia

[118] *Id.,* at 498.
[119] *Id.,* at 500.
[120] *Id.,* at 500.
[121] *Id.,* at 502.

(with effect from 3 June 2006, the Republic of Serbia) with respect to a dispute concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide 1948.[122] The case centered on atrocities that took place during the time of the disintegration of the Socialist Federal Republic of Yugoslavia (FRY) in the early 1990s.[123]

After deciding that the massacres committed in the Srebrenica constituted the crime of genocide,[124] the Court examined whether such massacres gave rise to the international responsibility of the Respondent State, Serbia.[125] At

[122] The Court was asked to examine the facts alleged by the Applicant State, whether the alleged atrocities occurred within the scope of Article II of the Genocide Convention. In the ICJ *Genocide* case, *supra* note 82, the Court dealt with, for the very first time, State responsibility under the Genocide Convention. *See generally* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. As of July 18, 2007, 140 States were parties to the Convention; ICJ Genocide Case, *supra* note 82. After the breakdown of FRY, independent sovereign States had emerged. These are Serbia and Montenegro, the Republic of Bosnia and Herzegovina, the Republika Srpska Krajina Crotia, and the Republic of the Serb People of Bosnia and Herzegovina, later to be called the Republika Srpska. The Republika Srpska did not enjoy any international recognition as a sovereign State. However, it had de facto control of substantial territory, and the loyalty of a large numbers of Bosnian Serbs.

[123] For detailed historical analysis *see* Richard Holbrooke, To End a War (1998); Amantha Power, A Problem from Hell: America and the Age of Genocide (2002); Roger Carole Poirier, The Breakup of Yugoslavia and the War in Bosnia (1998); Commission of Experts, *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780,* (1992) U.N. Doc. S/1994/674, (27 May 1994). ICJ, Genocide Case, *supra* note 82, at para. §237 When the Bosnian people declared independence, Bosnian Serb nationalists, who were against the Bosnian independence, declared their own separate Bosnian Serb State (the Republika Srpska- VRS) within the borders of old Bosnia. FRY supported the VRS by dispatching troops and other equipment belonging to the now Serb-dominated Yugoslav National Army (the JNA) to Bosnia. Although the soldiers changed their badges, their army vehicles continued to carry signs of the label "JNA." The case was concerned with the existence of close ties between the Respondent State Serbia and the authorities of the Republika Srpska, of a political, military and financial nature. It created an administrative correlation and control of the army of the Republika Srpska (VRS).

[124] ICJ, *Genocide Case*, *supra* note 82, at para. §297. "[T]he Court concludes that the acts committed at Srebrenica falling within Article II (a) and (b) of the Convention were committed with the specific intent to destroy in part the group of the Muslims of Bosnia and Herzegovina as such; and accordingly that these were acts of genocide, committed by members of the VRS in and around Srebrenica from about 13 July 1995."

[125] *Id.*, at para. §379.The court investigated on which basis, the Respondent State's international responsibility can be subjected to the connection with the massacres committed in the Srebrenica area. The ICJ took three steps for further analysis because of their strong interconnection. First, in regards with the law of State responsibility, the question is whether the acts of persons who committed the genocide, could be attributed to the respondent State. Second, the Court examined the conditions to discover whether the material scope of Article III of the Genocide Convention, including the acts amount to be punishable, were perpetrated by persons whose conduct is attributable to the respondent State. The final one is the inquiry of the relevant circumstances where the respondent State was obliged to prevent and punish genocide according to the Article I of

this point, the relationship between FRY (now Serbia) and the VRS became the center of the case.[126] Concerning the relationship between FRY and VRS, the Court recalled that the FRY made "considerable military and financial support available to the Republika Srpska." However, regardless of this material link, the Republika Srpska and the VRS were not de jure organs of the FRY as designated under the FRY's internal law.[127] Thus, the Court had recourse to the international law of attribution to establish whether there was a de facto relationship.[128]

The court utilized the ILC articles on State Responsibility to give grounds for its reasoning.[129] The Article 8 of the ILC Articles on State Responsibility[130] is the main reference for the Court alongside with the jurisprudence of the Nicaragua case. The Court quoted from the Nicaragua judgment that the responsibility of the Respondent could arise if it were proved that it had itself "directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the Applicant State."[131] The Court admitted that there was sufficient evidence that the FRY was providing substantial support, inter alia, financial support, to the Republika Srpska. Despite this fact, payment of salaries and other benefits to some officers of the VRS, did not automatically make them organs of the FRY.[132] The court emphasized that the chain of command and those officers subordinated to the political leadership of the Republika Srpska kept partial independence.[133]

The Court referred to the previous judgment in the *Nicaragua* case by quoting the famous paragraph 109 of that judgment.[134]The Court reached the conclusion in the negative that neither the Republika Srpska nor the VRS

the Genocide Convention.

126 *Id.*, at paras. §385-412. The court dealt with this inquiry in between these paragraphs by dividing into two subsections; "The question of attribution of the Srebrenica genocide to the Respondent on the basis of the conduct of its organs and on the other hand, the question of attribution of the Srebrenica genocide to the Respondent on the basis of direction or control."

127 *Id.,* at para. §385.

128 *Id.,* at para. §396.

129 *Id.,* at para. §406.

130 Article 8 of the ILC Articles on State Responsibility, *supra* note 57, conduct directed or controlled by a State "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

131 ICJ, *Genocide case*, *supra* note 82, at para. §399.

132 *Id.*, at para. §386

133 *Id.* at para. §388. They exercised elements of the public authority of the Republika Srpska. The court came up with the conclusion that those officers must be taken to have received their orders from the Republika Srpska or the VRS, not from the FRY.

134 ICJ *Nicaragua case*, *supra* note 80, at para. §109.

could be regarded as 'mere instruments' through which the FRY was acting.[135] Furthermore, Republika Srpska or the VRS were partially independent and the FRY did not have a real autonomy on them. And the former had a real "qualified, but real, margin of independence." [136] Consequently, the Bosnian Serbs' political and military organizations cannot be equated with organs of the FRY.[137]

Scholarly Critiques

The ICJ's endorsement of the Nicaragua test[138] in the Genocide Case has triggered significant scholarly critique.[139] Plücken and Griebel described the ICJ's use of Nicaragua test as "a misapplication of established rules which is unlikely to find much support" and as "a legal mistake made by the Court, one which it might be difficult to correct in the future".[140] Shackelford argued that the "Tadić test is better-suited to deal with allegations of genocide than restrictive Nicaragua test".[141]

On the other had some writers contended differently arguing that the Nicaragua test is the most appropriate test. For example, Rajkovic argued that more expansive attribution test would be "malleable to . . . extra-legal agendas" and would open door to "politicized jurisprudence," and that Court's adherence to Nicaragua sent "a forceful message . . . that international courts

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135 *Id.,* at para. §394.

136 *Id.*, The Court further argued that effective control or the instructions given should not be in overall action, rather it should be in accordance with each operation and the alleged violations.

137 *Id.,* at paras. §394, §395. In the view of the Court, there was some evidence, demonstrating that differences over strategic options emerged between Yugoslavian authorities and Bosnian Serb leaders at that time. "The Court therefore finds that the acts of genocide at Srebrenica cannot be attributed to the Respondent as having been committed by its organs or by persons or entities wholly dependent upon it, and thus do not on this basis entail the Respondent's international responsibility."

138 ICJ, *Genocide Case*, *supra* note 82, at para. §403. The ICJ rejected the overall control in two grounds; First, the ICJ argued that ICTY, referring to inquiries of State responsibility, " addressed an issue which was not indispensable for the exercise of its jurisdiction"… "issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it". Secondly, *id.,* at paras. §405,406, the ICJ found the 'overall control' test 'unpersuasive.' The ICJ argued that "logic does not require the same test to be adopted in resolving the two issues, which are very different in nature" and the 'overall control' test overly broadens the scope of State responsibility.

139 *See e.g.* Cassese, *The Nicaragua and Tadić Tests Revisited*, *supra* note 105; Abass, *supra* note 111.

140 Plücken & Joern Griebel, *supra* note 75, at 621.

141 Shackelford, *supra* note 3, at 24.

should not be used to advance extra-legal agendas."[142] Talmon argued that the ICJ in the two leading cases on the attribution problem, the Nicaraguan case and Bosnian *Genocide* case, were in fact so identical that the latter casted some further justifications on the ruling in the former.[143]

The Court's conclusion

When the Court applied the Nicaragua test to the conflict in the Genocide Case, the Court found that the VRS could not be categorized as a de facto organ of the FRY. In the opinion of the Court, the relationship did not consist of "complete dependence" and VRS was not "merely [an] instrument" of the FRY.[144]

3.4.2. ICTY and "overall control" test

The International Criminal Tribunal for former Yugoslavia (hereinafter ICTY)[145] was looking for an answer for establishing whether or not the armed conflict in the Former Yugoslavia (FRY) region is to be considered as international armed conflict. This was necessary to identify the acts perpetrated by Dusko Tadić [146] after May 19, 1992 whether entailed crimes against "protected persons."[147] The Tadić Chambers questioned the relationship between the

[142] Nikolas Rajkovic, *On 'Bad Law' and 'Good Politics': The Politics of the ICJ Genocide Case and Its Interpretation,* Leiden J. Int'l L. 21, 885-910 (2008), at pp 885, 896, 900.

[143] *Talmon* at 111. According to Talmon, the *Nicaragua* judgment established two distinct tests concerning the problem of attribution, the 'strict control test' and the 'effective control test' respectively.

[144] ICJ, *Genocide Case*, *supra* note 82, at para. §392.

[145] U.N. S.C. Resl. 827, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (May 25, 1993) [hereinafter ICTY Statute] Article 2: Grave breaches of the Geneva Conventions of 1949.

[146] *Id.*, Dusko Tadić was indicted, a citizen of the former Yugoslavia, of Serb ethnic descent, and a resident of the Republic of Bosnia and Herzegovina at the time of the alleged crimes. "It is the first determination of individual guilt or innocence in connection with serious violations of international humanitarian law by a truly international tribunal." The Indictment by the Prosecutor against Dusko Tadić, charging him with a total of 132 counts involving grave breaches of the Geneva Conventions, violations of the laws or customs of war, and crimes against humanity. The accused was charged with individual counts of persecution, inhuman treatment, cruel treatment, rape, willful killing, murder, torture, willfully causing great suffering or serious injury to body and health, and inhumane acts alleged to have been committed at the Omarska, Keraterm and Trnopolje camps and at other locations in Opstina Prijedor in the Republic of Bosnia and Herzegovina.

[147] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Article 4 "[P]ersons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they

VRS and the Federal Republic of Yugoslavia (FRY). The appeal case came after the decision given by the Tadić Trial Chamber on May 1997.[148]

The main inquiry of the Appeal Court was the legal criteria for establishing "when, in an armed conflict, which is prima facie internal, private persons may be regarded as acting on behalf of a foreign power, thereby rendering the conflict into international." [149] The Court referred to the general international law in order to reach an answer to this problem.[150]

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are not nationals." If the FRY had "control" over the VRS (Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska) during the time in question, then the victims would qualify as "protected persons" under the fourth Geneva Convention (In the purview of Article 4 relative to the Protection of Civilian Persons in Time of War, being "in the hands of an occupying power of which they were not nationals."). If it is proven that the State in question is responsible for those acts it necessitates consideration that the State was a party to a conflict deemed to be an international armed conflict. If this categorization fails, Tadić's victims would not be deemed protected persons, it would automatically imply the existence of a non-international armed conflict. Grave breaches of the Geneva Conventions can only possibly happen in the context of an international armed conflict. The Trial Chamber acquitted Tadić on the ground that the victims referred to in the indictment had not been proved to be "protected persons" under the applicable provisions of the Fourth Geneva Convention. Therefore, almost half of the charges against Tadić were considered inapplicable and were terminated by the Trial Chamber- then overruled by the Appeal Chamber.

[148] ICTY Appeal Chamber, *Tadić Judgment*, *supra* note 46, at para. §68. This was the first time that the Appeals Chamber decided on an appeal from a final judgment of a Trial Chamber.

[149] *Id.*, at para. §81. The Appeals Chamber phrased the question as follows: "(i) On what legal conditions armed forces fighting in a prima facie internal armed conflict may be regarded as acting on behalf of a foreign Power and (ii) whether in the instant case the factual conditions which are required by law were satisfied."

[150] *Id.*, at para. §97. "Indeed, the legal consequences of the characterization of the conflict as either internal or international are extremely important. Should the conflict eventually be classified as international, it would inter alia follow that a foreign State may in certain circumstances be held responsible for violations of international law perpetrated by the armed groups acting on its behalf." The Third Geneva Convention of 1949 governs the lawful combatants. According to the Article 4 A (1, 2) of Geneva Convention of 1949, militias or paramilitary groups may be regarded as legitimate combatants if they form "part of the armed forces of a Party to the conflict" or "belong to a Party to the conflict." What logic suggests, "if, in an armed conflict, paramilitary units 'belong' to a State other than the one against which they are fighting, the conflict is international and therefore serious violations of the Geneva Conventions may be classified as grave breaches. The Appeals Chamber discussed how to define the notion "belonging to a Party to the conflict." It is obvious that Article 4 A (1, 2) regulates how to qualify irregulars as lawful combatants. Though the Court admits that belonging to a Party requires 'a relationship of dependence and allegiance' of those irregulars to the Party to the conflict, such interpretation also indirectly concerns a test of control. The Appeal Chamber was convinced that the notion of control is necessary to consider what makes an individual or group of individuals, a de facto organ of a foreign State. However, the Court emphasized that what renders an internal armed conflict into an international one, relies on the specification of what degree

In the view of the Appeals Chamber, the notion of control is the relevant 'ingredient' of the law, where there is the need for international humanitarian law to be supplemented by general international law. The Court found it relevant to examine the notion of control by a State over individuals, governed in general international rules on State responsibility.[151] This is because "international humanitarian law does not contain any criteria unique to this body of law for establishing when a group of individuals may be regarded as being under the control of a State, that is, as acting as de facto State officials."[152]

After being convinced that the attribution principles laid down in the law of State responsibility is applicable for the case concerned, the Court examined the very early established test of control, namely 'effective control' by the International Court of Justice (ICJ). The Appeals Chamber read the Nicaragua case as follow:

> "[The ICJ] essentially set out two tests of State responsibility: (i) responsibility arising out of unlawful acts of State officials; and (ii) responsibility generated by acts performed by private individuals acting as de facto State organs. For State responsibility to arise under (ii), the Court required that private individuals not only be paid or financed by a State, and their action be coordinated or supervised by this State, but also that the State should issue specific instructions concerning the commission of the unlawful acts in question..., the test was not met as far as the *contras* were concerned: in their case no specific instructions had been issued by the United States concerning the violations of international humanitarian law which they had allegedly perpetrated."[153]

However, the Appeals Chamber found the 'effective control' test unpersuasive. According to the Court, the 'effective control' test is not convincing based on two fundamental reasons. First, the Nicaragua test appears "not to be compatible with the logic of the law of State responsibility."[154] Second, the Nicaragua test seems inconsistent with judicial and State practice.[155]

The Nicaragua test, in the Court's view, appears to be incompatible in accordance with the law of State Responsibility because "the principles of international law concerning the attribution to States of acts performed by

of authority or control must be employed by a foreign State over armed forces fighting on its behalf.

151 *Id.*, at para. §98.

152 *Id.*

153 *Id.*, at para. §114.

154 *Id.*, at paras. §116-123.

155 *Id.*, at para. §124-145.

private individuals are not based on rigid and uniform criteria."[156]The acts of private individuals are attributable to States in the instances where the State exercises control over them. Although the Court argued that the effective control test requires a high threshold for the test of control, it admits that "the degree of control may vary according to the factual circumstances of each case."[157]

In the situations where a private individual engages some specific illegal acts, it requires to show that the controlling State issued specific instructions for that particular act contrary to international law, which places the individual acting in a de facto capacity. In this respect "a generic authority over the individual would not be sufficient to engage the international responsibility of the State."[158]

On the other hand, the Court took the view that an organized group needs a further evaluation. In this respect, the "overall control" test newly established by the Chamber, in its view, provides a better understanding equating the organized individuals to the State organ.[159]

The Court highlighted that:

> "[o]ne should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State."[160]

According to the Court, the requisite of control in this case is independent from the requirement of instruction, which is necessary for individuals. Since

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156 *Id.*, at para. §117.

157 *Id.*

158 *Id.*, at paras. §118, §119. The Appeals Chamber pointed out a particular situations where the individuals acts ultra vires. States may assign a private individual with the specific task of performing lawful actions on its behalf. However, if that individual acts beyond the lawful task and breach the international law, in this case, States may also maintain responsibility on this account.

159 *Id.*, at para. §121.

160 *Id.*, at para. §120.

the characteristics of an organized group require a broader perspective in which "[the law of] State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to individuals or groups of individuals must answer for their actions."[161]

Then the Appeals Chamber turns to the argument of which the Nicaragua test is at variance with judicial and State practice. The Court argued that the "effective control" test is not the exclusive test and the ICJ failed to maintain convincing evidence that the test is well-suited with international judicial and State practice.[162] In the light of international case law and state practice, the Appeals Chamber looked for an answer for "what measure of State control does international law require for organized military groups?"[163]

In the view of the Appeals Chamber, financial support or even military assistance by a State to an armed group is not sufficient to attribute their acts to that State.[164] "It must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group."[165] Given that, the issuance of instruction for the operation of particular acts contrary to international law, is not necessary for the purposes of attribution.[166]

Finally, the Court emphasized that:

> "[The requirement for armed groups], does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) has a role in organizing, coordinating or planning the military actions of the military group, in addition to

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161 *Id.*, at para. §121, 122. "In the case of an organised group, the group normally engages in a series of activities. If it is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, whether or not each of them was specifically imposed, requested or directed by the State."

162 *Id.*, at para. §124.

163 *Id.*, at para. §130.

164 *Id.*, at para. §130.

165 *Id.,* at para. §131.

166 *Id.,* at para. §132.

> financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts."[167]

The Tadić Appeals Chamber Judgment[168] triggered one more time the academic debate regarding the weakening of legal boundaries between two types of armed conflict. The Tadić appeal judgment was the first judicial decision that acknowledged the fundamental change of modern armed conflict regarding with the increasing of internal armed conflicts. The judgment deeply argued the certain distinction and questioned whether the classification was still maintainable where the types of armed conflicts began to multiply.[169] The Appeals Chamber concluded that State practice weakened the traditional idea of rigorous interpretation of types of armed conflicts.[170]

According to Cassese, the Chamber did not propound a rigid expression of the required degree of control for any relationship. It could alter according to the circumstances ambient to each relationship. The Chamber relied on judicial and State practice when associating two degrees of control. First, regarding the relationship between private single individuals and a State, acting on behalf of a State, only the acts performed under the instruction of the State can be attributed to that State. In these instances, each action should be treated individually and specific instruction is the fundamental requirement to attribute those actions to a State. This was how the 'effective control' test was submitted by the ICJ in Nicaragua.[171]

However, secondly, there is another degree of control over actions by organized and hierarchically structured groups. In this situation, the Appeals Chamber set out another control test in favor of a flexible approach. There is no need for specific instruction for each individual operation. Such 'overall control' includes not only "in equipping, financing or training and providing operational support to the group, but also in coordinating or helping in the

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[167] *Id.,* at paras. §137, §138. The Court admited that the ICJ in Nicaragua case had to be carefully examined because "if the controlling State is not the territorial State where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions."

[168] *Id.*

[169] Emily Crawford, *Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts,* Leiden J. Int'l L. 20, 441-465 (2007), at 451.

[170] ICTY Appeal Chamber, *Tadić Judgment*, *supra* note 46, at para. §97.

[171] Cassese, *The Nicaragua and Tadić Tests Revisited, supra* note 105*,* at 657.

general planning of its military or paramilitary activity."[172]

In the overall control test, because of its control of a global nature, there is not any requirement for instruction or direction for each action where there is a hierarchically organized group. Cassese argued that the Appeals Chamber did not preclude the 'effective control' test but favored both, which are admissible on different substance and orbit corresponding with judicial and State practice.[173]

3.4.3. Attribution before the European Court of Human Rights

The European Court of Human Rights (ECtHR) has jurisdiction to investigate purported breaches of the rights presented in the European Convention on Human Rights (ECHR). From the objective of the convention, in order to establish jurisdiction the conduct at stake should be imputable to a High Contracting Party.[174] The case law of ECtHR, especially the cases of Loizidou v. Turkey[175], Behrami v. France[176], and Bankovic v. Belgium[177] provides insights for such inquiry.[178]

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172 ICTY Appeal Chamber, *Tadić Judgment*, *supra* note 46, paras §131, §137.

173 Cassese, *The Nicaragua and Tadić Tests Revisited, supra* note 105, at 657.

174 The Court has developed "extraterritorial jurisdiction" over persons within the territory that a High Contracting Party exercises legal space (espace juridique) within the scope of Article 1 of the ECHR. For a detailed discussion on the approach taken by ECtHR see Christine Byron, *Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies,* Va. J. Int'l L. 47, 839-896 (2007); Solomou and Others v Turkey, Application No 36832/97, Judgment of 24 Jun 2008 *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-87144, at para 43. "The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention" For a detailed discussion about the principles used by the ECtHR and corresponding elements set forth in the work of the International Law Commission (ILC) on the topic of international responsibility and relevant judgments of the International Court of Justice (ICJ), *see* Maarten Den Heijer, *Issues of Shared Responsibility before the European Court of Human Rights,* Amsterdam Center for International Law Research Paper, Shares Series 4, (January 26, 2012) *available at* http://www.sharesproject.nl/wp-content/uploads/2012/01/Den-Heijer-Maarten-Issues-of-Shared-Responsibility-before-the-European-Court-of-Human-Rights-ACIL-2012-041.pdf (visited March, 2017). *See* also on extraterritorial application of ECHR: Marko Milanovic, Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy (2011); Michal Gondek, *Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?* Nethl. Int'l. L. Rev. 52, 349-387 (2005).

175 ECHR Loizidou v Turkey, *supra* note 80.

176 ECHR Behrami and Saramati v France and Others, *supra* note 87.

177 ECHR Bankovic and Others v. Belgium and 16 Other Contracting States, Application No. 52207/99, Admissibility Decision of 12 December 2001, 41 ILM (2002).

178 Some scholars argue that the concepts of jurisdiction (the question of admissibility) and State responsibility (the question of merits) should be treated differently. See Gondek, supra note 177, at 368, cited from fn. 160.

Effective-Overall Control Test

Loizidou v. Turkey (1996)

In the case of Loizidou v Turkey[179], the Court dealt with the facts that a large number of Turkish troops in northern Cyprus were launched on a territory outside of its own designated sovereign area of land. The holding power in the territory was the Turkish Republic of Northern Cyprus (TRNC). However, the Court did not classify the TRNC as a de facto organ of Turkey. Rather, in the words of the Court, it is classified as 'subordinate local administration.'[180]

The Court had to determine "whether Turkey was responsible for the continuous denial to the applicant of access to her property in Northern Cyprus. The respondent State, Turkey, denied that the Court had jurisdiction, on the grounds that the act complained of was not committed by one of its authorities but, rather, was attributable to the authorities of the Turkish Republic of Northern Cyprus (TRNC)."[181] Then the question was whether the conduct commissioned by the authorities of TRNC, consisting of the breach of the ECHR, was attributable to Turkey, which requires the responsibility of Turkey under the auspices of the ECHR.[182]

While the Court, seized the issue of jurisdiction, the way it handled the attribution problem was by resorting to the concept of control in order to find an answer to whether Turkey was responsible for the acts of the TRNC authorities. The issue of imputability or attribution was discussed scholarly in depth as being whether the court's findings was in conformity with the relevant principles of international law governing State responsibility.[183]

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179 ECHR Loizidou v Turkey, *supra* note 80, For summary of the case, *see* Bernard H. Oxman & Beate Rudolf, *Loizidou v. Turkey case report,* Am. J. Int'l L. 91 (3), 493-517 (1997); *see also* De Frouville, *supra* note 68 at 269; In this case, the Greek Cypriot applicant complained of a breach of her right for the respect for her possessions as guaranteed under Article I of the Protocol I to the European Convention, following the occupation and persistent control of the Northern part of Cyprus by Turkish armed forces that had prevented several attempts to access her home. The Turkish government alleged that the acts raised by the applicant were not within its competence but in that of the 'Turkish Republic of Northern Cyprus' (TRNC), created in 1983.

180 Loizidou v Turkey, *supra* note 80, at para. §62: "Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful- it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration."

181 *Id.*

182 *Id..* at para. §56.

183 *See* a detailed discussion at: Cassese, *The Nicaragua and Tadić Tests Revisited*, *supra* note 105, at pp. 649-653; Talmon, *supra* note 111, at pp. 493-517; For the discussions on

Some scholars argued that the *Loizidou* case did not deal with attribution of responsibility, but rather with the question of State jurisdiction.[184] Cassese, by contrast, argued that while the Court looked for whether the State's complaint had jurisdiction over the alleged victims parallel with the question to which State or entity the violations were to be attributed to. This inquiry stipulates which State or entity submitted responsibility for those commissioned violations.[185] That being so, the Court concluded that the restrictions on the right to property complained of by the applicant were attributable to Turkey.[186]

> "Having effective overall control over northern Cyprus, [Turkey's] responsibility cannot be confined to the act so fits own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support"[187]

The Court utilized the notion of 'effective-overall control' in a sense aiming to determine the literal power of Turkey outside its national frontiers. It reflects a certain control over a territory and a population that does not belong to it. However, the Court used the effective-overall control test to define to what extent the relationship between Turkey and TRNC adequately fits within the context of the convention.[188]

One of the difficulties appears while the Court was seizing a standard for attribution, the court did not resort to the findings of the International Court of Justice (ICJ) and International Criminal Tribunal for the Former Yugoslavia

effective control exercised by Turkey over the territory of Northern Cyprus, attribution of human rights violations *see* Oxman & Rudolf, *supra* note 182, at pp. 532-537; see also Frank Hoffmeister, *Loizidou v. Turkey Case Report,* Am. J. Int'l L. 96 (2), 445-452. (2002), at pp. 445-452; Andre De Hoogh, *Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadić Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia,* Brit. Y.B. Int'l. L. 76, 255-292 (2011), at pp. 255-292; For a stiff criticism on supposed attribution standard see Milanovic, Extraterritorial Application of Human Rights Treaties, *supra* note 177, at pp. 41-52; Milanovic, Marko Milanovic, *State Responsibility for Acts of Non-State Actors: A Comment on Griebel and Plücken,* Leiden J. Int'l L. 22 (2), 307-324 (2009), at pp 309–314.

184 Milanovic, *State Responsibility for Genocide*, *supra* note 111, at 585–587.

185 Cassese, *The Nicaragua and Tadić Tests Revisited*, *supra* note 105, at 658.

186 Loizidou v. Turkey, *supra* note 80, at para. §56. This approach was also upheld in the case of Cyprus v. Turkey A.pp.No. 25781/94. European Court of Human Rights, Grand Chamber, May10, 2001 available at http://www.echr.coe.int/Eng/Judgments.htm, at para §77; ECHR Bankovic and Others, *supra* note 180, at para. §70; Solomou and Others v Turkey, *supra* note 177, at para. §47.

187 Loizidou v. Turkey, *supra* note 80; *see* also, Frank Hoffmeister, *Cyprus v. Turkey,* Am. J. Int'l L. Vol. 96 (2) (2002), at 446.

188 De Frouville, *supra* note 68, at 269.

(ICTY). Rather the Court advanced its own relevant test by pointing out two distinguishing elements to form its own criteria. First of all, the court appears to read the course of identifying the territorial entity as being a 'subordinate local administration'[189] by putting leverage on the organizational structure of the entity. Secondly, the entity in question was under the 'effective authority' or to a certain extent under the 'decisive influence' of outside power.[190]

The control over TRNC was defined as being effectively authoritative or at least having a resolute impact on the decision making mechanisms of TRNC. Finally, despite the entity maintaining a certain autonomy, it sustains its existence by the advantage of support, by means of military, financial and political, provided by the outside power.[191]

The picture delineated by the Court simply excluded the mandate on the commission of the conduct allegedly infringing on the human rights provisions. Rather the Court emphasized the authority on an organizational body which had an indirect influence on the conduct in question. The court did not point out any direction or instruction from the external State on the employment of the act of breach.

> "…It is not necessary to determine whether…Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC". Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention (art. 1). Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus..."[192]

Concerning the question of attribution, the Court held that effective control over an area outside a State's national territory employed directly or through a local authority requires that State's responsibility. The court did

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189 Loizidou v. Turkey case, *supra* note 80, at paras. §52, §56.

190 *Id.*; *see also* Talmon, *supra* note 111, at 509.

191 Talmon *, id.,* at 510.

192 Loizidou v. Turkey, *supra* note 80, at para. §56. The main factor made the Court to anticipate such a strong influence of external power was simply the presence of the Turkish military on the territory of the TRNC. The Court was not concerned about the legality of such military action. Rather, the Court established the effective overall control standard and attributed the conduct of such an entity to Turkey in virtue of the presence of large numbers of troops engaged in 'active duties' in the territory of TRNC.

not find it necessary to be evidenced whether Turkey was in actual control of the actions of the "TRNC" authorities.[193] The Court concluded such control from the large number of Turkish troops stationed in Northern Cyprus. This "obvious" control necessitated Turkey's responsibility for the policies and actions of the "TRNC."[194]

Bankovic v Belgium & 16 Others case (2001)

In the Bankovic v Belgium & 16 Others case, The ECHR had to deal with the problem of jurisdiction as it relates to acts of States within their jurisdiction.[195] Such jurisdiction also concerns the acts of State performed abroad by having extraterritorial public authority.[196] *Bankovic* case was about an application brought in respect of those injured by the bombing of a radio station in Belgrade (a city not located within the territory of a contracting party to the European Convention of Human Rights [ECHR]) by the air forces of a number of contracting parties to the convention.[197]

In the Bankovic case, although the court investigated 'the legal space of the European Convention,'[198]the law of State responsibility has influenced the reach of human rights obligations.[199]Bankovic case was the first case before

[193] The test was evidently submitted to a territorial scope. However, the elements allocated above demonstrates that the Court advanced the test beyond a territorial consideration by putting leverage on the issues of 'decisive influence' and 'strong support' suffice a control over the local entity in question.

[194] Oxman & Rudolf, *supra* note 182, at 534. This approach was also endorsed in the judgment of the Solomou v Turkey case before the ECtHR, referring the Turkish-Cypriot forces as 'agents' of Turkey. Unfortunately, the effective-overall control test does not provide any clear answer for control over the operational activities of the local entity and the level of participation from the external State. The ECtHR promoted to make reference to control over the area rather than directly to control over the officials that had breached Ms. Loizidou's rights. The International Criminal Tribunal for the Former Yugoslavia (ICTY) referred to the Loizidou case in the Tadić case, claiming that the effective control test established by the ICJ was not endorsed by judicial and State practice.

[195] ECHR, Bankovic and Others v. Belgium, *supra* note 180.

[196] Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench,* I.C.L.Q. 55, 791-804. (2006), at 795.

[197] ECHR, Bankovic v. Belgium & others, *supra* note 180, at paras. §9-11.

[198] Byron, Blurring of the Boundaries, *supra* note 177, at 877; *see* also Daniel Bethlehem, Sandesh Sivakumaran, Noam Lubell, Philip Leach, Elizabeth Wilmshurst, *Classification of Conflicts: The Way Forward, supra* note 4: "[T]he jurisdictional competence of the ECHR is primarily territorial, with certain acts performed or producing effects outside a State's territory exceptionally giving rise to the exercise of jurisdiction extraterritorially."

[199] U.N. 58th Sess., International Law Commission, by Martti Koskenniemi, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law,* U.N. Doc. A/CN.4/L.682 (April 13, 2006) (hereinafter ILC Report on the Fragmentation 2006), at para. 469; ECHR Bankovic

the Court that it had dealt with the issue of responsibility under the ECHR for actions carried out by the armed forces of Contracting States while taking part in a United Nations (UN) mandated peace operation.[200]

In relation to the exercising effective control over an area the following of paragraph of the Bankovic decision is worth to mention.[201] Although the court admits that its case-law recognizes the extra-territorial jurisdiction of a contracting State is exceptional, it states:

> "[W]hen the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government."[202]

Ultimate Authority and Control

Behrami & Saramati v. France & others (2007)

In the case of Behrami & Saramati v. France & others, before the European Court of Human Rights (ECtHR)[203], the Court was asked to decide whether actions committed by the NATO Kosovo Force (KFOR) and the United Nations Mission in Kosovo (UNMIK) constituted violations of the Troop Contributing Nations' (TCN) obligations under the European Convention on Human Rights (ECHR).[204] The inquiry held by the Court is the problem of who exercises

v. Belgium & others, *supra* note 180, at paras. §59-60.

[200] Kjetil Mujezinovic Larsen, *Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control Test',* Eur. J. Int'l L. 19, 509–522 (2008), at 510. "[T]his was the first case before any international court or tribunal which concerned accountability for human rights violations in a territory under UN administration."

[201] ECHR, Bankovic v. Belgium & others, *supra* note 180, at paras. §70, §71. The court, in Bankovic case, set forth two situations where a State can be regarded as exercising jurisdiction extraterritorially for the purposes of Article 1 of the ECHR. The first situation covers the instance when a State exercises effective control over an area, which also extends the legal space of its jurisdiction. Second, in the instance where an individual is under the authority and control of State organs, the State exercise extraterritorial jurisdiction.

[202] *Id.,* at paras. §71.

[203] ECHR, Behrami and Saramati v France and Others, *supra* note 87; *see generally,* Larsen, *supra* note 203; Aurel Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases,* HRLR 8:1, 151-170 (2008); Caitlin A. Bell, *Reassessing Multiple Attribution: The International Law Commission and the Behrami and Saramati Decisions,* N.Y.U. J. Int'l L. & Pol. Vol 45, 501 (2010); Marko Milanovic & Tatjana Papic, *As Bad As It Gets: The European Court of Human Right's Behrami and Saramati Decision and General International Law,* I.C.L.Q. 58, 267–286 (2009).

[204] ECHR, Behrami and Saramati v France and Others, *supra* note 87. For a detailed discussion on the international organizations and attribution *see generally,* U.N. International Law

elements of control over the organ or agents when a State contributes troops at the placement of United Nations(UN) forces for peacekeeping.[205]

In the case, the Court dealt with whether the acts of the "international security presence' (or KFOR) were 'in principle' attributable to the respondent State or the UN.[206] The Court found that the acts of KFOR were attributable to the UN under tenet of 'ultimate authority and control' that the Security Council had maintained over KFOR.[207]

The Court held that "the UN [Security Council] retained ultimate authority and control and that effective command of the relevant operational matters was retained by NATO."[208] The Court finally concluded "KFOR was exercising lawfully delegated Chapter VII powers of the UNSC so that the impugned action was, in principle, "attributable" to the UN."[209]

However, the UN has a legal personality separate from that of its member States and that that organization is not a Contracting Party to the European

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Commission. 63rd Sess., *Responsibility of International Organizations. Reports of the Working Group or Sub-Committee and the Special Rapporteur,* U.N. Doc. A/CN.4/L.778 *available at* http://legal.un.org/ilc/guide/9_11.htm (visited March, 2017); Kristen E. Boon, *New Directions in Responsibility: Assessing the International Law Commission's Draft Articles on the Responsibility of International Organizations,* Yale J. Int'l L. Vol. 37 (Spring, 2011); Cedric Ryngaert & Holly Buchanan, *Member State Responsibility for the Acts of International Organizations,* Utrecht L. Rev.Vol. 7, 131-146 (2011).

[205] ECHR, Behrami and Saramati v France and Others, *supra* note 87, at para. §141; Larsen, *supra* note 203, at 512 "The situation during peace operations is, however, ordinarily that military personnel do not act as agents of their home State, but that they are rather placed at the disposal of the UN or another international organization (e.g., NATO). This complicates the legal picture."

[206] KFOR was deployed in Kosovo according to the Security Council Resolution 1244 (1999) *available at* http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf

[207] ECHR, Behrami and Saramati v France and Others, *supra* note 87, at para. §133, §135. "The UNSC was to retain ultimate authority and control over the security mission and it delegated to NATO (in consultation with non-NATO member States) the power to establish, as well as the operational command of, the international presence, KFOR. NATO fulfilled its command mission via a chain of command."; In another case, Dušan BERIĆ and Others against Bosnia and Herzegovina, Application nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05, (16 October 2007), ECHR Admissibility Decision, *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83109#{"itemid":["001-83109"]}, In this judgment, the Court held that the Office of the High Representative (OHR) in Bosnia-Herzegovina were in principle attributable to the UN since the authority exercised by the OHR over this territory had been delegated by the UN Security Council. *See also* Klein, *supra* note 147, at 303.

