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CONTENTS

WHAT'S WRONG WITH MEDIATION?*

Arabuluculuğun Nesi Yanlış?

Mustafa Oğuz TUNA**

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ABSTRACT

Mediation is one of the oldest dispute resolution mechanism. Throughout history, the practice of mediation was not the greatest or higher than its counterparts. Despite always being on the table, it was not preferred because either it is found as a useless attempt or most of the time perceived as a waste of time. Due to its voluntary and non-binding nature, it is always deemed wide open to abuse when there is bad faith. This article right here presents the assessment of the advantages and disadvantages of mediation at the international dispute resolution platforms. There are certain reasons of mediation that encourage parties to perform mediation while at the same time there are particular weaknesses which lead parties towards more secured methods of dispute resolution when it comes to their interests. At the international level, it was also asked in this article whether a Singapore-like Convention might suit the investment disputes considering the positive and negative features of mediation. Suggestions were made as to what extent the mediation should stay loyal to its characteristics and on what occasions the practice could leave being conservative via hybrid means of settling agreements.

Keywords: Investment Law, Investment Mediation, Investment Disputes, Mediation, Singapore Convention.

ÖZET

Arabuluculuk, en eski uyuşmazlık çözüm mekanizmalarından biridir. Tarih boyunca, arabuluculuk uygulaması emsallerinden daha büyük veya daha çok değildi. Her zaman masada olmasına rağmen ya boş bir girişim olarak görülmesi ya da çoğu zaman vakit kaybı olarak algılanması sebebiyle tercih edilmemiştir. İhtiyari ve bağlayıcı olmayan niteliği nedeniyle, kötü niyet söz konusu olduğunda her zaman suistimale açık olduğu kabul edilmiştir. İşte bu

* There is no requirement of Ethics Committee Approval for this study.
The meaning of the title is neither how mediation dares to arbitration, nor nothing is wrong with mediation and it's just fine. Instead, the title literally refers to that; what is wrong with mediation as we are trying to make it better?

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makale, uluslararası uyuşmazlık çözümü platformlarında arabuluculuğun avantaj ve dezavantajlarının değerlendirilmesini gözler önüne sermektedir. Arabuluculuğun, tarafları arabuluculuk yapmaya teşvik eden belirli nedenleri olmakla birlikte, aynı zamanda tarafların çıkarları söz konusu olduğunda onları daha güvenli uyuşmazlık çözüm yöntemlerine yönlendiren bazı zayıflıkları da vardır. Uluslararası düzeyde, arabuluculuğun olumlu ve olumsuz yönleri dikkate alınarak Singapur[1] benzeri bir Sözleşmenin yatırım uyuşmazlıklarına uygun olup olmayacağı da bu makalede araştırılmıştır. Arabuluculuğun ne ölçüde karakteristik özelliklerine sadık kalması gerektiği ve uygulamanın hangi durumlarda muhafazakarlıktan çıkarak uyuşmazlıkların hibrit yöntemlerle çözüleceği konusunda da önerilerde bulunulmuştur.

Anahtar Kelimeler: Yatırım Hukuku, Yatırım Arabuluculuğu, Yatırım Uyuşmazlıkları, Arabuluculuk, Singapur Konvansiyonu.

INTRODUCTION

The mediation has been in the trends of international law practice for the last decade and so does for the resolution of investment disputes. Due to its disadvantages, it is repeatedly proposed to undergo reforms and change its characteristics. However, will these changes boost the use of mediation or endanger the future of mediation? The question of what mediation lacks and requires in fitting into the international sphere of commercial and investment disputes or does it really need a change in its form to serve better is going to be addressed in this article.

The fundamental characteristics of mediation are flexibility, voluntariness and being non-binding. Since all three are in interaction with each other, a change in one could directly deform the essential features of mediation. Yet the mediation has become the focus of reformists in recent years and had its share of the innovations such as gaining enforceability by the Singapore Convention.[2] The problem that is likely to occur here is that the mediation may face losing its essence upon these developments. Mediation, after losing its non-binding nature, the flexibility first and then accordingly the confidentiality which all accepted as the crucial advantages compared to arbitration might happen to be at risk of disappearing in time.

However, as the greater demand of practitioners will continue, whether because of the harmful drawbacks of arbitration or the attraction of mediation itself, such modernization either will improve the wider use of mediation or just simply take mediation to somewhere which is not mediation at all.

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1 Nuray Ekşi, "Arabuluculuk Sonucunda Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Konvansiyonu (Singapur Konvansiyonu)", *UTTDER* 1 (2020) 27-91.

2 <https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements> accessed 01 January 2024.

I. THE RATIONALE BEHIND THE SINGAPORE CONVENTION

Intensive use of international commercial arbitration is breaking records each year as the global trade peaks. Such that the practice of it has become an indispensable reference for the parties of the commercial contracts in time.[3] Accordingly, today now the vast majority of the international commercial contracts, drafts, regulations and so on are in favor of the solution of the disputes through arbitration as the one and only reliable mechanism at present.[4]

However, even the arbitration had pathologic examples of failing from a perfect enforcement convenience of the New York Convention. It was experienced that some countries dissented to enforce the decisions rendered by the arbitral tribunals due to state immunity.[5] In addition, the intensive use of the arbitration in time has also developed its unique bureaucracy, heavy workload of proceedings and astronomic amounts of bills for the legal costs. On the contrary, besides the comparatively swift[6] and cheap[7] proceedings, the benefits of the mediation vary in many ways in respect of protecting the relationship and providing long-lasting and strengthened business links.[8] First of all, the flexibility of the mediation procedures provides an easier flow of information between the parties and it gives a productive ambience regarding the solution of the dispute as they will have greater control and power over the dispute which in arbitration, they may not have.[9] The mediation method with a

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3 Margaret Moses, *The Principles and Practice of International Commercial Arbitration*, 2nd ed. (Cambridge, New York: Cambridge University Press, 2012). Giuditta Cordero Moss, *International Commercial Arbitration: Different Forms and Their Features* (Cambridge: Cambridge University Press, 2013).

4 Peter D. Cameron, *International Energy Investment Law: The Pursuit of Stability* (Oxford: Oxford University Press, 2010). Andrew Newcombe, *Law and Practice of Investment Treaties: Standards of Treatment* (2009).