[208] *Id.,* ECHR, Behrami and Saramati v France and Others, at para §140.

[209] *Id.,* at para §141.

Human Rights Convention.[210]The Court, in fact, examined whether it had jurisdiction for the alleged infringements. Then the control over the military contingent did matter, because the entity controlling those persons had to be a party to the European Convention on Human Rights in order to raise the responsibility before the convention.[211]

The Court applied the ultimate authority and control test to establish whether the UN or France was responsible for the conduct held during the operations. The Court attributed all acts and omissions relating to the operations in Kosovo entirely to the UN, and not its member States.[212] It did not consider the possibility of the dual or multiple attribution of KFOR's conduct to the UN as well as to NATO and its contributing States (TNCs).[213]

The court found that the alleged human rights violations were attributable to the United Nations and not to the individual TCNs, and therefore the Court was not competent *ratione personae* to examine the relevant actions.[214] Finally, the Court concluded that the UN had an operational command that was evidence for ultimate authority and control over the military contingents during the operations, so that it did not have jurisdiction. [215]

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210 *Id.,* at para §144.

211 *Id.,* at paras. §133, §*144:* The Court relied on the 1244 Security Council Resolution. The relevant power was a delegable power according to the Chapter VII, which allows the UNSC to delegate to 'Member States and relevant international organizations.' The Security Council resolution "put sufficiently defined limits on the delegation by fixing the mandate with adequate precision as it set out the objectives to be attained, the roles and responsibilities accorded as well as the means to be employed."

212 Nollkaemper & Jacobs, Shared Responsibility, *supra* note 45, at 390. "What are the costs of accountability gaps when only one actor is found responsible, even though another actor contributed to the harmful outcome?"

213 Christopher Leck, *International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct,* MELB. J. INT'L L. Vol. 10 (2009), at 362.

214 Larsen, *supra* note 203, at 511. "It was undisputed that Kosovo was not under the control of the Federal Republic of Yugoslavia at the time of the incidents, and [the court] stated that the territory was 'under the effective control of the international presences which exercised the public powers normally exercised by the Government of the FRY.'As such, it appears that the Court considered that the requirements for extraterritorial application of the ECHR were met. But the Court continued to say that the relevant question in the case was not primarily about extraterritorial effect, but whether the Court was competent *ratione personae* to examine the States' contributions to the civil and security presence in Kosovo. In order to address this issue the Court had to decide whether the conduct could be attributed to the United Nations." *See also* ECHR, Behrami and Saramati v France and Others, *supra* note 87, at paras. §70, §71, §121.

215 *Id.,* at para §153.

4. Framing Attribution in the Context of Cyberattacks

It appears that present attribution tests and their relevant interpretations, consist of a normatively inconsistent character that increases the risk of international law to become fragmented. In order to avoid such an outcome, I formulate, without any substantial modification, the principles of attribution in terms of two main classes of attribution models, *de facto* organ theory (agency-based attribution) and control theory (control-based attribution). The aim is to establish a categorical framework for validating legally consistent attribution standards that are also applicable to cyber attacks.

In regard to the contradiction between the interpretation of control tests and the abstract nature of attribution models, de facto organ theory and control theory differ, but they fall within the same conceptual area. While the latter requires proof of control, the former requires a de facto relationship. This distinction may not be problematic in cases where the concept of State responsibility transforms from a subjective context to an objective one.[216] The analytical distinction between de facto organ theory and control theory is apparent, however, whether or not the relationship of non-state actors to a State depends on equating, for legal purposes, the non-state actors with an organ of the State or identifying them as agents working on behalf of the state.[217] Thus de facto organ theory requires complete dependence, issuance of instruction and direction for each specific operation, while control theory requires an autonomous concept of control and a continuous factual link between the State and a group of individuals.

4.1. De facto organ theory (Agency-based Attribution)

4.1.1. Defining de facto affairs

The International Court of Justice (ICJ) in the Nicaragua case defined de facto organ theory. In that case, the ICJ distinguished two classes of individuals who lacked de jure State organ status but nevertheless acted on behalf of the State.[218] Members of one military group that was dependent on the United States for financing, equipment, planning, and direction were categorized as "Unilaterally Controlled Latino Assets" (UCLAS). A second group, the *contras*, that was also financed and equipped by the United States, however, was found to retain a degree of independence.[219]

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216 De Frouville, *supra* note 68, at 271.
217 ICJ, *Nicaragua case*, *supra* note 80, at para. §109.
218 Cassese, *The Nicaragua and Tadić Tests Revisited*, *supra* note 105, at 652.
219 ICJ, *Nicaragua case*, *supra* note 80, at para §106.

The ICJ ruled that the acts of those categorized as UCLAS were attributable to the United States because they were paid by and acting on the direct instruction of U.S. military or intelligence personnel.[220] The ICJ did not, however, make the same judgment in relation to link between the United States and the *contras*, whom it did not find to be a de facto organ. The Court held that, even though they were financed, aided and supported in several ways by the United States, the *contras* were not a pure creation of the United States because their relationship with it was not one of "complete dependence." The Court further found that the United States did not exercise "effective control" over the *contras*.[221]

De facto organ theory proposes equating private actors with de jure organs of States. This link is not a legal abstraction, but a positive determination that a non-state actor is dependent on and under the control of a specific State organ.[222] Although the distinction between de jure and de facto organs is based on a factual link and the nature of a State function, de facto organ status means acting "on behalf" of the State, a notion that has unlimited potential applications.[223] According to this theory, the organs of a State supplement their own action with the help of private persons who act as "auxiliaries" while remaining outside the State's official apparatus.[224] Clearly, States delegate to private persons those tasks that they do not want to carry out directly.[225]

The Nicaragua judgment is significant from the perspective of de facto organ theory for two reasons. First, there exists a de facto link between the State and private persons.[226] In the Nicaragua case, the United States participated in the financing, organization, training, supply, and equipping of the *contras*, as well as selection of military targets and planning of entire operations.[227] The second requirement is that private persons be in a condition of "complete dependence" on the State, or that the State have "effective control" over those persons in regard to the acts that the State allegedly ordered them to execute.[228]

According to De Frouville, the second requirement, the finding of a simple factual link, can be seen as the consequence of a subjective conception of responsibility according to which the "fault" remains the requirement

220 *Id.,* paras. §75, §86.
221 *Id.,* paras §75, §86, §115.
222 De Frouville, *supra* note 68, at 265.
223 International jurisprudence and conflicting tests display such reality.
224 ILC Articles on State Responsibility, *supra* note 57, Article 8, commentary para §2.
225 De Frouville, *supra* note 68, at 267.
226 *Id.,* at 268.
227 ICJ, *Nicaragua case*, *supra* note 80, para. §115.
228 De Frouville, *supra* note 68, at 268.

for responsibility. The theory establishes the parameter that the act must proceed from the free will of the State.[229] The requirement of "effective control" indicates a strict understanding that the State desires the outcome of the private conduct. Objective factual attachment is not sufficient to establish attribution, and further investigation is necessary to reveal the State's aims.[230]

Although this strict interpretation of de facto organ theory of attribution remains to be applied by the ICJ in its more recent ruling of the 2007 Genocide case, it appears that the ICJ modified its approach by distinguishing between a de facto organ and a private person acting under the effective control or instructions of the State.[231] This new approach is unconvincing because it conflicts with the established criteria in the Nicaragua case.[232]

Another example of the distinction between de facto and de jure is the aforementioned Loizidou v. Turkey case before the European Court of Human Rights. This case involved a breach of the property rights of a Greek Cypriot applicant[233] who could not access her property because of Turkish control of the northern part of Cyprus.[234] It is unclear whether the European Court considered classifying the Turkish Republic of Northern Cyprus (TRNC) as a de facto organ of Turkey in accordance with Articles 4 or 8 of the ILC since it defined the former as a "subordinate local administration."[235]

4.1.2. Specifics of de facto organ theory

De facto organ theory includes specific notions of "complete dependence," "issuance", and "operating at specific capacity."

Complete dependence

The ICJ formulated the attribution in the Nicaragua case using an incorporated concept of dependency and control.[236] According to the

229 *Id.*
230 *Id*.
231 *Id*.
232 Cassese, *The Nicaragua and Tadić Tests Revisited*, *supra* note 105.
233 ECHR Loizidou v Turkey, *supra* note 80.
234 The Turkish government alleged that the acts raised by the applicant were not within its competence but in that of the 'Turkish Republic of Northern Cyprus' (TRNC), created in 1983.
235 ECHR Loizidou v Turkey, *supra* note 80, para. §62.
236 Ademola Abass, *Proving State Responsibility for Genocide, supra* note 111, at 891; ICJ *Nicaragua case, supra* note 80, at para. §109. "the [ICJ] has to determine... whether or not the relationship of the *contras* to the United States Government was so much one of dependence on the one hand and control on the other that it would be right to equate the contras, for legal purposes, with an organ of the United States Government..."

Nicaragua formulation, control is a byproduct of dependence or, put another way, dependence generates the potential for control.[237] In the words of Talmon, "Dependence and control are thus two sides of the same coin";[238] the Court made the question of responsibility one of "degree," namely the "degree of dependency" on the intervening State. Complete dependence, then, creates a "degree of potential control" of the intervening State over the non-state actor.[239]

Beyond the discussion of whether the Nicaragua formulation advocates one or more tests of attribution, de facto organ theory embraces the concepts of dependence and control, contending that both encourage a legal understanding of the non-state actor as a State organ, so that the acts of non-state actors are at the same time viewed as those of a State.

Complete dependence is assessed according to three strict criteria. First, the non-state actor must have absolute dependence on the intervening State. Second, this dependence must extend to all of the activities of the non-state actor. Finally, the intervening State must possess a high degree of control over the non-state actor. A non-state actor who meets these three requirements can be viewed as a de facto organ of the intervening State.[240]

Operating at specific capacity (issuance of direction)

De facto organ theory encompasses another "exacting test" beside the complete dependence test that applies in instances in which specific instructions must be given by the intervening State concerning each action taken by the non-state actor.[241] De facto organ theory only applies when individuals act in a specific capacity on behalf of a State.[242] Thus, for example, the "effective control" test in the Nicaragua case required evidence that the United States had directed the *contras* to perform specific operations (e.g., the indiscriminate killing of civilians) on its behalf.[243]

In this respect, the question is no longer one of dependence, but rather of the specificity of operation.[244] Although non-state actors are to a certain extent independent of the intervening State, their conduct occurs under the authority of de jure organs of that State. Under these circumstances, the

[237] *Id.,* paras §106-115; ICJ *Genocide case*, *supra* note 82, paras. §375, §391, §393.
[238] Talmon, *supra* note 111, at 497.
[239] ICJ *Nicaragua case, supra* note 80, at para. §109.
[240] *Id.*
[241] *Id.,* at paras. §118–119, §141.
[242] Cassese, *supra* note 105, at 653, 657.
[243] *Id.,*
[244] Talmon, *supra* note 111, at 500.

objectives of non-state actors and an intervening State regarding a particular operation that involves an internationally wrongful act are complementary rather than distinct. Consequently, the function of de facto organ theory is to decide whether a person or group of persons qualifies as a de facto organ of a State; the focus is on particular operations on a case-by-case basis. In this respect, de facto organ theory prioritizes instruction and dependence over control.

In the context of cyberspace, identifying the online actors remains complicated. It is highly difficult for skilled cyber attacker to be positively identified.[245] It may appear as "information-warfare militia unit, but at the same time, being a university IT department, an online advertising agency, an online gaming clan, a patriot-hacker team, and a local cyber-crime syndicate engaged in software piracy".[246] Although the type of any domestic legal status or lack of it has no effect on attribution, however, as for example of the Stuxnet case, it shifted from financial motivations for the conduct of cyber attacks toward the aim of disrupting critical infrastructure on overseas.[247] This brings attention of those perpetrators' identity where cyber attacks have become an instrument in States' attempts to gain political, economic and military advantages, for which reason States will probably continue to sponsor them. According to de facto organ theory, complete dependence is the first resort to look into if any factual link materializes equating private cyberattackers with de jure organ of sponsoring State.[248] The inquiry starts with whether the cyberattackers are pure creation of the sponsoring State, whether those perpetrators are dependent on the sponsoring State for 'financing, equipment, planning and direction', whether their existence is conditional on the sponsoring State's involvement, organization, training, supply, selection of tagets and planning of entire operations. As in the affirmative, these cyberattackers will be considered de facto organ of that State.[249]

However, in the instances where cyberattackers retain a degree of independence in which they act as 'auxiliaries' remaining outside the State's

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[245] Alexander Klimburg, *Mobilising Cyber Power*, Survival, 53:1, 41-60 (2011), available at http://www.tandfonline.com/doi/abs/10.1080/00396338.2011.555595 (laast visited March 2017), at 43.

[246] *Id.*

[247] *Supra* note 18.

[248] De Frouville, *supra* note 68, at 265.

[249] Macák, *Decoding Article 8*, *supra* note 1, at 410. Macák put forward that "if the said relationship outgrows these requirements and becomes one of 'complete dependence' of the non-State actor on the State, the former will be considered a de facto organ of the latter, thus removing the situation from the scope of Article 8 altogether and leaving the State responsible under Article 4" of ILC articles on State responsibility.

official apparatus, the sponsoring State exercises command and control in relation to a particular operation.[250] As a consequence of subjective conception of responsibility, the degree of control shall be stated as high as the wrongful act must proceed form the free will of the State, where apparently that State desires the outcome of the cyberattack.[251]This creates a specific link between the sponsoring State and the perpetrators that the latter acts as de facto in actual State function, subordinated and delegated with issuance of operation in which acting on behalf of that State. In this case, if a State specifically instructed private actors to conduct cyberattack against a selected objective, the outcome of operation would be attributable to the State in question.[252] In the light of de facto organ theory; incitement, 'rallying call', alignment of goals, encouragement for the action, or shared goals would not be sufficient to conclude that the conduct is attributable to the sponsoring State.[253] The instructions must be given specifically "in respect of each operation in which the alleged violations occurred".[254] For example, in the Estonian case, one may argue that Russia politically had shared goals with the perpetrators and plausibly instigated or encouraged the latter to attack Estonian networks, however, it was not enough for the aforementioned formation of the legal attribution.[255]

4.2. Control theory (Control-based Attribution)

4.2.1. Defining the control affair

When a State outsources tasks to private actors, it needs to retain control over them. The conduct of the latter, however, would not immediately be the State's responsibility, since it can only be held responsible for allowing a non-

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250 Crawford, *First Report on State Responsibility, supra* note 79, para 204.

251 De Frouville, *supra* note 68, at 268.

252 Macák, *Decoding Article 8*, supra note 1, at 415, "In the physical world, examples of acting on instructions in the sense of Article 8 include individuals outside official State structures who are employed by the State as 'auxiliaries' or sent to third States as 'volunteers' charged with specific tasks."

253 *Id.*

254 ICJ, *Genocide case*, *supra* note 82, at para. §400.

255 Macák, *Decoding Article 8*, *supra* note 1, at 417. "Likewise, a State will not incur responsibility for conduct that exceeds the express instructions by going beyond what is incidental to the authorised course of action. Such behaviour would amount to conduct ultra vires and attributing it to the State would go against the general presumption against attribution of private conduct. By way of example, we may imagine that a State tasks a private company with a one-off risk and vulnerability assessment of its government networks. If the employees of the company go beyond this authorisation and use their access to the networks to launch a cyberattack against another State, the instructing State would not bear the responsibility for the attack in question as it would clearly be ultra vires with respect to the original instructions."

state actor to exercise the desired functions.[256]In this respect, the scope and degree of control play a pivotal role in defining the relationship between the non-state actor and the State.

As previously discussed, the Loizidou v. Turkey case establishes an analytical distinction between the de facto and de jure status of State organs and private persons. It thus appears that the European Court does not regard the TRNC as a de facto organ of Turkey.[257] To review briefly, it is not clear whether the Court's categorization falls under Articles 4 or 8 of the ILC, since the court defined the TRNC as a "subordinate local administration."[258] The Court did argue that the large number of its troops engaged in active duties in northern Cyprus meant that the Turkish army exercised effective control over that part of the island. This degree of control would make Turkey responsible for the policies and actions of the TRNC.[259] Thus De Frouville has argued that the notion of effective overall control "allows one to establish that all acts committed by its organs de jure or de facto on this territory are attributable to Turkey … thus expresses the extraterritorial dimension of the responsibility of State Parties to the Convention. But it has nothing to do with the definition of a de facto organ."[260]

In the Tadić case, the ICTY employed principles of State responsibility to determine whether the conduct of individuals is attributable to a State and its participation in the conflict. The Court accordingly examined individuals, their conduct, and the participation of an outside State.[261] The Tadić decision is convincing in the sense that it did not reject the application of an effective control test entirely.[262]

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256 Milanovic, *State Responsibility for Genocide, supra* note 111, at pp. 585-587.

257 Milanovic, *Extra-territorial application, supra* note 177, at pp 41-44.

258 ECHR Loizidou v Turkey, *supra* note 80, at para. §62.

259 *Id.,* para. §56.

260 De Frouville, *supra* note 68, at 269.

261 Marina Spinedi, *On the Non-Attribution of the Bosnian Serbs' Conduct to Serbia,* J. Int'l Crim. Just., 5, 829-838 (2007), at 831.

262 Cassese, *supra* note 105, at 653-654. ICTY Appeal Chamber, Tadić Judgment, *supra* note 46, para. §141; The Court pointed to three factors used to determine State responsibility in accordance with a given situation. The first, specific instructions, is based on criteria similar to the effective control test. The second criterion concerns the assimilation of individuals to State organs, that is, whether individuals have actual contact with State organs and behave within the structure of a State; there is in this case no need for any specific instruction.The third criterion is an overall control test designed to categorize an organized group of individuals.

4.2.2. Specifics of control theory

The Concept of Control

While de facto organ theory focuses on the degree of dependence and specific instructions, control theory addresses the question of conduct, control and its continuity.[263] The ICTY, in the Tadić case defined control as playing a significant role "not only in equipping, financing or training and providing operational support to the group, but also in coordinating or helping in the general planning of its military or paramilitary activity."[264] There is no need for specific instructions for each operation; the State's overall control over the group is sufficient.[265] The test also submits a territorial dimension. However, the elements allocated above demonstrates that control go beyond a territorial consideration by putting leverage on the issues of 'decisive influence' and 'strong support' that suffice a certain degree of control over the non-state entity in question.[266] Cassese has described this as "control of a global nature."[267]

Control takes a different form in the context of a hierarchically structured group. Again, States cannot be expected to exercise absolute control over each member of an organized armed group. This fact inherently weakens the link between the group members and the State. However, the State's systematic and broad support of the group indicates strong influence over the planning or organization of the group's activities.[268] A specific order or command is not required for this kind of relationship. The global authority of the State over the group suffices to confer responsibility on the former when the latter breaks international law.[269]

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[263] See detailed discussion in Talmon, *supra* note 111, *but see cf.,* Plücken & Griebel, *supra* note 75.