5 Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, *Redfern and Hunter on international arbitration*, 6th ed. (Oxford: Oxford University Press, 2015) 653-660. Malcolm Simpson, "Enforcement of Arbitral Awards: Be Alive to the Rule Against Re-litigation", *Corporate Disputes Magazine* October-December (2017) 191-192.

6 Dragos Marian Radulescu, "Mediation–An Alternative way to Solve Conflicts in the International Business Environment", *Procedia - Social and Behavioral Sciences* 62 (2012) 293.

7 In practice, according to Walde, average cost of mediation is up to 25% of the whole direct litigation costs and he estimates the average number of costs for big investment arbitration cases at the ICSID as USD 3-5 million. Thomas Walde, "Mediation/Alternative Dispute Resolution in Oil, Gas and Energy Transactions: Superior to Arbitration/Litigation from a Commercial and Management Perspective", *OGEL 2* (2003) 5-7.

8 Thomas Walde, "Pro-Active Mediation of International Business and Investment Disputes Involving Long-Term Contracts: From Zero-Sum Litigation to Efficient Dispute Management", *OGEL 4* (2003) 7-8.

9 John G. Merrills, *International Dispute Settlement*, (5th ed. Cambridge: Cambridge University Press 2011) 18.

settlement focus has several advantages in response to address these problems of the arbitration.[10] Mediation also shows a sign that the parties are trying to overcome the dispute to keep their long-term business relationship alive and show their good intention on the market sensitivity as it is just a mutual settling process that does not have an antagonist character.

Despite its less experience compared to arbitration, the attention of disputants and lawyers is gradually increasing.[11] As a result, the idea of mediation as one of the most popular forms of the ADR methods, appeared as it could be offered to the resolution of international commercial disputes[12]. In order to eliminate all kinds of these worries regarding arbitration, finally, Singapore Convention came out as a response to finish the discussions and get the mediation off the ground into the commercial disputes. The Singapore Convention was discussed, drafted, developed by the UNCITRAL Working Group II and adopted on 20 December 2018, and opened for signature on 7 August 2019. From this time forward, what will be experienced in practice is going to tell us whether that was a good idea or not.

A. Principles of the Convention

Singapore Convention has been signed by 55 countries so far since it was open on 7 August 2019. The Convention enters into force six months after the deposit of the third instrument of ratification, acceptance, approval or accession by the signatories of the Convention (Article 14/1). Thus the signature is not sufficient and to carry into effect, the Convention is subject to ratification, acceptance or approval by the signatories (Article 11/2). Then that means the party to the Convention consents to apply full enforceability to international settlement agreements resulting from mediation (Article 3/1)[13].

The requirements to prove a settlement agreement whether it resulted from mediation are also noted down by the Convention. For instance, the mediator's signature on the settlement agreement; a document signed by the mediator indicating that the mediation was carried out; an attestation by the institution

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10 Energy ADR Forum Report by CAEM (The Centre for the Advancement of Energy Markets), Using ADR to Resolve Energy Industry Disputes: The Better Way (2006) 12.

11 According to Walde, the most distinctive feature of mediation is a neutral person is chosen by the parties to lead them to settle the dispute by reaching a mutually bargaining position rather than imposing a settlement by judge. Walde, "Mediation/Alternative Dispute Resolution in Oil, Gas and Energy Transactions: Superior to Arbitration/Litigation from a Commercial and Management Perspective" (n 7) 4.

12 Ener M A, "Singapur Konvansiyonu: Arabuluculuk Anlaşmalarının New York Konvansiyonu", *AHBVÜHFD* 4 (2019) 232.

13 Talat Kaya, "Singapur Sözleşmesi ve Uluslararası Ticari Arabuluculuk Sonucunda Ortaya Çıkan Sulh Anlaşmalarının Tanınması ve İcrası Meselesi" *MÜHF-HAD* 2 (2019), Prof. Dr. Ferit Hakan Baykal Armağanı 985.

that administered the mediation or any other evidence acceptable to the competent authority[14]. If the mediation is conducted electronically, it is still valid if the communication among them for the course of mediation is proved (Article 4).

In addition, there are also grounds for refusing to grant relief by the competent authority. These grounds firstly can be the parties' incapacity. Second, there is a cluster of reasons concerning the settlement agreement when it is invalid, inoperative, incapable of being performed under the law to which the parties have validly subjected or the law applicable deemed by the competent authority. Again the settlement agreement may not be final, not be binding or might have been subsequently modified, the obligations in the settlement agreement could have been performed or may not be clear and comprehensible, or that granting relief would be contrary to the terms of the settlement agreement[15]. Thirdly, the impartiality of the mediator and a serious breach by the mediator in which without that, a party would not have entered into the settlement agreement[16]. Finally, with regards to the mediation procedure; the competent authority can also refuse to grant a relief sought by a party when it would be contrary to the public policy of that party or the subject matter of the dispute is not capable of settlement by mediation under the law of that party[17]. All of the abovementioned grounds are listed in Article 5 of the Convention and exhaustive.[18] The Working Group aimed to keep the available defences to a minimum, as a complex mechanism with many review grounds would be problematic for parties who want a fast and efficient process.[19]

Article 7 of the Convention also ensures parties to avail of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon. It means that the Convention allows the continued application of law or treaties of the country where the settlement agreement is sought to be

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14 Mustafa Erkan, *Arabuluculuk ve Singapur Sözleşmesi* (Oniki Levha Yayınları, 2020) 147.

15 Ersin Erdoğan, "Milletlerarası Arabuluculuk Anlaşma Belgelerinin İcrasına İlişkin BM Sözleşmesinin (Singapur Sözleşmesi) Değerlendirilmesi" *Arabuluculuğun Geliştirilmesi Uluslararası Sempozyumu,* 6-7 December (2018) Ankara 199-200.

16 Sibel Özel, "Arabuluculuk Sonucunda Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Sözleşmesi: Singapur Konvansiyonu" *MÜHF-HAD* 2 (2019), Prof. Dr. Ferit Hakan Baykal Armağanı 1203.

17 ibid (n 16) 1204. Erdoğan, "Milletlerarası Arabuluculuk Anlaşma Belgelerinin İcrasına İlişkin BM Sözleşmesinin (Singapur Sözleşmesi) Değerlendirilmesi" (n 15) 201.

18 United Nations Convention on International Settlement Agreements Resulting from Mediation "Singapore Convention On Mediation", Information Brochure, Signing Ceremony, Singapore, 7 August 2019, 3.

19 Timothy Schnabel, "The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements", *Pepperdine Dispute Resolution Law Journal,* Volume 19/1, (2019) 42.

relied upon that offers a regime more favorable than that of the Convention. This is a part of the purpose of the Convention where it seeks to encourage granting relief under the Convention in the greatest number of cases as possible.[20]

Parties to the Convention can make reservations and withdraw reservations at any time and the procedure of the entering into effect is similar to the Convention itself (Article 8/3-5). The reservation rights of the parties took place in article 8/1 of the Convention[21]. According to this, there are only two ways of reservation and no other reservations are permitted except those (Article 8/2). First, a party may declare a reservation on not to apply the Convention to settlement agreements to which it is a party, or to which any governmental agency or any person acting on behalf of a governmental agency is a party to the extent specified in the declaration. Second, a party can declare that the Convention applies only to the extent that the parties of a settlement agreement have agreed to the application of the Convention (Article 8/1). The latter envisages a general reservation and leaves more freedom to the commercial parties of a settlement agreement. Up to now, Belarus, Georgia, Kazakhstan and Saudi Arabia had the first type of reservation and the Islamic Republic of Iran declared a specified reservation together for both types.[22]

B. Promotion of the Convention and the Purpose

First of all, Singapore Convention will boost the consideration of multistep clauses in business contracts. The added value of these clauses to the dispute resolution regime is indisputable. At this angle, mediation with an enforceable background will highly likely take its place in between enforceable arbitration as the final remedy and the mostly voluntary consultations and negotiations. Parties are going to take mediation into consideration at the contract drafting stage. Today now, it is worldwide accepted that they are already default-like clauses and best suited to the individual needs of the parties. Adding mediation to that ladder will no doubt reinforce the structure of these escalated clauses. Enforceable mediation unquestionably encourages parties to draft multi-tiered clauses and also perform in due course. One benefit is also the prevention of abuse of mediation in these clauses as delay tactics that may lead to a later arbitration case in which to enforce an arbitral award becomes too late and impractical. In this respect, parties should be consulted on the future viability of the "enforceable" settlement agreement and the potential of the applicability of the Convention. A diligently drafted multistep clause together with enforceable mediation would also provide an extra trust to the parties in such clauses.

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20 "Singapore Convention On Mediation", Information Brochure, (n 18) 3.

21 Mustafa Serdar Özbek, *Alternatif Uyuşmazlık Çözümleri* (Yetkin Yayınları, 2022) 922.

22 As of January 2024: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en> accessed 01 January 2024.

The main significance of the Convention is, initially, to help the disputants to focus on their disagreement and encourage them to settle in an amicable way. Eventually, by the time the dispute is resolved, the commercial relationship between the two former disagreeing parties will be healed, strengthened and sometimes renewed. To do this, it is required to integrate the mediation through all kinds of international commercial law instruments in the most efficient way to get the best benefit. It is of importance to attract the interest of the legal environment in promoting the adoption of the Convention and the most effective use of mediation. Subsequently, this may lead to an increase in the expertise of mediation by the dispute resolution institutions of each state. To sum up, the use of mediation results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States.[23]

II. MEDIATED SETTLEMENT AGREEMENTS RESULTING FROM INVESTMENT DISPUTES AND THE SINGAPORE CONVENTION

Singapore Convention, regardless of the other pros and cons, aimed to help enforceability of the settlement agreements resulted from commercial disputes. Hence the arbitration still stands as the basic mechanism for commercial disputes, apparently the costlier, faster and more constructive ADR method; mediation has emerged and now has the same effect as arbitration.

In the first place, concerns about the enforceability have widely risen on the settlement agreements which resulted from commercial mediation and finally, in 2018, model convention and model law on international commercial mediation have been prepared by UNCITRAL Commission and opened for signing on 7th August 2019, Singapore[24] and came into force on 12 September 2020.[25] The apparent matter regarding the Convention is now whether it can be applied to settlement agreements resulting from mediation between host states and investors.

A. Applicability of the Singapore Convention to the Investment Mediation

The biggest criticism regarding the Singapore Convention here appears as the uncertainty that whether it applies to the investment disputes or not.

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23 Preamble, Singapore Convention.

24 The documents can be found here: <https://uncitral.un.org/en/texts/mediation/modellaw/commercial_conciliation. https://www.singaporeconvention.org/convention-text.html> accessed 01 January 2024.

25 <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-4&chapter=22&clang=_en> accessed 01 January 2024.

It is indeed unclear in the text that the settlement agreements resulting from investment mediation would benefit from the Convention.

Even though the name of the Convention and the specific model law purports that this development could cover only commercial mediation, it does not explicitly ban to apply the settlement agreements resulted from investment mediation. Can this approach of the Convention be interpreted as the extension of the scope to the mediated settlements of investment disputes? However, in our thought, the same developments for the settlement agreements resulted from mediation in investment disputes will require more concentration likewise it has been done in commercial mediation due to the intrinsic nature of the investment disputes. That seems a long way off at first but could be promoted as said developments can be perceived as encouraging for the doctrine of investment law.[26]

In the current situation, model law explains that the term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; *investment*; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passengers by air, sea, rail or road.[27]

As it is given here, a wide range of business activities non-exhaustively presented under the term commercial including "*investment*". The term investment also may refer to domestic investments and commercial transactions of foreign investors with local or other foreign investors and that is still a commercial law subject matter and the disputes that arise are available to benefit from the Convention. Therefore, the term commercial should not be given a wider interpretation to cover the transactions between foreign investors and the host states as "investment disputes". It needs to elaborate and give much clarity to the scope to include such disputes in the Convention. In addition, any wording with regards to the scope must take place directly in the text of the articles.

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[26] Laura Kaster, "Will There Be a Vast Worldwide Expansion of Mediation for International Disputes?", *Alternatives to the High Cost of Litigation* Volume 33, no. Issue 8 (2015) 122. Mercy McBrayer, "The Singapore Mediation Convention: Could it apply to investor-state disputes?", *Corporate Disputes Magazine* October-December (2019) 100-101.