[264] ICTY Appeals Chamber, Tadić judgment, *supra* note 46, paras. §131, §137.

[265] *Id.,* at §120.

[266] Loizidou v. Turkey, *supra* note 80, at para. §56.

[267] Cassese, *supra* note 105, at 657: The definition referred as global by Cassese in the judgment is "not only in equipping, financing or training and providing operational support to the group, but also in coordinating or helping in the general planning of its military or paramilitary activity." ICTY Appeals Chamber Tadić judgment, *supra* note 46, paras. §131, §137.

[268] Cassese, *id.,* at 661.

[269] *Id.,* at 657. ICTY Appeals Chamber, Tadić judgment, *supra* note 46, paras. §118-119, §132-136. The ICTY, in the Tadić case, accepted the requirement of specific instruction in instances in which individuals were given direction to act illegally within the territory of another State; however, took another approach to determining control over organized and hierarchically structured groups. The Court supported the high threshold of the effective control test, but only in instances concerning individuals.

The Appeals Chamber found that the relationship between VRS and FRY was sufficient to conclude that FRY played a role in the armed conflict by coordinating or helping to plan the military activities of the VRS. This global control was sufficient to assert that FRY could be held accountable for any misconduct on the part of the group.[270] Unlike the effective control test, specific instruction was not a requirement. The Court allowed interplay between the distinctions between individual and organized groups, using the control concept as an independent model. This approach also has its foundations in the ILC Articles on State Responsibility. The ILC forges a compromise by allowing "control" to serve as an autonomous criterion, or an alternative, in regard to other two notions, namely instruction and direction.[271]

A further justification for the distinction between individuals and groups is the existence of a factual link, whether temporary or continuous, between the State and the private person.[272] Thus, while the de facto theory supposes a temporary factual link between the foreign State and individual, the control theory, by contrast, assumes 'decisive influence', 'strong support' and a continuous factual link between the State and the organized group.[273]

Attribution in extra-territorial context

Territorial scope plays a significant role in the application of control theory. In the Tadić example, the State in question had weakened authority over the territory in which armed clashes occurred.[274] The neighboring controlling State had territorial ambitions regarding the State in which the conflict was taking place. There was sufficient evidence to conclude that the controlling State was attempting to enlarge its territory through armed forces that it controlled.[275]

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270 ICTY Appeals Chamber Tadić judgment, *supra* note 46*,* at §131.

271 De Frouville, *supra* note 68, at 271*.*

272 *Id.*

273 ICTY Appeals Chamber Tadić judgment, *supra* note 46, at paras. §120, § 122. Talmon, *supra* note 111, at 495. Organized groups by definition have a structure, and most are characterized by a chain of command, a set of rules, and outward symbols of authority. Members of a group receive orders from a leader, not from an outside State, and they usually do not act independently but comply with the prevailing group standards and the leader. In fact, at the same time the internal law of the outside State does not authorize those individuals to act on her behalf. This is, then, one major difference between individual and group activity.

274 *Id.,* at para. §139.

275 ICJ, Corfu Channel (United Kingdom v Albania) (Merits) I.C.J. Rep 9, 1949 18 (Corfu Channel Case). A related problem concerns evidence that can be used to demonstrate the scope of the relationship between a State and private actors. In the Corfu Channel Case, the ICJ acknowledged the difficulties in presenting evidence in situations where a territory is under the control of another State and admitted "a more liberal recourse to inferences of fact and circumstantial evidence."

In Celebici case, the ICTY Appeals Chamber also emphasized this territorial context. The Court argued, as in the Tadić case, that the controlling State had territorial ambitions on another State in which the conflict was taking place and was using armed forces to achieve its ends.[276] Although the armed groups had "autonomous choices of means and tactics" while acting on behalf of the controlling State, the goal of territorial enlargement demonstrated that both shared a common strategy.[277] These cases demonstrate that territory is a key dimension of the control theoryin which the relationship between that State and the non-state actors has a continuous and auxiliary nature.

The Loizidou v. Turkey[278] case before the European Court of Human Rights can again serve as an instructive example. The Court dealt with the fact that many Turkish troops were stationed beyond their national borders in northern Cyprus.[279] The Court used the relationship between the Turkish military and the TRNC authorities as a major parameter for establishing the attribution test that it termed "effective overall control." In the words of the Court, 'the Turkish Military had effective overall control over northern Cyprus,' that creates a subordinate relationship with 'strong support' and 'decisive influence'.[280] The Court thus, by addressing the issue of territory in the context of the control standard, established that such control necessarily entails Turkey's responsibility for the policies and actions of the TRNC.[281]

In the context of cyberattacks, control theory suggests that the analytical distinction between de facto and de jure organs of sponsoring State may be excluded in the instances where the relationship between that State and the non-state actors has a continuous and auxiliary nature. Classification of individuals is not needed where the relationship served in extraterritorial and chain of command context. 'Continuation of instruction' creates a certain degree of control that reaches out a particular relationship of 'suggestion or innuendo' between the non-state actor and the sponsoring State that may

276 Prosecutor v. Delalic, Mucic, Delic and Landzo (Celebici), ICTY Appeals Chamber Judgment, Case No. IT-96-21-A (February 20, 2001), at para. §47.

277 *Id.*

278 ECHR Loizidou v Turkey, *supra* note 80.

279 ECHR Loizidou v Turkey, *id.*, at para. §62.

280 *Id.*, at para. §56.

281 Oxman & Rudolf, *supra* note 182, at 534. This test does not attempt to define the existence of a de facto organ, but instead stresses the extraterritorial dimension of the responsibilities of State parties to the European Convention. From the point of view of the Court, the external State need not "actually exercise… detailed control over the policies and actions" of the authorities of the territorial entity in order to attribute the acts of the TRNC to Turkey. Concerning the question of attribution, the Court held that effective control over an area outside a State's national territory, whether employed directly or through a local authority, necessarily implies that State's responsibility.

also trigger the responsibility of the latter.[282]The subordinate relationship of this kind between the sponsoring State and the leadership of a group of individuals structured hierarchically suffice 'control of a global nature'.[283] Altough the evidences in the Stuxnet worm case was not sufficient to come to a swift conclusion, the alleged U.S.-Israeli cyberattack on Iran to destroy Iranian nuclear centrifuges appears to be advanced and destructive.[284] Many experts have referred this attack as very likely a State-sponsored cyberattack.[285]It was reported that the virus "created in a modular fashion-programmed in 'chunks' by teams that probably had no idea of the larger project".[286] While the alleged sponsoring States played host to attackers, planned, organized, coordinated the attack; however, the leadership of non-state actor and its chain of command, and the ongoing relationship of subordination remains to be officially evidenced. This is because the online orbit occupied by 'loosely structured entities'.[287]

5. Conclusion

According to the proposed categorization, de facto organ theory has specific requirements regarding instruction, direction, and complete dependence, while the requirements of control theory focus on continuity of the relationship and the degree of control in an organizational and extra-territorial context. The normative differences between these two models of attribution do not produce a fragmented system, but rather contribute to the notion of unity in international law. Furthermore, de facto organ theory relates to questions of dependence and instruction, and control theory to questions of conduct and its continuation. A seemingly fanciful but in fact normative distinction between these two theoretical perspectives thus may have the potential to provide answers regarding the allocation of responsibility between States and non-state actors in cyberspace.

Significant in this regard is the distinction between individuals and groups where different standards of attribution are concerned. Attributable cyber activities often involve private individuals receiving specific instructions from the intervening State for each operation that they carry out on that State's behalf. Other conditions obtain in the case of an organized group that has

[282] Crawford, State Responsibility General Part, *supra* note 56, at 146.
[283] Cassese, *supra* note 105, at 657.
[284] *Supra* note 18, Neither country has confirmed or denied involvement.
[285] *Supra* note 20.
[286] Klimburg, supra note 250, at 43.
[287] Macák, *Decoding Article 8, supra* note 1, at 422. Such as Anonymous, the Honker Group, or CyberBerkut.

a chain of command, a set of rules, and outward symbols of authority.[288] Members of an organized group naturally rely on the rules of the group and the orders of the commander rather than acting on their own. It is insufficient and impractical to demand that a State issue specific instructions to individual members of a group before making a determination of attribution. Thus in the Tadić case, the Court concluded that the group as a whole was under the overall control of the intervening State.[289] In cases where cyber activities involve organized groups, material proof relies on the conduct of individual group members, apart from that which is self-motivated.

According to de facto organ theory, attribution requires that specific instructions have been issued to individuals regarding each cyber activity by the sponsoring State, unless complete dependency on the intervening or instructing State is evidenced.[290] This is the case in instances where individuals perform cyber activities on behalf of a State.[291] As a result, the status of individuals comes to play a crucial role in regard to determining whether they may be considered a de facto organ of that State.

On the other hand, in cases involving organized and hierarchically structured groups, such as cyber units, the degree of control over conduct is a sufficient indication of attributability, and specific instructions are not required for each individual operation.[292] Such control resides not only in "equipping, financing or training and providing operational support to the group, but also in coordinating or helping in the general planning of its [attack]."[293] This is the case when one State sponsors a group of individuals to conduct cyber attacks against another State by coordinating or otherwise helping in the general planning of the group's activities.

While control theory focuses on the conduct, its continuity and the degree of control, then, de facto organ theory makes the legal status of individuals the central issue by examining their dependency on the instructing State.[294] The use of organized groups creates the problems of complicity with a command of chain and identification of the exact perpetrator of the wrongful conduct. It is therefore crucial to determine whether this conduct was committed directly or rather was controlled by entities other than the agents on the ground.

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288 ICTY Appeals Chamber Tadić judgment, *supra* note 46, at para. §120.
289 *Id.*
290 *Id.,* at paras. §118–119, §141.
291 Cassese, *supra* note 105, at 657.
292 ICTY Appeals Chamber Tadić judgment, *supra* note 46, at para. §120.
293 *Id.,* at paras. §131, §137.
294 Talmon, *supra* note 111, at 499.

A strict interpretation of attribution could result in the potential to produce undesirable outcomes. Since no single authority controls cyberspace, sponsoring States are free to attempt to enlarge their capacities in this new international arena by launching cyber actions against other States. The lack of such flexibility in attribution models may enable States to evade responsibility for serious breaches of international law. Their illegal conduct has become more sophisticated because of the special role of non-state actors in cyber conflicts. States may try to avoid responsibility by acting through non-state actors and then contending that these agents are not classifiable as State organs under given international and domestic laws.[295] If the evidentiary standard is set high in this regard, States can simply escape accountability.

I argue that the doctrine of attribution has the potential to provide legally adequate mechanisms for strengthening international standards of accountability and responsibility for unlawful cyber activities. From this perspective, maximization of accountability is necessary for international peace and security. A categorization of systematic models, without any fundamental change in the law of attribution, can increase the utility of the relevant standards for today's needs. It remains up to individual States to decide whether they will adopt the lower standards of proof in order better to hold State promoters of cyber attacks accountable in the present and to discourage sponsorship of international cyber crime in the future.[296]

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VERIFICATION OF PATENT INFRINGEMENT IN PRACTICE AND RELEVANT PROVISIONS OF THE INDUSTRIAL PROPERTY ACT

Uygulamada Patente Tecavüzün Belirlenmesi Ve Sinai Mülkiyet Kanunu'nun Konuyla Ilgili Düzenlemeleri

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ABSTRACT

Thanks to registration, novel and industrially applicable inventions with inventive step, and the novel and industrially applicable utility models that lack the inventive step are protected against unlawful users. Verification and assessment of the consequences of the infringement of patents and utility model rights requires a high level of technical and legal expertise. In this article, the issue of infringement of patent and utility model rights is examined in the light of fundamental principles and especially the practice, and the scope of the rights conferred by patents and utility models, as well as verification of infringement are discussed with reference to practice.

The relevant provisions of the latest act on industrial property rights on patents are compared with the provisions of the preceding legislation, Decree Law 551 that also pertained to patents. The relevant provisions of the latest Act dated 10.01.2017 on Industrial Property are compared with the provisions of the previous legislation, Decree Law 551 on patents.

Keywords: infringement of patent, claims, industrial property rights law, damages, utility model

ÖZET

Yenilik, buluş basamağı ve sanayiye uygunluk taşıyan buluşlar; buluş basamağı şartına uymayan yeni ve sanayiye uygun modeller tescillenerek yasa dışı kullanımlara karşı korunmaktadır. Patent ve faydalı model haklarına tecavüzün belirlenmesi ve sonuçlarının değerlendirilmesi ise değerli bir teknik ve hukuki uzmanlık gerektirmektedir. Bu çalışmada, patent ve faydalı modele tecavüz konusu ele alınmakta, temel ilkeler ve özellikle uygulama boyutu üzerinde durulmaktadır. Ayrıca, patent ve faydalı modelden doğan hakkın kapsamı ve tecavüzün tespiti konusundaki uygulama da ele alınmaktadır.

10.01.2017 Tarihinde yürürlüğe giren Sınai Mülkiyet Kanununun konuyla ilgili hükümleri de 551 sayılı PatKHK kapsamındaki kurallarla karşılaştırılmaktadır. Kanununun konuyla ilgili hükümleri de mevcut kurallarla karşılaştırılmaktadır.

Anahtar Kelimeler: patente tecavüz, istemler, sınai mülkiyet kanunu, tazminat, faydalı model

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INTRODUCTION

Among the industrial property rights, the patent right is of pivotal importance is for the needs of technical improvement. Decree Law 551 Pertaining to Protection of Patent Rights (hereinafter will shortly be referred to as Decree Law 551), which was, to a great extent, composed of translations of the EU legislation, has applied until lately. It appears that the Act on Industrial Property (IPA)[1] will bring Turkish patent law more in line with the EU patent laws. In this article, the topic of patent infringement including the provisions of the new act, the approaches and the methods that will referred to in practice and the legal remedies will be discussed with references to the IPA.

I. RIGHTS UNDER PATENT AND LEGAL PROTECTION

A. IN GENERAL

The right over an invention accrue automatically upon successfully achieving such invention, without being subject to any requirement as to the form[2]. Patent is a limited monopolistic right granted in exchange for the disclosure of a special technical knowledge[3] which, after a thorough examination, is decided to be an invention. The patent registration institution does, according to the preset legal principles, examine the application it receives, and if these conditions have been met, grant the patent or the utility model certificate. If what has been granted is a patent or a utility model registration certificate, then it will be deemed, in regard to validity, to have a confirmatory nature, whereas in regard to protection, a provisionary nature[4]. Otherwise, lack of interest in the inventor is incompatible with human nature and; this would mean that potential inventors, who know their intellectual efforts and labor would not be rewarded, will not endeavor for innovation. This will also mean conceding beforehand to the stagnation and lack of development of the humanity and its environment.

Absolute rights that a patent provides to its owner are – except for some restrictions that are associated with public order, public health, time etc. – similar to the tangible property ownership right in the property law[5]. Absolute

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1 Act on Industrial Property Act no: 6769 was published in 10.01.2017 in the Official Gazette.

2 Whether the right over an invention accrues automatically when the invention is made, or if it is created upon registration is a controversial issue in jurisprudence.

3 BENTLY, Lionel/ SHERMAN, Brad; Intellectual Property, 2002, p. 310.

4 OZTURK, Ozgur; Turk Hukukunda Patent Verilebilirlik Sartları (Patentability Requirements in Turkish Law), Istanbul 2008, p. 15.

5 Whereas tangible property right applies to concrete movable items, intangible property right is associated with patented ideas and doctrines, designs, works and signs in trade.

rights will be in effect for the entire term of a patent with substantive examination, which is twenty years. In the IPA, the duration of the protection term is not changed and; in Article 101, a twenty-year protection term is provided for patents, and a ten-year term for utility models. Here, it is also stated that these "terms cannot be extended". In the provision, the reason for this emphasis it not clearly expressed. However, it is understood that, though not obviously, this might function as an impediment preventing issuance of extension certificates, which are used in the EU countries to make up for the protection time losses in the case of drug patents[6]. Also in the repealed Decree Law 551, it was provided that the terms would not be extended.

In order to know the scope of a particular patent, it is necessary to know and to analyze the invention that is the subject matter of the patent. The first step to understand the invention is to know the relevant technical field as well as the existing state of the art. The scope of the rights that is granted by patent is specified in Article 85, and the actions listed therein are considered stoppable by the patent owner. In Article 85 of the IPA, the scope of the patent right is provided in more detail, and conducts that are excluded are, unlike Article 73 of the repealed Decree Law 551, listed in the 3rd subparagraph of the same provision. This will understandably be more convenient to apply.

In practice, the scope of patent protection that will have an impact on both infringement lawsuits and invalidation lawsuits is included in Article 89 of the IPA. According to this provision, the scope of the right that originate from patent application or the patent is determined by the claim or the claims. In IPA, the same principle that is provided in Article 69 of the European Patent Convention[7] has been adopted.

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6 Whereas patent protection is legally valid for 20 years, when it comes to patenting of the products of drug industry, no matter how much it might be desired by the patent owner, this term cannot be used entirely; the protection time and the commercialization cannot be started simultaneously. The competent bodies of the EU had introduced a complementary protection system by Regulations 1768/92 and 1610/96. Acceptance of the application of the patent process might, for reasons like the delay of the product development time because of administrative difficulties, and especially the requirement for market entry permission, affects the duration of the viable fraction of the patent protection term. In order to make up for the time lost by the patent owner when obtaining the market entry permission, normally an additional term of 5 years, and in the case of pediatric drugs, 5,5 years is given.