[27] United Nations Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002)

Article 8 of the Convention allows certain reservations as explained above. One is that a party may declare a reservation for not to apply the Convention to settlement agreements to which it is a party. Pursuant to this article, such reservations can be declared and withdrawn at anytime. In addition, the states are not allowed to make reservations on a dispute by dispute basis so it is to be applied for all disputes. In this regard, states hold the option to declare reservations as well as not to declare any reservation. So, when a state does not make a reservation, according to a view, it can be construed that the Convention was drafted in such a way as to leave the door wide open for its application to the states themselves and not only their citizen commercial parties.[28]

In our opinion, although this interpretation may look defendable to a certain extent, it still sounds a little bit too fictitious. The uncertainty regarding the applicability of the Singapore Convention on investment mediation is of much important subject that cannot be left to the inextricable discussions of academics. In addition, investment disputes indicate a number of disparities compared to commercial disputes which render them sort of inconvenient to be accepted under the scope of this Convention. In this respect, a brand new Convention that specifically gives enforceability to the mediated agreements resulting from the disputes between investors and host states would provide utmost assistance to the resolution of this uncertainty. Nevertheless, assuming the existence of such a Convention, there would still be problems in the adaptation to the practice of bringing two completely different parties together and sit them at the table as "two parties".

B. Challenges to the Application of Mediation to the Investment Disputes

Similar to commercial mediation, a host state and an investor can also conduct mediation for an investment dispute and they can conclude a settlement agreement as well. However, then the challenges that apply to the investment disputes will differentiate them from commercial disputes in many ways.[29]

The main difference between investment disputes and commercial disputes is the role of the host states. Host states, unlike commercial parties, are inevitably the heavier side of the dispute resolution table. As the name reveals, they are also the hosts of the dispute table as the "respondent" in every case.[30] This is because of the pervasive structure of the host states. It is truly

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28 Laura Kaster, "Will There Be a Vast Worldwide Expansion of Mediation for International Disputes?" (n 26) 122. Mercy McBrayer, "The Singapore Mediation Convention: Could it apply to investor-state disputes?" (n 26) 102.

29 For detailed research, please see Mustafa Oğuz Tuna, *Alternative Dispute Resolution in Energy Industries* (Routledge, 2022).

30 Jose Daniel Amado, "From Investors' Arbitration to Investment Arbitration: A Mechanism

an investment agreement between the host state and the foreign investor but in fact, it is a permission, license and sometimes a concession given by the host state to the investor who is bound up by the laws of it. When a dispute arises, a party of that dispute may have to continue to pay taxes to the opposite party of the dispute, continue to perform his liabilities by law made by the opposite party of the dispute, continue to seek relief from the competent authorities whose wages regularly disbursed by the opposite party of the dispute. In sum, there is not a manageable counterparty in front of the investors. On the other side, sovereignty is a substantial issue for both sides to pay regard to. The host state is accountable before the public so any misconduct may result in facing complaints regarding the "give-in" image of the host state. In addition, the nature of mediation is to be voluntary. Therefore, reaching a consensus is more difficult than commercial mediation since any party can act evasively and may not be willing to continue the proceedings. If truth be told, any subject matter left to the will of the parties is open to abuse.

Mediation is non-binding and is not enforceable in principle. Lack of enforceability has always been deemed as the prime and the greatest drawback of mediation. ICSID conciliation rules always had to face criticism on the lack of enforceability despite successful examples.[31] However, the registered ICSID conciliation cases are now only thirteen and this number equals 1.4% of the whole ICSID registered cases so far.[32] One survey also exposed that 74% of the respondents believed that an international instrument similar to New York and ICSID for the arbitration would encourage mediation and conciliation.[33] As long as such a step is not taken for investment mediation, sooner or later these numbers are not likely to change and this obstacle will keep standing in front of mediation.

In the current practice, to secure the enforcement of the settlement agreement, parties may request a bank guarantee that covers the estimated

for Allowing the Participation of Host State Populations in the Settlement of Investment Conflicts" *University of Cambridge Faculty of Law Legal Studies Research Paper Series* [2014] 29.

31 Tesoro Petroleum Corporation v. Trinidad and Tobago, CONC/83/1, Report issued on 27 November 1985. Lester Nurick and Stephen J. Schnably, "The First ICSID Conciliation: Tesoro Petroleum Corporation v. Trinidad and Tobago", *ICSID Review: Foreign Investment Law Journal* Volume 1, no. Issue 2 (1986).

32 The ICSID Caseload Statistics (ISSUE 2023-2) Chart 2: All ICSID Cases Registered by Applicable Rules, 2.

33 Author and the conductor of this survey later on led the Working Group II of UNCITRAL and finalized the development as Singapore Convention. Stacey Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation, Legal Studies Research Paper Series Research Paper No. 2014-28* (2014) 45.

value of the merit, as well as a separate deposit, which could be asked just for the merit of the case. This guarantee assures the enforcement in the case that a non-performance of the settlement agreement. But the dispute, more or less, should be able to be calculated. The guarantee provisions should be drawn prior to the proceedings of mediation and should not be deemed as a sign of giving in from any claim of the depositing party.

Confidentiality is one of the key features of commercial mediation as well as commercial arbitration.[34] Generally, it is not abnormal for the market to remain unaware of the existence of a dispute whether it has arisen or not.[35] Thus, confidentiality is more assured in mediation not only for the context but for the entire dispute.[36] However, in investment arbitration, the ICSID awards are publicly available. This is due to transparency as the key feature of investment disputes opposite to commercial ones. The reasons lie behind the transparency rule for investment arbitration must be considered for the investment mediation too. It is again because of the role of the host state and public concerns. Host governments are accountable for their transactions including a settlement agreement which may result in the government to be bound up with.[37] Transparency ensures to prevent host states from doing whatever they cannot do through arbitration, to do with mediation.

Abuse and bad faith of the parties always constitute a risk for a perfect, fair and successful mediation. As a matter of fact, as long as the mediation is a voluntary and non-binding method of dispute resolution, it is always open to abuse to delay the proceedings by the bad-intentioned party. For instance, the parties can conclude a settlement agreement after negotiations but in order to bring enforceability, the parties can just make up a mediation case which backdated on the paper and go through the Singapore Convention. It may first sound a tricky convenience as long as both parties are keen to do this but the spirit and the justification of the Convention would contradict with such "well-intentioned" corruption.[38] It is close to impossible to figure out the intention

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34 Ileana M. Smeureanu, *Confidentiality in International Commercial Arbitration, International arbitration law library,* (Alphen aan den Rijn Biggleswade: Wolters Kluwer Law & Business, 2011).

35 Noah Robins, "Use of Mediation for Investment Disputes", *OGEL 2* (2004).

36 By contrast, confidentiality in ADR methods is more likely to appear for sides and the dispute as it is an amicable way in itself. Arthur Marriott and Henry Brown, *ADR Principles and Practice* (3rd ed. London: Sweet & Maxwell, 2011) 517. Nadja Marie Alexander, *International and Comparative Mediation: Legal Perspectives, Global trends in dispute resolution* (Alphen aan den Rijn: Kluwer Law International, 2009) 245.

37 Michael Cover and Wolf von Kumberg, "The Energy Charter Treaty and ADR in the Context of Investor/State and Other Disputes", *Energy Charter Secretariat Knowledge Centre - Occasional Paper Series* [2016] 6.

38 "Singapore Convention On Mediation", Information Brochure, (n 18) 1.

of the parties beforehand so the duty of the rules of the mediation proceedings together with the assistance of the appropriate mediator, is to make sure that the mediation which started in consensus, must continue through the end even the parties do not settle, hence it is to find out that they cannot settle.

Arbitration has developed its own laws, regulations, proceedings and system throughout the years. That brought a top level of expertise to academics, arbitrators and the legal world. The same is not the case for mediation or even close.[39] Therefore, it is a rare coincidence to find a mediator who has a satisfactory experience in mediation as well as an expertise in substantive law. As a result, lack of expertise automatically affects the success of the mediation.

There is no precedent in mediation.[40] The previous mediation proceedings, no matter how similar, do not necessarily set an example for another. It is always the case on the agreements to mediate that the parties include articles providing that the mediators are not bound up with previous or other settlement agreements made in different mediation proceedings. It is of course due to the flexible nature of mediation. Having no precedent in mediation can cause contradictory outcomes but the parties cannot claim against them as it consensual in principle.

The proceedings of the mediation are not uniform.[41] Even if the institutional mediation rules are adopted, parties would always offer to alter the rules to a form in which is more favorable for them. So the other party either should get along or also cannot be rigid to the flexibility rule with their decisions as it is one of the key features of mediation. This and such barriers to standardization will always bear a disturbance from the perspective of the mediators and third parties.

Last but not least, cross-cultural disputes have always been tiresome for international commercial disputes.[42] Considering investment disputes together with other parameters, cultural divergence makes it more difficult to settle out of arbitration. A breach deemed not legitimate for a party may not have the same effect for another with different cultural background regarding his legal system.[43]

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39 Virginia A. Greiman, *Twenty-Seventh Annual International Law Symposium: The Public/Private Conundrum in International Investment Disputes: Advancing Investor Community Partnerships* (2011) 6.

40 This is even the case for arbitration. For example, two cases against Pakistan; Bayindir v. Pakistan and SGS v. Pakistan resulted with two different decisions on jurisdiction. While the arbitration has this contrast in its practice, mediation seems further away from providing safer results for the parties.

41 Jeswald Salacuse, "Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution", *Fordham International Law Journal* Volume 31, no. Issue 1 (2007) 159.

42 Thomas Walde, "Efficient Management of Transnational Disputes: Case Study of a Successful Interconnector Dispute Resolution" 3.

43 Daniel Posin, "Mediating International Business Disputes", *Fordham Journal of Corporate &*

All in all, considering the abovementioned challenges and the absence of a Singapore-like Convention, the current practice will continue to resolve the issues regarding the enforcement via arbitration. Hence, it is still not unusual for tribunals to hold the proceedings and invite parties for a possible settlement. To do this, following the commencement of arbitration proceedings pursuant to a treaty, parties can any time reach a settlement by themselves or through an ADR option and may request from the arbitral tribunal to embed such settlement agreement into the arbitral award. This will strengthen the enforcement of the settlement because arbitral awards can be enforced internationally through the New York and ICSID Conventions[44]. This also might be possible for domestic proceedings if it is allowed by the domestic procedural rules. On the other option, before any arbitral step is taken, some institutions allow the parties to appoint a mediator on the condition that agreeing upfront and then to act as an arbitrator when it comes to concluding a settlement agreement in an arbitral award.[45]

III. FUTURE OF MEDIATION

First of all, right now the mediation is not enforceable in its nature and the practice is on a voluntary basis. As the mediation is not binding in general and based on the consensus of the parties regarding the outcome, the main critique is that each party can always exploit this by using delay strategies if one has no intention of reaching an agreement[46]. One of the conveniences of arbitration procedure for the parties in which is to be able to enforce the awards lacks in mediation. The outcome of the process is treated by law as a regular agreement thus the parties may have to file a lawsuit to enforce it and there is always a risk that the other party may anytime be against that. The flexibility of mediation in finding solutions provides the ability to proceed quickly but it is limited by the boundaries established through existing laws and regulations. Very complex issues and disputes contain violence or any misbehaviour against law sometimes do not make it appropriate to get benefit from mediation techniques. These types of disputes could only be brought to law enforcement.

Financial Law Volume 9 (2004) 465. Munir Maniruzzaman, "The Problems and Challenges Facing Settlement of International Energy Disputes by ADR Methods in Asia: The Way Forward " *Journal of International Energy Law and Taxation*, no. Issue 6 (2003) 196.

44 Mustafa Serdar Özbek, *Tahkim Hukuku* (Yetkin Yayınları, 2022) 1831, 1835.

45 With the name in practice "Hybrid" methods. For example SCC Mediation Rules Article 14.

46 An opposite view to that critique says: *"This ability of any party to abort a mediation should not be seen as a flaw in the procedure. It is an incidental aspect of a party's freedom to act in this process. It is an essential pre-condition for free negotiations to take place. A party does not enjoy this freedom to withdraw without consequences in litigation or arbitration. To do this is to lose the case."* Marcus Stone, *Representing Clients in Mediation : A New Professional Skill* (London; Edinburgh: Butterworths, 1998).