7 European Patent Convention (EPC) was signed in 1973, and our country acceded to it by Resolution 2002/42, dated 7.6.2000, of the Council of Ministers (Official Gazette 24107, 12.7.2000);The European patent, the registration process for and the principles of protection of which are stipulated in this Convention, can be defined as a bundle of patents that allows synchronous protection upon single application and examination; thus, stating the examination phases and the countries in which protection is sought. In the said Article 69 it is also provided how, in the event of amendment of claims, the scope

IPA provides that the descriptions and drawings have, unlike they were in the repealed Decree Law 551, do not play a direct role in specifying the scope of the protection, and that they are auxiliary elements (IPA, Art. 89/1). Claims are the texts that clearly express the elements of the invention that would be protected. The inventor should obtain the protection he expects from the patent fairly and proportionately, and at the same time the expectations of the competitors and the public for transparency should be met. Since the claims draw the perimeters of the scope of the protection, the use of the knowledge and the idea explained in the claims, without permission constitutes infringement of the patent and; in the event of the use of the same protected knowledge or idea or of its equivalent, infringement of the patent will be in question. The scope of the protection is determined according to the claim or claims and when a thorough examination is conducted during the process that follows the application, the focus will be directed on the invention characteristics of the claims. Protection provided by a patent[8], which had been granted with substantive examination, is very strong, because such a patent has a hypothetical characteristic, the validity of which cannot be disputed until a court decides for its deregistration. Although the patent without (substantive) examination in the repealed Decree Law 551 did grant the same protection, in the event of an infringement dispute, it will nevertheless have to be scrutinized as it would not have undergone a substantive examination prior to its registration. Indeed, according to Provisional Article 1 of the IPA, these patens would be treated as per these repealed provisions.

Meanwhile, inventions that are "novel and applicable in industry" but that do not go beyond the state of art are protected by a certificate which does not long term protection. Utility model certificate can be obtained more easily than a patent, and with it, petty inventions that are novel and applicable in industry are protected. Unlike the repealed Decree Law 551, in the IPA, the technical characteristic criterion is added to the other two

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of protection that the patent applicant would benefit from during the time between the date of the patent application and the date of registration ought to be interpreted and; what would its effect on third persons be. In respect to European patent applications, the scope of protection given upon such application for the time that elapse until the European patent is granted, is determined by the last submitted patent claim mentioned in the publication made in accordance with Article 93 of the Convention. However, the granted European patent in the form it is granted or as amended after the objection will, provided that the scope of protection is not expanded, incorporates the former form. Description and drawings on the other hand, can be used for but do not play a direct role in specifying the scope of the protection.

8 By making a choice that is in line with the European Patent Convention and the contemporary international texts, the method of giving patents without substantive examination is not included in the IPA.

registration criteria, which are novelty and applicability to industry. for utility models. According to Article 142/2 of the IPA, technical properties that do not contribute to the invention will not be taken into consideration[9]. This wording leads to comments that, even though to a lesser extent, inventive step would be sought as a condition for the registration of the utility model. Hence, possession of technical characteristics is considered, in an implied way, as a criterion for a patentable invention. The emphasis here, on technical contribution, is about the innovation in the technical field with which the utility model is associated. On the other hand, in Article 82 of the IPA, the same criterion is not openly mentioned, but implicitly pointed out. Still, for an invention, technical characteristics is considered as a prerequisite as it is stated that patents can be given in any field of technology, and in paragraph 2 of Article 82, non-technical fields are excepted. As a matter of fact, in European Patent Law practice, it is a well-established understanding that inventions should have technical characteristics[10]. Carrying out activities that are proportional to their R&D, and production capacities, and depending on the characteristics of the inventive efforts, choosing the utility model method can be deemed as rational for the firms and enterprises that are at about the size of a Small and Medium Seized Enterprise. Since in practice thorough examinations are not conducted during the registration processes of utility model certificates, attribution of undue significance to them can nevertheless result in adverse consequences. That is because utility models are scrutinized for conformity with the registration requirements only when a dispute as to their validity arises; then the court can, for example, ask the experts in the relevant technical field to submit a report on the absolute novelty criterion, and where it is concluded that novelty did not exist, declare the certificate null and void as if it had never been issued. For this reason, the repealed Decree Law 551's Article 158/2 that pertain to the qualified protection of these certificates contains provisions which can be characterized as an assurance for the system. The provision of Article 158/2 of the repealed Decree Law 551 was revoked by the judgment of the Constitutional Court, dated 21.9.2014, numbered 2013/100 – 2014/14 and; in Article 143/13 of the IPA, the same principle is included, but this time without any correlation with any probable action for invalidity. Accordingly, "*Issuance of the utility model [certificate] cannot be construed as a guarantee given by the [Turkish Patent] Institute as to the validity and usefulness; neither does it confer responsibility on the Institution.*" Therefore, it is evident that if the owner of the registered utility

[9] To be precise, the provision reads as follows*: "(2) When appraising the innovativeness of the utility model, technical properties that do not contribute to subject matter of invention will be disregarded."*

[10] European Patent Office, Case Law, 2013, p. 2; T 22/85 OJ 1990, T 154/04 OJ 2008

model had developed it by acquiring the essence of the invention from a third person without permission, such owner cannot enforce the rights conferred by that certificate on such third person.

B. SCOPE OF PROTECTION – CLAIMS

In lawsuits for patent infringement, in order to establish the scope of the protection, and therefore to understand if the defendant's actions fall under the scope of the patent, referring only to the summary, title, description and drawings of the invention will not be sufficient. What is essential is the section on the claim or the claims. For this reason, patent claims must be drafted in such a way that would enable a clear understanding of the invention and the perimeters of the protection. Every patent application and the patent certificate that follows, contains at least one claim. Where there is more than one claim, the first claim is named as the main claim or the independent claim. The main claim contains the gist of the main elements of invention.

In Article 6 of the Patent Cooperation Treaty[11] (*Patent Cooperation Treaty*) – the purpose of which is worldwide cooperation on matters pertaining to the registration of the inventions, uniformity of the protection and obtaining of patent rights – it is stated that the matter of the claim or the claims, for which protection is sought, should be written clearly and concisely, and that they should be fully supported by the description.[12].

Writing of the claims that specify the legal perimeters requires expertise and experience. A correct approach would be using the words that are appropriate and in sufficient number to express how the invention operates and what kind of a result it produces. In that sense, a patent application can include one or more claims. When determining the scope of the protection, the main source is the claims, and the description and the drawings are auxiliary. The provision of Article 89 of the IPA is, in this sense, similar to that of the repealed Decree Law 551 and the EPC[13].

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[11] Turkey became a party to the PCT, signed on the date of 19.6.1970, by Resolution 96/7772 of the Council of Ministers of 5.1.1996 (OG 8.2.1996, 22548).

[12] European Patent Office, Case Law, Munich 2013, p. 250.

[13] Considering the Article that reads as follows "The scope of the patent application or of the protection provided by the patent is determined by the claims. In addition to this, the description and the drawings are used for the interpretation of the claims."
"Claims cannot be interpreted as being confined to their strict literal wording. However, for determining the scope of the protection, the claims cannot be broadened in a way that would include the characteristics, though contemplated by the inventor, are not expressed in the claims, but which can be revealed from the interpretation of the description and the drawings by a person skilled in the technical field", it is concluded that the principle on determining the scope of protection is retained.

Expressing the claims in a clear and understandable language will be effective in specifying the scope of the protection, in clarifying the statuses of third persons in regard to the patent, and in ensuring that the action space limits are known[14]. No claim should contain any conflicts in it, or neither should it be in conflict with other the claims [15]. An independent claim alone defines the invention and does not refer to another claim. Dependent claims, on the other hand, are claims that refer to an independent claim, and that adopts its characteristics. With dependent claims, the perimeters and the secondary characteristics of the invention are manifested more clearly[16].

The claim or the claims complement(s) the invention's elements, protection of which is desired. Each claim must be clear and brief [17]. The claim and the claims are based on the description. The claim and the claims cannot extend beyond the scope of the invention. This principle is, at the same time, a basis for invalidity. Filing a lawsuit for invalidity after the final decision of Turkish Patent and Trademark Office (TPTO) is possible. In addition to lack of the conditions for registration, the phrase in Article 138/1(c) of the IPA that reads, "if the subject matter of the patent exceeds the scope of the application…" is also a cause for invalidity. In that case, the coherence of the invention will break down, and the need to invalidate the patent will arise as freedom of enterprise and competition of third persons will unjustifiably be impaired.

The practical role of the claims is that they determine whether the invention worth protection; in other words, whether the claims satisfy the conditions. By looking into the claims, it will, in the lawsuit for infringement, be established whether if there is such infringement, or, in the lawsuit for invalidity, whether if the state of art is surpassed and; the claims and the previous state of art will be compared. This comparison will be made between the certificates regarding the state of the art, and the claims. The second significant role is determining the valid scope of protection of the patent. The boundaries of the scope of protection are drawn by the claims[18]. The infringement allegations will be examined and a conclusion will be reached by taking these boundaries as bases. In infringement and invalidation lawsuits

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14 T 165/84, T6/01; European Patent Office, Case Law, p. 250.

15 T 2/80, OJ 1981, 431; European Patent Office, Case Law, 2013, p. 250.

16 European Patent Convention, which affects our national law and to which we are a party, does in its Article 69 include provisions that pertain to the extent of the protection conferred by a European patent application. The extent of the protection conferred by a European patent or a European patent application shall be determined by the contents of the claims.

17 UNAL, Onur; Patent Hukukunda Istemler (Claims in Patent Law), Bursa 2008, p. 30

18 SEHIRALI, CELIK Feyzan H.; Patent Hakkinin Korunmasi (Protection of Patent Right), Ankara 1998, p. 77

an assessment will eventually be made by taking the claims as bases, and a judgment will be reached as to if an infringement exists, and on damages as well as the matters associated therewith[19]. These claims will also be referred to when examining the invalidity allegation.

Where a patent includes examples of the functions or the results of the invention or of a composition of such invention, interpretation of the claim or the claims cannot be limited to such examples. In particular, if the additional components of the product or the procedure are absent in the examples explained in the patent, or if they do not include the properties of such examples, or else they fail to realize every purpose or property mentioned in such examples, then such product or procedure can't be deprived of the protection that is provided by these claim or claims. The provision of Article 89/2 of the IPA on this matter is based on the same principle. Matters that have been thought, but not been demanded in the claim or the claims by the inventor cannot be assumed or interpreted to have included the characteristics, which would unfold upon interpretation of the description and the drawings by an expert in the relevant technical field. In that sense, the description and the drawing must be prepared in such a way to support the claim[20].

Use of the exactly same claims fall under the scope of the protection. Use of the equivalent of the claims, if not the same, consists infringement. The word equivalent has the same or a very close meaning with the words like equipollent, matching, equal, and stands for those with equal values, with identical values and functions[21].

The doctrine of equivalents is recognized also by the IPA. Article 89/5 of this law pertains to this matter, which reads as: "*In determining the scope of protection provided upon patent application or by the patent, also the elements that are equivalent of the elements stated in the claims at the time an infringement is alleged, will be taken into consideration. Where an element virtually performs the same function as the one asserted in the claims; if it performs such function it in the same way and generates the same result, it will, in general, be deemed to be equivalent of the element asserted in the claims.*" According to this provision, in determining the scope of the protection, if an element virtually performs the same function as that of the patent claim, performs in the same way and generates the same result, by and large, it will be deemed to be the equivalent of the protected function in the claims.

[19] According to Article 83/1 of Decree Law 551, the scope of the protection is determined by the claim or the claims.

[20] European Patent Convention, Art. 84; T133/85, EPO Case Law, p. 213

[21] tdkterim.gov.tr/; SENER, Esat; Hukuk Sozlugu (Law Dictionary), p. 532

When determining the scope of the protection that results from the patent application or the patent, the elements that have equivalent characteristics with those of the elements indicated in the claim or the claims as of the date on which the infringement was alleged, will be taken into account. The elements and the characteristics for which the inventor principally demands protection are included in the section of the patent certificates regarding the claims. They constitute the scope of the protection and are decisive for identifying whether the infringement had been committed. If there is an element that performs the same function and produces the same result with the element for which protection is sought, this will be deemed to be the same with, in other words, the equivalent of the claim for which protection is sought[22]. When determining the scope of the protection, to reach at a conclusion by sufficing to interpret only the words in the contents of the claim or the claims creates significant drawbacks. Elements that perform the same function in the same way and which produce the same result are equivalent elements. Where, within the scope of the protection under a patent application or a patent, the element used on the date of the infringement allegation and the element demanded in the claim or the claims are the same or equivalent, infringement of the right will be deemed to have existed.

On the contrary, if there is difference between the element that is used and the element that is demanded, in other words, where the elements are not equal or equivalent, no infringement exists. The fundamental principle on determining the scope of the protection under a patent application or a patent is taking the contents of the claim or the claims as the bases. Nevertheless, when interpreting the claim or the claims, the description and the drawings will be referred to[23].

Meanwhile, the patent owner can change or correct its claims only before the patent is granted. Except for obvious mistakes like spelling errors or submittal of the wrong documents, patent claim or claims can be changed only during the patent issuing procedures if and when the law does explicitly allow this. The scope of the application cannot be broadened by making changes to the patent claim or the claims[24]. In the part of the IPA that is related to the patent process procedure, in Article 103/1, it is stated that the applicant can – during the time that elapses until application procedure is concluded by the TPTO – amend its application for as long as its scope is not expanded. In the

[22] GUNES, Ilhami; Uygulamada Sinai Mülkiyet Haklari ve Cezai Koruma (Industrial Property Rights and Criminal Protection in Practice), Ankara 2009, p. 81

[23] Decree Law 551 Art. 83/1; European Patent Office, Case Law, p. 263; ERDİL, Engin; Haksız Rekabet Hukuku, Istanbul, 2012, s. 997.

[24] Decree Law 551 Art. 64

event any objection is raised against the application, this can also be done before the TPTO makes its final decision on that objection, but again provided that the initial scope is not expanded.

C. RIGHTS AND POWERS OF PATENT OWNER

According to Article 85 of the IPA, the positive monopolistic right and power of the patent owner is that only he himself or the persons he allows will be able to use the patent and; the negative powers, on the other hand, are those which enables him to prevent production, sale and importation of the patented product, or to prevent others from keeping it for any reason other than personal needs. This provision applies also to utility models. In Article 145 of the IPA with heading that reads, "Applicability of provisions pertaining to patent to utility models and double protection", it is provided that in the absence of an explicit provision on utility model, the provisions in this Law pertaining to patents will, where they do not conflict with the characteristics of the utility model, also apply to utility models and; that the utility model owner would benefit from the same rights.

It must not be forgotten that the monopolistic rights and powers are effective for twenty years starting from the date of the application, and that this period cannot be extended[25]. In Article 101 of the IPA, the provision on protection period is the same as the provision in Article 72 of the repealed Decree Law 551 and; additionally, in the IPA Article, it is also provided that this period will not be extended. The patent owner befits from the patent rights free of any exceptions in regard to the place of the invention, the field of technology, and as to whether the products have been imported or locally manufactured.

[25] However, in the USA, Japan and the European Union, extensions for up to 5 years and 6 months can, in practice, be obtained under patent law, by taking into consideration the marketing licenses as well as the preparatory phase required for drug patents and plant protection chemicals. The reason for this is the impossibility of utilizing, from the start of the protection period until the licenses necessary for market access are obtained, the patent for production and sales, and in one sense waste of this period. Although the term of patent protection is by law 20 years, in the case of patenting of pharmaceutical products, this term cannot be used entirely. The competent authorities of the European Union did set up a complementary protection system, by Council Regulation (EEC) No 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products, and by Regulation (EC) No 469/2009 of the European Parliament And of the Council of 6 May 2009 concerning the supplementary protection certificate for medicinal products. Reasons like the patent application process, lengthening of the product development time, and especially the requirement for marketing license affects the yield that can be expected during the patent protection term. In the agricultural drugs and chemicals industry, the productive patent terms are getting shorter and shorter as verification of the feasibility and safety of the new drugs and pesticides requires more time consuming tests.

Decree Law 551 Art. 73/A, which pertain to the criminal protection of patent rights had been repealed by the Constitutional Court, and no statutory provision has yet been enacted to fill the resulting legal gap[26].

Besides, the provisions on unfair competition have been redrafted in such a way that would include new offenses, and Turkish Commercial Code 6102 which contain them had taken effect on the date of 1.7.2012. While accordingly the argument that the penal provisions on unfair competition cannot be applied to patents, designs and utility models, and that they were tacitly made obsolete by the Decree Laws and the special penal laws added to them[27] should not be adopted without discussing. Indeed, the complaints regarding unfair registration of patents, utility models and designs are investigated under the scope of unfair competition offense, and heard by the Criminal Courts of First Instance.

In order to protect his novel design, patent or utility model product, the owner of these can take recourse to the provisions on unfair competition, without bringing the issue of registration forward. Thus, protection of precious knowledge that is obtained as a result of thought, effort and investment is a general principle of law, and first and foremost of good faith. The provision of Article 54 of Turkish Commercial Code 6102 on the general principle as well as subparagraphs “1-a.4” and “c” of Article 55 that pertain to special situations are applicable. Should the owner wish to protect his registered design, patent or utility model under criminal law, he can try the existing unfair competition

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[26] As Decree Law 551 took effect, Turkish patent jurisprudence adopted the contemporary practices and took significant steps to protect the inventions. In order to penalize patent infringements, criminal provisions were, in violation of the no crime and punishment without law principle, inserted in Decree Law 551 by Law 4128 as Article 73/A; which were later on amended by Law 5194. However, the said violation of this principle resulted in the repeal of these provisions by the Constitutional Court. While civil law protection of patents and utility models is still in effect, the criminal provisions in Article 73/A – which was added to Decree Law 551 by Law 4128, and which was later on amended by Law 5194 on the date of 22.6.2004 – are not effective and cannot be applied since the judgment of the Constitutional Law, dated 5.2.2009 and numbered 2005/57 – 2009/19, that repealed it according to the no crime and punishment without law principle. However, the claim and the claims are what is essential when determining the scope of the patent application or of the protection under the patent whereas the description and the drawings are of auxiliary nature . No provision has since been enacted on patent infringement offense and penal sanctions against it. During this period, the results and effects of enforcing only civil law protection has been experimented and; neither no have provisions on penal protection regarding patents and utility models are included in the IPA Industrial Property Law. Although IPA has penal provision just for trademark infringement.

[27] The Court of Cassation was basing its judgments on the argument that the provisions on unfair competition were – in respect to patent, utility model and design infringement offenses – obsolete. 3.6.2015, 2015/4496-2015/2291 (National Justice Network -UYAP; Database of the Rulings of The Court of Cassation)

provisions. Nationality of the owner will be irrelevant because according to Article 39 of the TRIPS Agreement, and to Article 10*bis* of Paris Convention, protection must be extended against unfair competition.

Instead of costly and difficult processes for the registration of the patent or the other industrial property, the protection of such idea or knowledge for an indefinite time is also possible by keeping it as a trade secret. As to the protection of unregistered inventions, although it is obvious that they cannot be protected under the provisions of the IPA on patent, the general provisions on unfair competition do apply also to the unregistered inventions[28].