Given all the abovementioned drawbacks, the Singapore Convention aimed to ease and erase all negative approaches and make mediation more accessible to the large masses. International commercial mediation became the example of such enterprise and the future of mediation will have essential feedback from the reaction of mediation practice to this Convention. Eventually, it is anticipated to expand what is experienced in international commercial mediation to the use of mediation in other branches of law.

A. Current Usage of Mediation and Where is it Now?

It has always been a mystery whether we were able to know if mediation is already used in international commercial or investment disputes. According to some academics, mediation is very often used[47], and for some of them, it is not[48]. Although these arguments are not based on scientific data, in fact, it would not be possible to obtain such knowledge due to the confidential and flexible nature of the mediation.[49] Mediation is now the most popular alternative dispute resolution way to arbitration at the moment but not the only one. There are others which some of them are few experienced in the international arena but some of them never as far as is known[50]. These are negotiation, conciliation, expert determination, early neutral evaluation and so on.[51]

The negotiations over a specific disagreement between the parties or to renegotiate the parties' positions when a dispute has arisen are always anticipated during the contract term. Negotiations or renegotiations, therefore are not deemed as an alternative dispute resolution mechanism most of the time. However, the parties are definitely able to prefer to negotiate the dispute

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47 Eric De Brabandere, "The Settlement of Investment Disputes in the Energy Sector", in *Foreign Investment in the Energy Sector - Balancing Private and Public Interests*, ed. Eric De Brabandere and Tarcisio Gazzini (2014) 131. Michael Reisman, "International Investment Arbitration and ADR: Married but Best Living Apart", *ICSID Review-Foreign Investment Law Journal* Volume 24 (2009) 187.

48 As stated: "has not become widely used" on Salacuse, "Is There a Better Way? Alternative Methods of Treaty-Based, Investor-State Dispute Resolution" (n 41) 174. "it is extremely underused" on Linda Reif, "Conciliation as a Mechanism for the Resolution of International Economic and Business Disputes", *Fordham International Law Journal* Volume 14, no. Issue 3 (1990).

49 Francisco Orrego Vicuna, "Arbitration in a New International Alternative Dispute Resolution System", *News from ICSID* Volume 18, no. No 2 (2001) 10.

50 Leading dispute resolution institutions have launched their own mediation, conciliation, expert determination and neutral evaluation rules. UNCITRAL published its "Conciliation Rules" in 1980. The term "conciliation" here means as conciliatory which covers all conciliation, mediation, neutral evaluation, mini-trial or similar terms whichever any amicable solution settled by the neutral third party.

51 Henry Brown, *ADR Principles and Practice* (n 36). Stephen B. Goldberg, Frank E A Sander, Nancy H. Rogers, Sarah Rudolph Cole, *Dispute resolution: Negotiation, Mediation, Arbitration, and Other Processes.*

at the first step as an ADR way. After negotiations, should the parties' deadlock positions continue, the process naturally develops from the consensual attempt by passing through a neutral's non-binding recommendations to a confrontational stalemate at the end. As a matter of fact, it is a common practice called *"escalate", "stepped"* or *"tiered"* process of dispute resolution which guides the parties to respectively resort to negotiation-mediation-arbitration step by step. That system has been integrated into the dispute resolution clauses by almost every model international contracts with slight differences from each other, more or less in the same form.

Simultaneously, shortcomings of the mediation and the efficacy of arbitration; mostly the enforceability brought these two together in seeking a way out of the impasse and came out as the "hybrid" methods of dispute resolution. Hybrid ADR procedures consist of using at least two different dispute resolution methods together in the same dispute resolution process to reach the same goal. They are preferred more to get benefit from the advantageous features of both dispute resolution processes rather than their disadvantages. Hybrid methods receive their names from the combination of them.[52] Common examples encountered in practice are; med-arb, arb-med[53] and arb-med-arb.[54] Neither ICSID nor UNCITRAL provides separate rules for med-arb or arb-med.[55] However, as it is a voluntary-based dispute resolution mechanism after the arbitration begins, parties may request discontinuance of the proceedings and nothing stops them to use mediation, conciliation or any other ADR method combined within a hybrid process and the same route the other way around.

Unlike its growing popularity in commercial disputes, the use of mediation in investor-state disputes is limited. In fact, only 143 out of up to 3300 treaties offers mediation as a choice.[56] However, despite its underuse in practice,

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52 R. Doak Bishop, "A Practical Guide for Drafting International Arbitration Clauses", *International Energy Law & Taxation Review* Volume 16 (2000) 60.

53 Özbek M S, "Arabuluculuk İle Tahkim Yöntemlerinin Kesişme Bölgesi: Arabuluculuk-Tahkim" *Yargıtay Dergisi 1 (2017)* 55.

54 Carol Ludington, "Med-Arb: If the Parties Agree", *Transnational Dispute Management* Volume 14, no. Issue 1 (January 2017). Elizabeth Telford, *Med-Arb: A Viable Dispute Resolution Alternative* (IRC Press, 2000). Eunice Chua, "A Contribution to the Conversation on Mixing the Modes of Mediation and Arbitration: Of Definitional Consistency and Process Structure", *Transnational Dispute Management* Mediation & ADR, no. Issue 5 (2018).

55 Anna Joubin-Bret and Jean Kalicki, *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (Brill, 2015) 232. An example of a hybrid procedure is allowed by China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules Article 47 - Combination of Conciliation with Arbitration.

56 As of January 2024: <https://investmentpolicy.unctad.org/international-investment-agreements/advanced-search> accessed 01 January 2024.

there seems to be hope in the future for the mediation.[57] In order to increase the spread of mediation, the question of why not using the mediation more often than it is now can be asked fairly. Indeed, 36% of the investment treaty arbitration cases were either discontinued or settled and only 11% of these cases were rendered in an arbitral award.[58] These cases demonstrate a gap here and give an idea that there might be potential on whether the parties could try to deal amicably for not to incur the disadvantages of these failed arbitration cases. To fill such a gap, it is important to assess the response of investment disputes to the mediation because there is a growing interest in mediation for investment law as well as all areas of law. In other words; there are lots of advantages of mediation but the use of it in practice was considered low[59] and the increasing trend of mediation is worthy to be promoted as to whether the use of mediation could be increased more. With this idea, in the absence of a Convention that ensures enforceability, we are certainly in favor of the use of mediation through hybrid mechanisms for investment disputes because it is also a way of promotion for further developments which may lead to a likewise Convention later.

B. Non-binding nature of mediation: Advantage or disadvantage?

Mediated settlement agreements between host states and foreign investors are not able to take advantage of the enforceability convenience of New York and ICSID Conventions which has been granted to arbitral awards. For this reason, the enforceability of the mediated agreements, inter alia, could be accepted as the most significant concern throughout the discussions regarding mediation in the first stage when it is compared to arbitration.[60] It has been argued among the academia whether the abovementioned-like convention could be adopted for the settlement agreements resulting from investment mediation or not. As mentioned above, 74% of the respondents of a survey, stated that bringing enforceability through an international convention would definitely encourage the practice of mediation and conciliation.[61] Hence, it

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57 Jeswald Salacuse, "Mediation in International Business", in *Studies in International Mediation*, ed. Jacob Berkovitch (Palgrave Macmillan UK, 2002) 213. Silvia Constain, "Mediation in Investor–State Dispute Settlement: Government Policy and the Changing Landscape", *ICSID review* Volume 29, no. Issue 1 (2014) 25.

58 The ICSID Caseload – Statistics (Issue 2023-2) Chart 20: All Concluded ICSID Arbitrations – Settled or Otherwise Discontinued, 14.

59 *Investor–State Disputes: Prevention and Alternatives to Arbitration. UNCTAD Series on International Investment Policies for Development.* (2010) 63.

60 International Mediation Institute, *International Mediation & ADR Survey - Census of Conflict Management Stakeholders and Trends* (2016) 25.

61 Stacey Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation, Legal Studies Research Paper*

has already come into force for commercial mediation, but would it benefit investment mediation in the same way? Before getting into that question, we need to deeply consider the functionality of the Singapore Convention as what will be experienced here, is going to shed a light on similar developments in other disciplines.

It is an obvious fact that the enforceability of the mediated settlement agreements will rocket the use of mediation in international commercial disputes. The concern is what comes after that. In the plainest form, a binding mediation will stay close to a fictitious "simplified arbitration". ADR is the title that covers the entire ways to approach a dispute outside the traditional court litigation. Thus, it is literally meant to include arbitration as well. Indeed, commercial arbitration used to be an alternative to litigation.[62] However, the absence of a globally accepted international court mechanism and following the intensive practice of the arbitration in time with regard to the side effects on the parties, have turned it into the litigation of international commercial disputes and so do the investment disputes.[63] The hesitation here appears to be as what if the future of enforceable mediation resembles the journey of the arbitration which was then born as an alternative response to what it is criticized now.

As well as being accepted as a disadvantage, the non-binding feature of mediation may also promise some advantages to the parties in terms of having the chance to trade off where they cannot have it in arbitration.[64] In fact, the uncertainty of mediation encompasses multiple and unknown possibilities of outcomes in which the arbitration has two certain options at the end.[65] A mediation, for instance, may result in a settlement agreement on a tax reduction, various incentives, a variety of licences in the same or different sectors to be given, debt restructuring, performance of action or inaction as well as a certain amount of money to be paid while the arbitration is due to give an only two-way outcome in which a monetary compensation should be made by the loser to the winner of the case.

Series Research Paper No. 2014-28 (2014) (n 33) 45.

62 Arthur T. Ginnings, *Arbitration: A Practical Guide*, Published by Gower ed. (England: 1984) 18.

63 Jack J. Coe, "Toward a Complementary Use of Conciliation in Investor-State Disputes - A Preliminary Sketch", *UC Davis Journal of International Law and Policy* Volume 12.1 (2007) 11.

64 Margrete Stevens, "Investor-State Mediation: Observations on the Role of Institutions", in *Contemporary Issues in International Arbitration and Mediation - The Fordham Papers* [2009] 9.

65 Claudia Caluori, "Guidelines for Mediation in Investor-States Disputes", *Transnational Dispute Management* Volume 15, no. Issue 1 (2018) 5.

In addition, being non-binding grants parties more hegemony over the outcome of the dispute but rather in the arbitration, they have to deliver the decision-making to a third party to be bound by the award and have no effect on the outcome. So, there could be a risk of losing the attraction of the non-binding feature of mediation if it gains enforceability because the parties may forfeit the freedom to design the outcome. And yet, one asserted that the multiple-choice outcome is an advantage as long as the proceedings are under the parties' control.[66] Having control over the dispute is of significance to assess the effectiveness of mediation and it follows an inverse proportionality with the enforceability. Since enforceability revives the third-party's position; the more the outcome of the mediation is enforceable, the less the parties have control over the dispute.

Considering confidentiality, non-binding mediation can be used to get advantageous information from the opposite side. As it is not a mandatory process, there is always a risk that each party can change its mind and decide to leave during the procedures or to be against the settlement agreement afterwards.[67] Even if the mediation is mandatory to be exhausted by the parties and if the dispute is at an unsolvable complicated level, the parties may want to refrain from continuing mediation and that might need to be penalized. Thus the parties then may face the risk of being the victim of these mandatory "amicable" processes.[68]

In the final analysis, the advantages of being binding and non-binding must be evaluated by the parties. It should not be forgotten that the enforceability of the outcome directly affects the willingness of the parties and accordingly the antagonism between them. Sometimes, the parties may not be fond of battling for the dispute and prefer lower levels of confrontation as a policy and sometimes the specific circumstances require so. Taking advantage of the non-binding feature of mediation can also be limited by the parties themselves and that boundaries must not be exceeded otherwise it will appear as exploitation and that might entail reliance issues which possibly leads to bad faith. Overall, when it is considered with the nature of the dispute, being non-binding was always thought of as a drawback and this predominated over its positive sides.

The voluntary nature of mediation also cannot be ignored and that is strongly linked to the non-binding feature. The enforceability of the settlement

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66 Susan D. Franck, "Using Investor–State Mediation Rules to Promote Conflict Management: An Introductory Guide", *ICSID review* Volume 29, no. Issue 1 (2014) 79.

67 Student Notes, "Mediation of Investor-State Conflicts Bottom-up Systems for Dispute Resolution", *Harvard Law Review* Volume 127, no. Issue 8 (2014) 2559.