II. LAWSUIT FOR PATENT INFRINGEMENT AND ISSUE OF VERIFICATION OF THE INFRINGEMENT

A. DETERMINATION OF THE INFRINGEMENT AND THE METHODS

The scope of the protection, explained in detail at above, indicates the very point where the infringement starts in the event any patent protected claim is used by third persons without permission. In the IPA, on the other hand, the scope and perimeters of the protection are provided in Articles 85 and 89, where the powers of the owner of the invention to benefit from it and to prohibit others are stated. In these Articles, the technical fields and the general restrictions such as those that are based on public order concerns as well as the way to interpret the provisions on protection are indicated.

28 Hence, in a dispute about the protection of unregistered patentable inventions or utility models, the 11th Civil Chamber of the Court of Cassation ruled that recourse could be taken to Article 56 of Turkish Commercial Code. In that incident reviewed by the Court of Cassation, the plaintiff alleged that the defendant had fully imitated without permission the model 4400/4500 labelers, which are registered in the USA; that it sold them in Turkey and in the Middle East countries and; that it filed an application for utility model registration of the imitated product. The plaintiff asked for the determination of the facts regarding such infringement as well as for the cessation and public announcement of the same. The local court decided against the plaintiff. The Court of Cassation did, in its reversal judgment, point that there was no provision in Decree Law 551 that says inventions not registered in Turkey would not be protected and; state that the unfair competition principles in Article 56 of Turkish Commercial Code ought to be referred to in regard to the assertion and defense arguments of the parties to the case. This judgment must not be construed as non-compliant with the principle of territoriality. Although according to Decree Law 551, protection cannot be extended to a foreign patent if it is not registered in our country, the right of the owner of the invention or the licensor to stop any unfair, mala fide competition under Turkish Commercial Code Art. 56 cannot be ruled out. (Court of Cassation, 11th Civil Chamber, 4.3.2008, 2006/11131-2008/2607, FMR (Intellectual Property and Competition Law Journal of Ankara Bas Association) 2009/2, p. 120)

In practice, verification of the infringement of the patent is deemed as a technical matter [29]. Usually, an expert who knows the principles of patent and the experts in the relevant technical field are required to make an assessment of the matter, and to make an explanation to the court about the said technical field, as to what the invention is and what the product and the process of the party who allegedly had infringed the right is. The patent certificate should be reviewed from the perspective of an expert of that technical field, by considering the circumstances of the time when it had been issued as well as the common and widely accepted knowledge, thus looking into whether or not an infringement exists[30].

By disclosing his invention, the patent or the utility model owner makes the valuable technical knowledge he had obtained public, and therefore exposes it to the risk of being accessed by those who intend to use them without permission. The filed application should, according to Articles 92 and 138/1(b), be sufficiently clear and understandable, and suitable for the implementation of the invention by the technical expert. Article 92/1 provides that the invention must be explained in the claims explicitly and clearly, in a manner so as to enable a person skilled in the technical field of the subject matter to implement the invention. It is underscored that in the summary only technical information would be given, and that it would not be used to determine the scope of protection. In this Article, nothing new is added to the rule that the invention should be explained explicitly and clearly. The owner who complies with the conditions for entitlement to registration will, for this reason, benefit from an equitable protection. The patent owner does, as an individual, take advantage of the right by making contribution to technological development, and also ensure that the researchers is informed by making the technical knowledge available to public. That is because the disclosed and announced patent applications are then included in the state of art. It goes without saying that despite such disclosure, the patent owner does for the duration of the protection term enjoy his monopolistic rights.

In Article 85 of the IPA, the patent or utility model owner's preventive rights are listed. The patent owner has the right to demand prevention of third persons from doing the following without permission:

1. Production, sale and importation of the patented product, or keeping it for these purposes for any reason whatsoever other than for personal needs;

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29 11th Civil Chamber, 14.12.2015, 2015/6059-2015/13396; 11th Civil Chamber, 22.2.2016, 2015/7302-2016/1848 (UYAP)

30 BENTLY/SHERMAN, p. 499

2. Use of a process that falls within the scope of the patent protection;
3. Offering by third persons to others the use of process patents, which is known or should have been known to be prohibited;
4. Production, sale and importation of the products that are obtained directly by the use of the patented process, or keeping them for these purposes for any reason whatsoever other than for personal needs.

The legal provisions pertaining to the special kind of unfair competition that is defined as patent infringement, protect the intellectual efforts and the economic investments of the patent owner, the purpose of which were to materialize the invention. Protection against infringement is provided because the right to monopolistically enjoy the benefits of the invention belongs to its owner.

Those who overstep the patent owner's domain of protection can be considered as infringers. The provisions on patent infringement on the other hand, are included in Article 141/1 of the IPA. The acts that constitute infringement of patent rights are as follows:

1. To imitate the product to which the patent relates, entirely or partly;
2. To commercialize, import, or stock and/or use by way of implementation, the products that had been produced by infringing the patent right, when such infringement is known, or should have been known;
3. To use the patented process or to commercialize the products directly obtained by means of the patented process;
4. *To broaden the scope of rights granted under a contractual or compulsory license, or to transfer such rights to third parties;*
5. *Usurpation of the patent or utility model rights*.

In order to be able to speak of a patent right infringement, the invention must have been patented or the announcement of a valid patent application must have been published. Therefore, to pass a final judgment on an alleged infringement of a patent, for which an application had been filed but not yet decided, the court will wait for the decision of the Turkish Patent Institution for registration or refusal.

In this provision, both the patent and the utility model certificate are discussed. From this expression, it is deduced that both certificates entitle the owners to same kind of rights. In Article 141/1(ç) of the IPA, unlike the provision of the repealed Decree Law 551, the acts of "*usurpation of the patent or utility model right*" and overstepping of license as well are included in the definition of infringement. Again, the first of the acts of infringement is

about production. Then follows the provisions pertaining to the commercial actions of those who knows or should have known the patent, and where infringement of a process patent is alleged, to the burden of proof on the user that he had not used the patented process. According to Article 141/3 of the IPA, the patent or utility model applicant is entitled to file civil lawsuit for infringements that occurred after the date their application had been published. Where the infringer had been informed about the patent or the utility model, it will not be necessary to refer to the publication of the application as a prerequisite. In the event of bad faith, infringement will be deemed to have occurred before the publication. However, in the provision, it is not clear whether registration should be waited for. Certainly, as a customary practice, the decision of acceptance or rejection of the registration is deemed as a dilatory question, considering a possible rejection. It is because the first condition for the infringement of a patent or utility model is to be able to assume their validity.

Hence, the act of infringement is, first of all, committed by using the claims. As a rule, the action that gives rise to infringement is the one that comprises the basic elements of the main claim of the patent. If the product which is alleged to have constituted infringement contains the basic elements, protection of which under a patent is desired, infringement will be deemed to have existed. Acts of sale and commercialization of the products that constitute infringement can be committed also by those other than the makers of the imitation products.

B. LAWSUITS THAT CAN BE FILED IN THE EVENT OF PATENT INFRINGEMENT

a. Verification of the Patent Infringement and Lawsuit for Prevention of Infringement

A declaratory lawsuit is filed to verify if a legal relationship does or does not exist. Physical facts that have a particular legal consequence or that give rise to a particular relationship can be the subject matter of such verification, but unlike a lawsuit for performance, a declaratory judgment cannot be enforced[31]. In the repealed Decree Law 551, there are no provisions that pertain to the verification and prevention of patent infringements. However, in the *shared provisions* section of the IPA, in Article 149, this matter is regulated in a uniform way so as to include trademarks, designs and geographical signs.

Nevertheless, first of all verification of the infringement that will have to be prevented is the logical step to take. The patent owner or the licensees,

[31] For further information, please see: KURU, Baki/YILMAZ, Ejder/ARSLAN, Ramazan; Medeni Usul Hukuku (Civil Procedure Law), Ankara 2011, p. 275 et.al.

who are empowered to file the lawsuit, have a legal interest in filing the said declaratory lawsuit in order to have the infringement verified. Where the patent owner or the licensees incur or face incurring damages because of the patent infringement, they too have a legal interest in doing the same. Furthermore, even if the infringement has ended, a declaratory lawsuit can still be filed, this time for the verification of its continuing effects.

Although the right to demand prevention of infringement is not explicitly provided, this does not mean that it does not exist. If there are serious indications and the risk of an infringement even if has not yet started, a lawsuit for its prevention can be filed. In respect to verification and prevention of infringement, the provisions of Turkish Commercial Code on unfair competition do apply as general provisions. Whereas a special legislation on this matter, is suitable source and grounds for this issue, basing the lawsuit also on these provisions of Turkish Commercial Code would be useful.

In practice, for verification and prevention of infringement of patent or utility model as well as for damages, one lawsuit is filed, and eventually one judgment is passed.

In Article 149/1 under the *shared provisions* section of the IPA, it is provided that in the lawsuits that can be filed, verification that the action constitutes infringement; prevention and stopping of the infringement; transfer of title to the infringing products; compensation of tangible and intangible losses; seizure and destruction of the equipment, machines and apparatuses used to produce the infringing products and; announcement of the infringement can be demanded.

b. Cessation and Elimination of Patent Infringement

In the event of an ongoing patent infringement, cessation of the infringement can be demanded. This lawsuit is a lawsuit for performance, and the judgment is enforceable. The plaintiff may demand the prevention of the infringement even in the same lawsuit for cessation of patent infringement. The provision of Article 149, on the other hand, eliminates any possible hesitation.

In order to be held responsible for patent infringement, no fault is required and the plaintiff does not need to have incurred any loss either. Statute of limitations will not commence as long as the infringement continues. On the other hand, where the infringement has already stopped, remedying of its consequences and; solutions like seizure and destruction of the product that constitute infringement, transfer of title, announcement and publicity is possible.

The lawsuit for cessation the infringement can be filed against those who manufacture, sell, distribute the products that are subject of such patent infringement, and those who keep them for commercial purposes or who trade them.

A provision on the compensation of the loss incurred by the owner of the patent or utility model right is included also in the IPA, as a general rule; it will be possible to ask for the compensation of the damages caused by those who are unauthorized to use the patent or the utility model,. Article 151 regulates, the issue of non-realized profit and the methods for calculation. According to the IPA, as it was in Decree Law 551, the patent or utility model owners are allowed to select the method for the calculation of the profit that could not be realized because of the infringement. However, there is a restriction as to the methods that can be preferred. That is, if the holder of such right did not exercise it, non-realized profit will be calculated as provided in Article 151/5 – meaning that as it would, had the infringer used the patent or the utility model under a valid license. When the non-realized profit is to be calculated, the court should consider especially the economic significance of the intellectual property right or the number, the time periods and types of the licenses associated with the said industrial property right; the characteristics and the magnitude of the infringement, and other similar factors (IPA Art. 151/3).

In the event of infringement of the patent, a judgment with as much wider scope as possible will serve the interests of the patent owner. In other words, the patent owner will primarily expect a judgment in which minor variations of the act of infringement are encapsulated. However, potential problems that might be associated with the enforcement of such a judgment should not be underestimated[32]. The right of litigation of the patent owner with the intention of stopping the infringement as soon as possible, and thus preventing the increase of loss does also include the right to request for injunction along with the judgment. In patent law practice, requesting an injunction to obtain any result that could otherwise be obtained by a judgment is, unlike the general understanding, possible. Article 159 of the IPA allows those, who had filed or would file a patent infringement lawsuit, request an injunction to ensure effectiveness of the lawsuit. The scope of the injunctive order will be determined by the court, depending on the characteristics of the particular incident. In this context, such order can require delivery to the trustee; protection; seizure of the tools, equipment, molds and machinery used for the infringement, to take a guarantee, or other similar measures.

[32] PETERSEN, Anja; "The Wording of Requests for Injunctive Relief in Patent Infringement Proceedings" EPO Script, 2002, Munich, p. 458

Eliminating the infringement, however, means the elimination of the unlawfulness that arises as the result of that infringement. Enforcement of such judgment will ensure restoration of the conditions prior to the infringement. For example, by recalling from the market the products that constitute infringement and by destroying them, such infringement may be remedied and the restoration of the prior conditions may be ensured. Therefore, in order to have the counterfeit products recalled from the market, requesting cessation of the infringement will not be sufficient. In that case, the defendant's actions which constitute infringement will be ceased, but the previously manufactured and marketed products will still be on the market.[33]

aa. Method Followed in Infringement Lawsuits

In these lawsuits, it must primarily be verified that the plaintiff's case is based on a valid patent. Deliberations pertaining to remedying the infringement and returning to the former legal condition will be held, and a judgment will be passed on this matter. The characteristics of the patent owner's invention must be identified and the explanation of the invention must be made as a first step, following which the patented product and the defendants' product must be compared in order to establish whether or not infringement exists. Since the scope of the protection is determined by the claim or the claims, such claim or the claims will primarily have to be looked into rather than the product that the plaintiff alleges to have manufactured according to the patent. Although examination of the plaintiff's product will not be essential and neither will it produce conclusive results, this may nevertheless help understanding of the matter.

If the patent application is still being processed or the owner of a patent issued without substantive examination applies for such examination, the court must wait for the outcome of the procedure at TPTO. If the TPTO rejects the application or if the court decides for the invalidity of the patent, infringement cannot be deemed to have existed. Without disregarding the fact that since IPA has taken effect, patents without substantial examination will no longer be issued, the following judgment of the Court of Cassation is an example to such outcome at the time when Decree Law 551 was still in force:

> *"The plaintiff's attorney alleged that his client had his invention, named by him "Card Pass System", registered with numbers 2007/08940 and 2008/05766 at TPI; that in a residential compound called "Bahcesehir Regnum Elit Kent" a card pass system was installed, and that to enter the compound and to use the community facilities therein, the residents*

[33] CELIK, p. 160

used these credit cards distributed by the defendant Denizbank; that this application of the defendant was exactly the same with that of his client's registered "Card Pass System"; that also the credit cards, named "Seamiles", which can be used as ticket for inner-city sea transport, and "Pasobonus", which is intended for students, both of which marketed by Denizbank, were general purpose contactless pass card products that constituted the subject matter of his client's patent and; demanded and sued for, by reserving his rights for more, the collection of TL 1,000.00 tangible damages, and together with the highest rate rediscount interest that would run starting from the date this lawsuit is filed, TL 10,000.00 intangible damages, from the defendant.

Defendant's attorney demanded dismissal of the main lawsuit and; in the joinder lawsuit, declaring the defendant's registered patents, numbered TR 2007/08940 and TR 2008/05766 B, invalid.

The court decided for the dismissal of the main lawsuit and; in the joinder lawsuit, decided that since the application for the conversion of the patent without (substantive) examination, which is numbered 2007/08940, into a patent with substantive examination had been rejected because, although in the examinations it had been discovered that the patent was applicable to industry, it nevertheless lacked the inventive step and did not meet the innovative characteristics criteria, and thus that was the legal status of the referred patent with respect to both the infringement allegations as well as with respect to the demand in the joinder case file for declaring it invalid and; that since the registration of the plaintiff's patent was no longer valid, there was no need to pass a judgment on this now irrelevant demand. The court did, at the same time, declare the patent 2008/05766 invalid and decide for its deregistration, because it lacked innovative [characteristics] and the inventive step. The plaintiff of the main lawsuit, and the defendant of the joinder lawsuit appealed the judgment.

As upon discussing and considering information and documents in the case file, and all evidences on which the court based its arguments for its judgment, no aspect that is against the procedural rules and the law was found, none of the appeal arguments of the attorneys of the plaintiff of the main lawsuit, and of the defendant of the joinder lawsuit is deemed appropriate.

CONCLUSION: It is unanimously decided on the date of 1.6.2016 to reject, for the reasons explained at above, all appeal arguments of the attorneys of the plaintiff of the main lawsuit, and of the defendant of the joinder lawsuit and; to AFFIRM the judgment that is found in compliance with the procedural and substantive law and; to have the appeal fee balance of TL 30.70 collected from the appellant."[34]

[34] 11th Civil Chamber, 1.6.2016, 2015/10882-2016/6059

Whereas substantiation of copying of the patent claims is a technical matter, technical details are not by themselves sufficient for determining whether or not infringement exists. In order to make an assessment of the legal consequences of the infringement, knowledge of the principles on patent right as well as the examination of the financial aspect are also necessary[35].

In infringement cases, reading of the claims by referring to the descriptions and drawings in the patent certificate can help understanding of the invention as it should. However, grammatical interpretation of the claims will usually prove insufficient, and a purposive interpretation will have to be made. Starting with the examination of the latest created documents can be more useful when such an examination is needed for the explanation of the invention. By this way, the nature of the invention will be understood, and a better comparison can be made. Such assessments are primarily technical, and at the same time legal. In order to comprehend the invention, the judge can take the professional opinion of a technical expert of that particular field. Thus, Article 266 of Civil Procedure Law provides the statutory basis of this. When the resolution of the dispute requires special and technical knowledge, the opinion of one or more expert witnesses can be taken. The expert witness should make a comparison of the patent claims and the product of the allegedly infringing party. The point of reference is not the patent owner's product; it is the patent. The patent owner might not yet have manufactured the product or he might have manufactured the product without using the patent.

Use of the claims exactly as they are or the use of their equivalents will not make any difference; in both cases the infringement will be deemed to have occurred. However, occasionally some of the claims might not have been used, or features that are not written in the patent might have been added. In this eventuality, discovering of the essence of the invention will be decisive. Lack of inventive characteristics of the secondary or the additional features will not enable an assessment in favor of the defendant. Nevertheless, even if they are not associated with the essence of the patent, the missing features, the claims which are not used, will not overrule an infringement. Should, regardless of the missing features, the resulting product produce the same results with the invention, the patent will be deemed to have been infringed[36].

Verification of as well as stopping and remedying patent infringement can be requested in the same lawsuit. In fact, most of the lawsuits are indeed prepared and filed in such a way to include these requests. In an actual dispute, the patent owner plaintiff made such a request. The part of the judgment, which pertain to this matter is as follows:

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[35] MILLER, R. Arthur/DAVİS, H. Michael; Intellectual Property, US, 2000, p. 351

[36] BENTLY/SHERMAN, p.503

> "*...that it was about the invention titled 'liquid container cap mechanism', that the defendant is engaged in the business of cap manufacturing and marketing and, alleging that the bottle caps which the defendant manufactured and marketed constituted infringement of his client's patents, thus filed this lawsuit for the verification, stopping and prevention of the infringement of the rights of his client as well as of the unfair competition; for the seizure of the caps the manufacture of which constituted infringement of the patent rights, and also unfair competition; for stopping the promotion, manufacturing, importation and exportation, marketing, distribution and all kinds of trading of the bottle cap that infringe the patents as well as for public announcement of the judgment. Forwarding the same allegations in the joinder lawsuit, he asked for TL 15,000 tangible damages, TL 50,000 [damages] for loss of reputation TL 50,000 intangible damages, and any interest that would accrue...*"[37]

The characteristic features of the act of infringement should be indicated in the court's judgment and; such judgment must be drafted so as to allow a full enforcement like stopping of the production, sale, promotion and trading of the infringing products. Therefore, the dispute between the parties will have been resolved and the plaintiff patent owner will not have to file another similar lawsuit. Indeed, the infringer might try to circumvent the judgment by making minor adjustments on the product. For this reason, the main and the characteristic features of the act of infringement must be indicated in the final judgment. In its judgment, the court can state and explicitly define the claims that the defendant had used, and by this way, it will virtually have photographed the very act of the infringement.

bb. Application of Method and Exceptions in Process Patent Infringement Lawsuits

In the event of a process patent, it will be examined whether or not the defendant had used the patent duly; if he had manufactured the products that had been obtained by employing such process, and if he had marketed them. The patent owner will be entitled to request the measures, which are necessary for the registered patent, to be taken. However, it must be proven that the defendant had used the process provided in the patent owner's patent.

In Article 141/2, the provision in the matter of infringement of the process patent reads as follows: '*Where the subject matter of the patent is about a process for obtaining a product or substance, the court can require the defendant to prove that the process for obtaining the same product or*

[37] 11th Civil Chamber, 24.12.2015, 2014/18840-2015/13906 (UYAP)

substance is different from the process, which is the subject matter of the patent. Where the product or substance obtained by using the process that is the subject matter of the patent is new, every same product or substance that is produced without the permission of the patent owner will be deemed to have been obtained by using the process that is the subject matter of the patent. The burden of proof falls on whoever claims otherwise. In that case, the legitimate interest of the defendant in keeping his production and business secrets undisclosed will be taken into consideration."

There are some actions that are confused with patent infringement, and for which lawsuits for their prevention are filed. In practice, drug license applications are correlated with patent, and they can be the subject matter of infringement cases, which might also include request for injunction. On the other hand, according to Article 85/(3) of the IPA, the procedure for licensing of drugs is an exception to patent rights. A provision that is similar with this provision of the IPA was also included in Decree Law 551's Article 75/f on the scope and perimeters of this right. As it is mentioned with regard to matters about the limits of patent rights, monopolistic protection does not work where certain reasons exist. One of them is licensing of the drug, and actions that also involve the tests and experiments that are required for this reason. In a particular case it reviewed, the 11th Civil Chamber of the Court of Cassation stated that the defendant had filed an application for a drug, which was the same as the drug named "Efexor" that was already protected under patent No. 1997 00190. The plaintiff, who was the owner of the patent, argued that this action constituted an infringement and that it was the indication of the fact that the defendant would most probably exploit the plaintiff's registered patent. The court of first instance did not agree with these arguments, and based on Article 75/F of the Decree Law 551, concluded that the applications for licensing of the drugs as well as their testing, experimenting and experimental production constituted an exception to the patent right, thus affirming the local court's judgment [38]. The fact that the remaining protection term of the patent was long (11 years), was not deemed as confirmation of the patent owner's allegations. Besides, the Ministry of Health had stated that this application had not yet been decided, and the Court concluded that the action should be deemed within the scope of the exception.

Likewise, in another similar case, the judgement of a Civil Court of Intellectual and Industrial Property Rights that had passed a similar judgment was affirmed[39]. In this file, it was taken into consideration that the defendant had not yet started to manufacture and sell, and thus the patented process applications could not be compared. The court had decided that in patent

[38] 11th Civil Chamber, 24.6.2013, 2012/14850-2013/13172 (UYAP)

[39] 11th Civil Chamber, 17.2.2011, 2009/859-2011/1835 (UYAP)

infringement lawsuits, primarily, the scope of the plaintiff's patent should be verified, and then the defendant's action should be analyzed, thus concluding in its judgment that in that particular case nothing had not yet been manufactured and sold, and the fact that the same active substance had been used did not alone prove infringement.

CONCLUSION

Although the examination and resolution of patent infringement allegations is a legal matter, the technical support of an expert witness is also needed. Being able to understand and interpret the patent claims requires knowledge in that technical field. Eventually, this means that since, as mentioned in Article 266 of the Civil Procedure Law, the judge's legal and general knowledge would obviously not be sufficient to resolve the case, the help of a technical expert will be needed. The expert witness that would be selected must currently be practicing and following the developments in that particular technical field, and have an average level of expertise. The general understanding is that any technical personnel who makes repairs and performs maintenance work would not be a suitable expert.

While verification of copying of the plaintiff's patent that is still valid, or of a counterfeit product, is a technical matter, technical knowledge alone will not be sufficient to review the question of infringement. Assessment of the legal consequences of infringement requires knowledge of patent right and the principles on its protection, and in many cases examination of the financial aspect. In this respect, in infringement and compensation cases, experts who know the patent principles as well as financial experts should be assigned along with technical experts.

The expert will have to explain to the court, both the technical information known on the patent application date and the improvement or the solution provided by the patent; compare the claims with the allegedly infringing product or the use of process and; submit a report on how the infringement had occurred. In practice, difficulties are encountered when selecting and assigning the expert witnesses and; in most cases the problem arises from the lack of knowledge of the expert witness on the principles of patent law, as technical knowledge alone is not enough for the resolution of the patent dispute. When interpreting the claims, the balance between the legitimate expectations of the patent owner and the public domain that must be protected should be maintained. For this reason, the technical expert is required to work in collaboration with another expert or other experts with knowledge in patent law.

Nowadays, inventions are usually associated with computer programs, and many of them are computer aided. In cases of infringement of such patents, the term technical expert will naturally include software experts. Resolution of such disputes requires the help of software engineers as well as the experts in the pertinent technical field.

IPA, on the other hand, does not bring anything substantially new with respect to cases for the verification of patent and utility model infringements and; regarding the legal consequences of infringements. Considering the predominantly technical aspect of the matter as well as the complex technical nature of the patent cases, giving a thorough training to the practitioners of this field will be very useful.

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THE ROLE OF SOFT LAW AND THE INTERPLAY BETWEEN SOFT LAW AND HARD LAW IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS[1]

Yumuşak Hukukun Rolü ve Uluslararası İnsan Hakları Kapsamında Yumuşak Hukuk İle Sert Hukuk Arasındaki İlişki

Nagihan CİHANGİR[2]

ABSTRACT

This study sheds light on the issue of the role and significance of soft law as an instrument of international law. On this basis, it attempts to present a comprehensive research by including an examination and analysis regarding the concept of 'soft law', its significance, and the interplay between soft law and hard law in the context of international human rights.

Although soft law has not been acknowledged as law due to lack of binding character, and deemed to be less significant in the field of international law, considering the significant role of soft law instruments in the law-making process of international law and the 'multifaceted and dynamic' interaction of soft law and hard law, the view disregarding the significance of soft law seems to be 'misleading'.

In this context, the aim of this paper is to critically discuss the role of soft law and the interaction of soft law and hard law in various dimensions, and also explore the interplay between soft law and customary international law in the context of international human rights in depth.

Keywords: Binding Instruments, Customary International Law, Declaration, Hard Law, International Human Rights Law, Nicaragua Case, Non-Binding Instruments, Law-Making Instruments, Opinio Juris, Resolution, State Practice, Soft Law, Treaty Law.

ÖZET

Bu çalışma, uluslararası hukukun bir aracı olarak yumuşak hukukun rolüne ve önemine ışık tutmaktadır. Bu kapsamda, 'yumuşak hukuk' kavramı, önemi ve yumuşak hukuk ile sert hukuk arasındaki karşılıklı etkileşim konusunda uluslararası insan hakları bağlamında bir inceleme ve analiz içeren kapsamlı bir araştırma sunulmaya çalışılmıştır.

Bağlayıcı nitelik taşımadığı için bir hukuk dalı olarak kabul edilmediği ve uluslararası hukuk alanında daha az önemli görüldüğü halde, uluslararası hukuka ilişkin hukuk oluşturma sürecinde yumuşak hukuk araçlarının önemli rolü ve yumuşak hukuk ile sert hukukun "çok taraflı ve dinamik" etkileşimi dikkate alındığında, yumuşak hukukun önemini dikkate almayan görüş "yanıltıcı" gibi görünmektedir.

Bu bağlamda, bu makalenin amacı, yumuşak hukukun rolü ve yumuşak hukuk ile sert hukuk arasındaki etkileşimi çeşitli boyutlarda eleştirel bir yaklaşımla tartışmak ve uluslararası insan hakları bağlamında yumuşak hukuk ile uluslararası teamül hukuku arasındaki etkileşimi derinlemesine incelemektir.

Anahtar Kelimeler: Bağlayıcı Kurallar, Uluslararası Teamül Hukuku, Bildirge, Sert Hukuk, Uluslararası İnsan Hakları Hukuku, Nikaragua Davası, Bağlayıcı Olmayan Kurallar, Hukuk Yapma Araçları, Opinio Juris, İlke Kararı, Devlet Uygulaması, Yumuşak Hukuk, Sözleşme Hukuku.

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I. INTRODUCTION

Despite generally being deemed as non-binding instruments or non-binding provisions of treaties, soft law has a significant role in the law-making process of international law.

Namely, as pointed out by the ICJ in the *Nicaragua case,*[1] by performing an essential function in the evaluation of the existence of the two main elements (*opinio juris* and state practice) of customary international law,[2] soft law instruments 'precede and help form new customary international law'.[3] The instruments of soft law have also noteworthy effect of being the 'first step' in the law-making process of treaties, and they facilitate to reach the necessary consensus for adopting treaties which are binding on states.[4] Furthermore, soft law has remarkable influences in terms of identifying the new emerging needs and requirements of the international community, and also allows states and international institutions to take responsibility for dealing with these issues.[5]

Moreover, its initiator and complementary role on human rights law is also undeniable.[6] In this regard, the instruments of soft law have undertaken an important role as an example and precursor in the process of both the adoption of agreements and the emergence of fundamental norms establishing human rights law.

Although it has not been acknowledged as law due to lack of binding character, and regarded to be less significant compared with hard law in the field of international law, taking into account the significant role of soft law instruments in the law-making process of international law and the 'multifaceted and dynamic' interaction of soft law and hard law, the view disregarding the significance of soft law is 'misleading'.

The aim of this essay is to critically discuss the role of soft law and the interaction of soft law and hard law in various dimensions, and also the interplay between soft law and customary international law in the context of international human rights.

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1 *Case Concerning Military and Para-military Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14; 76 ILR 349.

2 E.g. the UNGA Res 46/215 (20 December 1991) UN Doc A/RES/46/215 citing D L Shelton, *Handbook of International Law* (Routledge Press, 2008) 8.

3 D Shelton, "International Law and Relative Normativity", in Malcolm D. Evans (ed), *International Law* (OUP 2010) 161.

4 A E Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48 *International and Comparative Law Quarterly* 901.

5 A Cassese, *International Law* (OUP 2005) 196.

6 Shelton (n 3) 164-169.

With this underlying aim in mind, this essay firstly provides an examination regarding the concept of 'soft law' and its significance, and the interplay between soft law and hard law from a general perspective, secondly, presents an analysis of the role of soft law in the context of international human rights specifically by also examining its interaction with customary international law and finally attempts to look at a specific problem of the clash between state practice and *opinio juris* in a critical way.

II. SOFT LAW

What is 'soft law'?

To draw up a general framework of an issue, firstly, the relevant concept must be accurately identified. In this sense, considering the literature, it is seen that a series of meanings given to the concept of 'soft law'.

Essentially, as a description of soft law, *Baxter* stated that 'there are norms of various degrees of cogency, persuasiveness, and consensus which are incorporated in agreements between States, but do not create enforceable rights and duties.'[7]

According to *Shelton*, the term of 'soft law'[8] 'usually refers to any international instrument other than a treaty containing principles, norms, standards, or other statements of expected behaviour.'[9] Moreover, she noted that the 'weak commitments of treaties' may be regarded as 'soft law'.[10]

Cassese identifies soft law as 'a body of standards, commitments, joint statements, or declarations of policy or intention, resolutions adopted by the United Nations General Assembly (hereinafter "UNGA") or other multilateral bodies, etc.'[11]

Boyle and Chinkin also defined the term as 'a convenient description for a variety of non-legally binding instruments used in contemporary international relations' that contains inter-state conference declarations such as the 1912 Rio Declaration on Environment and Development; UNGA Instruments such as the 1948 Universal Declaration of Human Rights (hereinafter "UDHR") and resolutions regarding various issues; recommendations, guidelines and codes of conduct adopted by international organizations, such as UNEP's 1987 Guidelines on Environmental Impact Assessment, FAO's Code of Conduct on Responsible Fisheries; the common international standards of national

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7 R R Baxter, 'International Law in "Her Infinite Variety" '(1980) 29(4) *International and Comparative Law Quarterly* 549.

8 Shelton (n 3) 159.

9 Shelton (n 2) 3.

10 Shelton (n 3) 160.

11 Cassese (n 5) 196.

regulatory bodies, NGOs, and professional and industry associations also can be potentially assessed within the meaning of soft law.[12] Additionally, the concept of soft law can be implemented into non-treaty agreements[13] which are not capable to come out as a treaty.[14]

In light of these definitions, it can be said that soft law has generally the following features: Soft law; *i)* is non-legally binding, *ii)* 'consists of general norms or principles, not rules'[15] and *iii)* is law that is not readily enforceable through binding dispute resolution',[16] *iv)* does not establish obligatory rules for parties, *v)* is regarded as a first step in international law-making process.

The Significance and Effects of Soft Law

Undoubtedly, soft law, consisting of non-binding norms, has significant and also extensive effects on the establishment and development of international law-making process.[17]

Firstly, the use of 'soft law' instruments, such as recommendations, guidelines, codes of practice or standards is important in indicating the constitution of guidelines which has subsequently the potential to transform into legally binding rules.[18] This can be achieved either by transformation into a treaty or under certain conditions, by recognition as a customary rule.[19] In other words, the instruments of soft law may 'lay the ground', or establish the 'building blocks', for the progressive constitution of customary rules or treaty provisions and 'gradually soft law may turn into law proper'.[20]

Besides, *Cassese* summarizes the 'three major features' of soft law instruments as follows: Soft law indicates 'the modern trends emerging in the world community', reflects 'the new concerns of the international community', and facilitates 'to reach full convergence of views and standards'.[21]

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[12] A Boyle and C Chinkin, *The Making of International Law* (OUP 2007) 211-212.
[13] Boyle and Chinkin (n 12) 213.
[14] ibid 213. Also they state that 'it is not easy to determine whether an agreement is a binding treaty as observed in the *Qatar-Bahrain Maritime Delimitation case*.' See, *Maritime Delimitation and Territorrial Questions* [1994] ICJ Rep 112; 102 ILR 1.
*For more definitions of soft law, see also, M Shaw, *International Law* (CUP 2014) 83; J Gold, *Interpretation: The IMF and International Law* (London: Kluwer Law International 1996) 299; C C Lichtenstein, 'Hard Law v. Soft Law: Unnecessary Dichotomy'(2001) 35(4) *International Lawyer* 1433; P M Dupuy, 'Soft Law and the International Law of the Environment'(1990-1991) 12(2) *Michigan Journal of International Law* 420.
[15] Boyle (n 4) 901.
[16] ibid 901.
[17] Shelton (n 2) 3.
[18] Shaw (n 14) 84.
[19] ibid 84.
[20] Cassese (n 5) 196.
[21] ibid 196.

Moreover, due to the concerns about sovereignty, States are willing to be a part of a non-binding agreement rather than an agreement consisting of binding rules, and seem to apply soft law instruments extensively. This is mainly because as well as having a non-binding character, soft law instruments do not require a series of procedural process in domestic law and present a flexible and suitable environment for reaching international consensus and responding to dynamic needs of the developing world.[22]

The Interplay Between Soft Law and Hard Law in General

In this section, to understand the relationship between soft law and hard law,[23] firstly the concept of hard law, secondly the interaction of soft law and the two main sources of hard law will be examined briefly.

Lichtenstein defines 'hard law' as 'an obligation of a State or States for the breach of which it is or they are responsible, whatever form of sanction or penalty that responsibility may entail' in international law.[24]

Also, according to *Abboth and Snidal*, the term of hard law refers to 'legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.'[25] In other words, 'hard law' is the law which establishes binding rules for the parties of international law, and, in the literature, the hard law is essentially regarded as customary law and treaty law in the light of Article 38 of the Statute of the International Court of Justice.[26]

The Relationship Between Soft Law and Customary International Law in General

The relationship and interplay between soft law and the instruments of hard law seems to be more dynamic, sophisticated and diverse in contemporary international law. According to *Shelton,* in the context of customary

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22 Boyle and Chinkin (n 12) 214; Shaw (n 14) 84; H Hillgenberg, 'A Fresh Look at Soft Law' (1999) 10(3) *EJIL* 499; Cassese (n 5) 196-197.

23 Shelton (n 2) 7.

24 Lichtenstein (n 14) 1433.

25 K W Abbott and D Snidal, 'Hard Law and Soft Law in International Governance'(2000) 54(3) *Legalization and World Politics* 421.

26 *Olivier* noted that 'treaties and customary international law can be singled out as the principal sources of international.' M Olivier, 'The Relevance of 'Soft Law' as a Source of International Human Rights' (2002) 35 *Comp.&Int'l L.J.* 289.
**Shelton* remarked that 'general principles of law are a third, more rarely used, source of international law, with judicial decisions and teachings of highly qualified publicists providing evidence of the existence of a norm.' Shelton (n 2) 1.

international law, soft law instruments may do one or more of the following:[27] *i)*'codify pre-existing customary international law, helping to provide greater precision through the written text';[28] *ii)*'crystallize a trend towards a particular norm, overriding the views of dissenters and persuading those who have little or no relevant state practice to acquiesce in the development of the norm';[29] *iii)*'precede and help form new[30] customary international law'.[31]

Additionally, *Chinkin* remarked that soft law can transform into customary international law or be 'declaratory' of it, and the appropriate instruments of soft law can make a 'catalytic effect'.[32]

In fact, according to Article 38 of the ICJ Statute, 'the essence of custom' is that it should compose 'evidence of a general practice accepted as law.' Therefore, it can be seen that two key elements must be existing for the formation of custom. In the *North Sea Continental Shelf Case,*[33] the ICJ held that for a customary rule to emerge the existence of *state practice*[34] (objective element) and *acceptance of law-opinio juris* (subjective element) are needed.[35]

In this context, non-binding instruments of soft law are expected to be beneficial when they can help produce 'widespread and consistent state practice'[36] and/or 'provide evidence of *opinio juris* in support of a customary rule.'[37] UNGA resolutions and intergovernmental declarations demonstrating this impact in the *Nicaragua Case*[38], the *Advisory Opinion on Nuclear*

[27] ibid 1.

[28] E.g. UN Basic principles and guidelines on the right to remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law, citing ibid 8.

[29] E.g. UNGA Res 1803(XVII) (14 December 1962).

[30] E.g. UNGA Res 46/215 (n 2).

[31] *Shelton* argued that 'non-binding instruments sometimes have provided the necessary statement of legal obligation (*opinio juris*) to evidence the emergent custom and have assisted to establish the content of the norm. The process of drafting and voting for non-binding normative instruments also may be considered a form of State practice.'Shelton (n 3) 161.

[32] C M Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850.

[33] *North Sea Continental Shelf Cases* [1969] ICJ Rep 3; 41 ILR 29.

[34] As acknowledged in the *Asylum Case* by ICJ, a general practice must be constant and uniform. See *Asylum Case (Columbia v. Peru)* [1950] ICJ Rep 395; 17 ILR 280.

[35] Shaw (n 14) 53, 61.

[36] Boyle (n 4) 901.

[37] Shelton (n 2) 8.

[38] *Nicaragua Case* (n 1).

Weapons[39] and the *Gabcikovo-Nagymaros Dam* Case[40] are good instances.[41]

In the *Nicaragua Case,* the judgment of the ICJ establishes a significant step in the ICJ's interpretation and development of international law.[42] In this case, the ICJ held that the *opinio juris* of States regarding the prohibition against the use of force 'could be deduced from their attitude towards the relevant resolutions of the UNGA'.[43] In this regard, *Chinkin* noted that:

> [W]ithout any more evidence of the alleged *opinio juris* than mere acceptance of the resolutions, the Court determined that there was indeed an established principle of customary international law. This conclusion was reached despite many instances of inconsistent State practice which were not considered by the Court to be fatal to the claim, but were dismissed as illegal breaches of the rule.[44]

Also, regarding the significance of the decision of the *Nicaragua Case* in terms of soft law, *Chinkin* argued that:

> [T]he decision appears to represent a willingness by the Court to accept the transformation of soft law principles into hard law. It may indeed be a greater recognition of General Assembly resolutions as constituting a source of international law and thus be a redefinition of those sources. This would be just such a revolutionary change in the sources of international law.[45]

Additionally, concerning the *Nicaragua Case,* stating that the role of resolutions adopted by international organisations as evidence of *opinio juris* is affirmed in Nicaragua, *Charlesworth* also noted that the ICJ is clear regarding the consent of States to such resolutions is more important than just clarification or repetition of the principles of the United Nations (hereinafter "UN") Charter. Namely, it means 'an acceptance of the validity of the rule or set of rules declared by the resolutions themselves'.[46]

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39 International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion [1996] ICJ Rep 226; 110 ILR 163; A Roberts and R Guelff, *Documents on the Laws of War* (OUP 2000) 639.

40 *Gabčikovo-Nagymaros Project* Case *(Hungary v. Slovakia)* [1997] ICJ Rep 7; 116 ILR 1.

41 Boyle (n 4) 901.

42 W Czaplinski, 'Sources of International Law in the Nicaragua Case' (1989) 38 *International and Comparative Law Quarterly* 151.

43 Chinkin (n 32) 850.

44 ibid 850.

45 ibid 850.

46 H C M Charlesworth, 'Customary International Law and the Nicaragua Case' (1984-1987) 11 *Australian Year Book of International Law* 1.

Besides, according to *Charlesworth* the effect of the *Nicaragua* decision 'is to elevate the significance of *opinio juris* over practice, to make evidence of *opinio juris* easier to find and to give priority to words over deeds'.[47]

Indeed, in the *Nicaragua Case*, which is regarded to be one of the most important examples indicating the issue of the transformation of soft law into customary international law, with respect to the prohibition against the use of force, the ICJ affirmed that States' attitude towards the relevant resolutions of the UNGA may provide evidence of the existence of *opinio juris* regarding emergence of a customary rule.[48]

Moreover, in the *Advisory Opinion on Nuclear Weapons,* with regard to the UNGA resolutions, as an instrument of soft law, the ICJ noted that:

> [G]eneral Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given UNGA resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.[49]

In its *Advisory Opinion on Nuclear Weapons,* the ICJ has indicated that UNGA resolutions may have 'normative value' and especially may 'provide evidence for establishing the existence of a rule or the emergence of an *opinio juris*', or they may 'show the gradual evolution of the *opinio juris* required for the establishment of a new rule'.[50]

The Relationship Between Soft Law and Treaty Law in General

The effects of soft law on treaty law can be relatively classified under three main headings, as follows:

i) First step effect in treaty-making process:

Boyle and Chinkin remarked that some of the non-binding instruments of soft law has a great significance because of being the 'first step' in a negotiation process which is ultimately leading to the completion of a multilateral treaty, and the non-binding UDHR which was adopted long before the 1966 UN Covenants is one of the good examples of such instruments.[51]

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[47] Charlesworth (n 46) 1.
[48] Chinkin (n 32) 850; Shelton (n 2) 9.
[49] Advisory Opinion (n 39) at para 70.
[50] Cassese (n 5) 169.
[51] For more examples see also Shelton (n 2) 11; Boyle and Chinkin (n 12) 216.

On this matter, *Shelton* emphasized the initative effect of soft law in treaty law stating that 'the process of negotiating and drafting non-binding instruments can greatly facilitate the achievement of the consensus necessary to produce a binding multilateral agreement.'[52]

ii) Filling in gaps of existing treaties in force:

Regarding this, *Shelton* remarks that non-binding instruments of soft law may take action to 'complete' or 'supplement' binding treaties, and gives the examples of the Bonn Convention on Migratory Species of Wild Animals (1979), the Antarctic Treaty (1959) regime, and agreements of the IAEA concerning non-proliferation of nuclear weapons in order to indicate this function. [53]

iii) Authoritative Interpretation of the Provisions of the Treaties:

Soft law can also be employed as 'authoritative interpretation' or 'amplification' of the provisions of a treaty,[54] when the issues are contentious and left unresolved in the treaty itself.[55] In this regard, 'UNGA resolutions interpreting and applying the UN Charter, including the UDHR can be a good example of this effect.[56] Therefore, despite having a non-binding character, the interplay of the instruments of soft law with related treaties may convert 'their legal status into something more'.[57]

The Interaction of Soft Law and General Principles/Domestic Laws

With reference briefly to *the relationship between soft law and General Principles*; *Boyle and Chinkin* states that general norms or principles are frequently set 'in the form of non-binding declarations or resolutions of international organisations than in the provisions of multilateral treaties.'[58] In this context, the UDHR continues to be one of the most efficient examples.[59]

In addition to these mentioned above, *the instruments of soft law can make an effect on domestic laws and national legislation* by providing 'guidance or a model for domestic laws, without international obligation' and these norms may turn into 'hard law' via 'adoption by States in their domestic law, or by incorporation into private binding agreements'.[60]

52 Shelton (n 2) 10.
53 Shelton (n 2) 11.
54 Boyle and Chinkin (n 12) 216.
55 Shelton (n 2) 11-12.
56 Boyle and Chinkin (n 12) 216-217.
57 ibid 220.
58 ibid 222.
59 ibid 222.
60 Shelton (n 2) 8, 13.

Moreover, the impacts of soft law especially on customary and treaty law not only relatively have the potential to refute the idea claiming that soft law is not law, but also are some of the most significant evidence of leading role of soft law in establishment and development of international law.

III. THE ROLE OF SOFT LAW IN THE CONTEXT OF INTERNATIONAL HUMAN RIGHTS

1. The Role of Soft Law in the context of Human Rights

In the field of human rights, 'nearly all recent multilateral conventions have been preceded by adoption of a non-binding declaration.'[61] In this regard, undoubtedly, the most significant example is the UDHR.[62] International and territorial treaties, almost without exception, refer to this Declaration 'as a normative precursor' and the Declaration itself indicates that 'it was intended as "a common standard of achievement" that could lead to binding agreement'.[63] Besides, the UN has adopted many resolutions and declarations affecting, directly or indirectly, human rights.[64]

Essentially, soft law is 'used regularly for international human rights standards setting, either as an ultimate or an intermediate expression of international consensus.'[65] In this regard, soft law can state standards and provide consensus on issues, when 'unanimity is lacking in state practice and the will to establish hard law is absent.'[66] In other words, hard law and soft law get into interact in order to identify and give form the content of international obligations,[67] and in this process, soft law has a significant function in 'facilitating and mobilising the consent of states' which are necessary to constitute binding international rules.[68]

Moreover, the instruments of soft law do not require establishing a binding treaty before it can make an effect in the field of international policy. As a

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[61] Shelton (n 3) 162.

[62] The UDHR was part of the rising development of postwar multilateral instruments, many of them constituting inter-governmental organisations. H Steiner, P Alston and R Goodman, '*International Human Rights in Context Law, Politics, Morals*' (OUP 2007) 160.

[63] Shelton (n 2) 10.

[64] However, *Olivier* pointed out that although resolutions in the field of international human rights play a profound role in the creation of both treaties and custom, they fall outside the scope of the traditional sources embodied in the Article 38 of the ICJ Statute; Olivier (n 26) 289.

[65] D Shelton, 'Compliance with International Human Rights Soft Law' (1997) 29 *Stud. Transnat'l Legal Pol'y* 119.

[66] Shelton (n 65) 119.

[67] ibid 119.

[68] Olivier (n 26) 289.

primary example, the Helsinki Final Act of 1975 was not a binding agreement, but it had 'incalculable' influence in a wide area in emphasising the role and importance of international human rights.[69]

This importance of Helsinki Act was also acknowledged by the ICJ in its Judgment on the *Merits in Nicaragua v. US*[70] by the following statement that 'Acceptance of a text in these terms confirms the existence of an *opinio juris* of the participating States prohibiting the use of force in international relations.'[71]

Furthermore, non-binding instruments may be regarded as an 'authoritative interpretation' of the obligations consisted in treaty provisions. The Inter-American and Universal Declarations of Human Rights, as they relate to the OAS and UN Charters, and the ILO Declaration on Fundamental Principles and Rights at Work can be referred to as instances.[72]

3. The Interplay between Soft Law and Customary International Law and The Role of Customary International Law in the context of Human Rights

Mainly, 'resolutions of international organisations and multilateral declarations by states may have considerable effects on customary international law.'[73] As pointed out above, soft law instruments sometimes have provided 'the necessary statement of legal obligation *(opinio juris)* to evidence the emergent custom and have helped in forming the content of the norm'.[74] In this regard, 'the Nicaragua judgment strengthens the law-making force of UNGA resolutions and de-emphasizes the importance of practice as one of the two elements necessary for the formation of customary international law'.[75]

In this context, in the *Nicaragua Case*, US' acceptance of the principle of the prohibition of the use of force which is contained in the declaration on principles governing the mutual relations of States participating in Helsinki in 1975 was held by the ICJ as a confirmation of the existence of an *opinio juris* regarding the emergence of a customary rule.

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69 Shaw (n 14) 84.
70 I Brownlie, *Principles of Public International Law* (OUP 2003) 535.
71 ICJ Reports 1986, 100, para.189 emphasis added; and see also 133, para.264, citing Brownlie (n 70) 535-536.
72 Shelton (n 2) 12.
73 Boyle and Chinkin (n 12) 225.
74 Shelton (n 2) 12.
75 T Meron, *Human Rights and Humanitarian Norms as Customary Law (OUP 2012)* <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198257455.001.0001/acprof- 9780198257455-chapter-2.> accessed 20/12/2015

Undoubtedly, the UDHR and the Helsinki Final Act are primary examples of soft law containing fundamental rights, principles and standards in the context of human rights law, and some of these rights concerning e.g. torture, slavery are also regarded to be as in the category of customary international law.

Furthermore, the importance of the role of the 'customary international law of human rights' is acknowledged in the *Restatement of the Law: The Third*: 'A State violates international law if, as a matter of State policy, it practices, encourages, or condones *i)genocide, ii)slavery or slave trade, iii)the murder or causing the disappearance of individuals, iv)torture or cruel, inhuman or degrading treatment or punishment, v)prolonged arbitrary detention, vi) systematic racial discrimination, or vii)a consistent pattern or gross violations of internationally recognized human rights*.'[76]

Meron emphasized that 'the Restatement lists a limited number of mostly civil rights, all of central importance, as norms embodying customary international law'.[77]

Also, according to *Cassese*, regardless of their ratification of the conventions on the matter, the rules banning slavery, genocide, racial discrimination, torture and forcible denial of the right of peoples to self-determination bind all States of the international community, and also these rules 'have acquired the status of *jus cogens*'.[78]

In the light of the statements above, it may be useful to take a brief look at the judgment of the national courts. In this context, the US case law has a special importance since it is acknowledged that the international law is part of the law of the US in the *1900 Paquete Habana judgement*[79] forming the basis with respect to the role of customary law in the US case law, and the relationship between soft law and customary international law is frequently examined in the decisions of the US national courts.

According to *Meron*, the leading case of the US courts on human rights and customary law is the judgment in *Filartiga v. Peña-Irala.*'[80] In this case, the Court had to determine whether the customary international law included a prohibition of torture, and found 'the UN Declarations of UDHR and the Declaration on the Protection of All Persons from Being Subjected to

[76] Brownlie (n 70) 537.

[77] Meron (n 75) 'The prohibitions against aggression, genocide, slavery, racial discrimination, crimes against humanity and torture and the right to self-determination are generally regarded as peremptory norms (jus cogens)'.

[78] Cassese (n 5) 394.

[79] *The Paquete Habana* 175 US 677 (1900); See J Klabbers, *International Law* (CUP 2013) 29; See also Meron (n 75).

[80] *Filartiga v. Peña-Irala,* 630 F. 2d 876, 878 (2d Cir. 1980) citing Meron (n 75).

Torture…' important 'because they specify with great precision the obligations of member nations under the Charter'.[81]

Moreover, the Court cited 'the consensus on the prohibition of torture expressed in the ACHR, the ICCPR and the ECHR' as a proof of the prohibition of torture by the modern applications of States.[82]

***State practice v. Opinio Juris*: How the clash between state practice and *opinio juris* (What States 'Do' *v.* 'Say') be handled in the context of human rights?**

What kind of approach should be demonstrated when there is a clash between what States say (verbal acts) and what they do (physical acts) on the ground? In this regard, there are some arguments around two opposite approaches which can be called 'traditional' and 'modern' approaches.[83]

While the traditional method 'requires both consistent *state practice* and *opinio juris*', the modern method of customary law formation in the field of human rights 'would allow *opinio juris* to play a more important role than *state practice'* which is usually insufficient and problematic concerning the human rights law.[84]

When defining a rule of customary international law, the *traditional approach* depends on *opinio juris* to confirm state practice, or deduces *opinio juris* from state practice, and also, the traditional approach gives more importance to physical acts than verbal acts in evaluating different types of States' acts.[85]

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[81] ibid.

[82] ibid.

[83] *Roberts* terms these two approaches as 'traditional custom' and 'modern custom'. A E Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 *Am. J. Int'l L.* 757.
*Also, *Wouters and Ryngaert* characterized the new approach as the 'modern positivist approach. J Wouters and C Ryngaert, "Impact on the Process of the Formation of Customary International Law" in Menno T. Kamminga and Martin Scheinin (ed.), *The Impact of Human Rights Law on General International Law*(OUP,2009)<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199565221.001.0001/acprof-9780199565221-chapter-6> accessed 22/12/2015.

[84] ibid; Also *Roberts* argued that 'traditional custom and modem custom are generally assumed to be alternatives because the former emphasizes state practice, whereas the latter emphasizes opinio juris.' Roberts (n 83) 757.

[85] M T Kamminga "Final Report on the Impact of Human Rights Law on General International Law", in Menno T Kamminga and Martin Scheinin (ed), *The Impact of Human Rights Law on General International Law* (OUP 2009) <http://www.oxfordscholarship.com.liverpool.idm.oclc.org/view/10.1093/acprof:oso/9780199565221.001.0001/acprof-9780199565221-chapter-1> accessed 22/12/2015; See also Roberts (n 83); *North Sea Continental Shelf*

However, asserting that the traditional approach is 'problematic' in the fields related to 'community values (jus ad bellum, armed conflict, human rights, the environment)', *Kamminga* stated that:

> Human rights treaty bodies and international criminal courts and tribunals have tended to follow an approach[86] that based on deduction from fundamental principles, rather than on induction from state practice. Moreover, when identifying state practice, they emphasize what states say rather than what they do.[87]

The new modern approach was also implemented by the ICJ in *Nicaragua case*[88] by taking into account 'the parties' and all states' UN Charter commitments and their support for General Assembly resolutions, and particularly the Friendly Relations Declaration'.[89]

In the light of mentioned above, as affirmed by the ICJ in the case of *Nicaragua* and stated in the opinion of some doctrine, it has been evaluated that the clash between 'verbal acts' and 'physical acts' of States (the challenge of inconsistent physical practice -e.g. states engaging in torture, states targeting civilians in times of war-) may be handled within the modern method emphasizing *opinio juris* over state practice, and verbal state practice over physical state practice since it is considered to be more suitable with regard to the protection of human rights and the globalization of values from the perspective of human rights.[90]

IV. CONCLUSION

Given the impact of soft law in the identification of the elements of customary international law in the process of law-making and especially its 'first step' effect in the adoption of many international conventions on human rights, it is obvious that soft law has a leading role in helping to establish international human rights law, although it is not considered to be binding as law.

Also, the judgments of the ICJ, recognizing the decisive role of statements of States given in the adoption of soft law instruments in resolving the problem of the identification of *opinio juris*, constitute evidence of the impact of soft law on hard law.

Case (n 33).

86 'Modern Approach'.

87 Kamminga (n 85).

88 ibid; Roberts (n 83).

89 Wouters and Ryngaert (n 83).

90 ibid.

Additionally, nowadays, what is most basically needed by the international community is to ensure the establishment and the spread of the good practices of reconciliation, tolerance and friendly settlement in inter-state relations.

In this context, soft law substantially contributes to ensuring the culture of reconciliation between States which prefer not to make binding international agreements due to the concerns of sovereignty and supremacy, and to producing new and different solutions to the new challenges existing in the international community. Therefore, the significance of soft law in international law seems to continue increasingly in the foreseen future.

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