68 Cameron Green, "ADR: Where did the 'alternative' go? Why mediation should not be a mandatory step in the litigation process", *ADR Bulletin of Bond University* Volume 12, no. Issue 3 (2010) 5.

agreements really affects the parties' intentions on starting off the mediation. There are indeed cases or positions that make the parties not willing to go to mediation if the settlement agreement was enforceable or vice versa. Another matter to be assessed at this point is the mandatory application of mediation. Mandatory access to mediation is a discussable topic on many points. Indeed, mandatory mediation procedures are exceptionally governed in some countries or only for specific fields of law as a precondition to the adjudicative proceedings. Even at mandatory mediation parties do not have to reach an agreement over mediation but to attempt, to participate in mediation is necessary by law here.[69]

As a policy choice, several countries apply a mandatory application of mediation in domestic legal systems.[70] Either by court-annexed or with an assistive institution, it is aimed to melt down the dilatory workload of domestic courts by compelling parties to perform mandatory mediation for specific disputes or the disputes up to a designated threshold. Indeed one survey proclaimed that, when the mediation was used before the litigation, 65% of the cases settled while only 29% of the cases settled when it was not used.[71] However, at the international level, no investment treaty known so far has a dispute resolution clause with compulsory mediation.[72] In fact, it could be a pragmatic policy measure in the domestic platform but the integration of similar mandatory measures at the investment treaty level may not produce outcomes as it is expected in the first place because it is against its voluntary character.[73] Indeed, a survey supports this idea revealing the fact that there is an essential difference between the settlement rates of mandatory mediation with 50% and voluntary application of mediation with 71%.[74]

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69 Maryam Salehijam, "A Call for a Harmonized Approach to Agreements to Mediate", *Transnational Dispute Management* Volume 15, no. Issue 1 (2018) 23.

70 Henry Brown, *ADR Principles and Practice*, (n 36) 94.

71 Tina Nabatchi, Lisa Blomgren Bingham, Jeffrey M. Senger and Michael Scott Jackman, "Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes", *Ohio State Journal on Dispute Resolution* Volume 24, no. Issue 2 (2009). P.258.

72 <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping> accessed 01 January 2024.

73 *"Given the research suggesting that non-suitable matters are unlikely to result in a settlement and that mandatory mediation is less effective than voluntary processes, the author is of the view that mandatory mediation is not appropriate and is likely to lead to negative cost consequences for disputing parties.*" Green, "ADR: Where did the 'alternative' go? Why mediation should not be a mandatory step in the litigation process." (n 68) 6. Jennifer Reynolds, "Foreword: ADR for the Masses", *Oregon Law Review* Volume 90, no. Issue 3 (2012) 695.

74 Lisa Blomgren Bingham, "Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes." 225.

These and similar such concerns bear a great deal of hesitation regarding mandatory mediation implementations despite its mission to encourage the practice of it.[75] It should be noted here that only to fulfil, to attempt mediation is mandatory as the parties cannot be obliged to conclude a settlement agreement.[76] Even though the arbitral tribunals have different approaches to the necessity of the fulfilment of cooling-off periods[77], the idea of compelling investors to stay the period for every dispute will be wide open to abuse and considered far from the good faith principle.[78]

CONCLUSION

It is anticipated that the enforceability can boost the use of mediation among larger contents and different sectors and practitioners. Together with this, it is also facing the risk of losing its advantageous sides when it is enforceable just like its greater kin arbitration which is explained above. Therefore, significant steps must be taken at the domestic and international levels before it begins to soar worldwide. According to us, it is the dispute resolution institutions first to take the necessary measures on the application of mediation by adopting and standardizing their rules.

It can be, to a certain extent, defended that to maturate the standards of the mediation under the Singapore Convention and put it on the right track to provide with the best of it, might naturally take time. However, it also signals that no lessons have been taken from the pathologic practice of arbitration which may, unfortunately, repeat in the form of its binding little brother; mediation - as a newborn arbitration. In this sense, we strongly urge the legal world that the abovementioned steps must be taken into account and carried into effect before it begins to turn into arbitration.

On the other side, it is obvious that what has been developed for commercial disputes seems inevitable to be experienced for the resolution of investment disputes as well. In the current practice of mediation, although it initially aims the commercial disputes, the applicability of the Singapore Convention to the investment disputes is not rigorously rejected, instead, there must be a distinctive legal regulation; convention, laws, annexes etc. as to whether the

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75 James Claxton, "Compelling Parties to Mediate Investor-State Disputes: No Pressure, No Diamonds?", *Journal of Japanese Law*, no. Issue 47 (2019) 13.

76 Kendall Isaac, "Pre-Litigation Compulsory Mediation: A Concept Worth Negotiating", *University of La Verne Law Review* Volume 32, no. Issue 2 (2011) 179. Salehijam, "A Call for a Harmonized Approach to Agreements to Mediate." (n 69) 23.

77 Tuna, "Alternative Dispute Resolution Mechanisms in International Energy Investment Disputes", (n 29) 93-99.

78 Enron Corporation and Ponderosa Assets, L.P. v. Argentina Republic (ICSID Case No. ARB/01/3), Decision on Jurisdiction, 14 January 2006. Para 88.

scope of the Convention excludes or includes the investment disputes. One hopeful news for a future project is the already prepared infrastructure of the investment mediation with specific rules published by the dispute resolution institutions like ICSID[79] and IBA.[80]

It can be admitted that this Convention was a missing piece[81] for the promotion of mediation in international commercial disputes. But now, is it time for the investment disputes? The process of the timeline might give a better hint:

1958 - Commercial Arbitration has become enforceable with the New York Convention.

1966 - Investment Arbitration has become enforceable with the ICSID Convention.

2019 - Commercial Mediation has become enforceable with the Singapore Convention.

???? - Investment Mediation will now become enforceable with a brand new Convention.

As the timeline demonstrates the path, it is now inevitable to wait for a Convention to guarantee the enforceability of settlement agreements resulted from mediation between host states and foreign investors. Considering the investment arbitration, it took almost a decade to build the same development for investment arbitration as it is in commercial arbitration. Analogically, it doesn't have to be that far but the nature of the due commissions, meetings, plannings, all negotiations and so yet, we highly recommend a likewise initiative must get off the ground rapidly while the discussions are still in the air. The establishment may take place within the body of the World Bank or UNCTAD who may produce certain guidelines for the practice. One may suggest making amendments to current Conventions like ICSID additional facility rules. However, as it will require special consideration to the rules and procedures because of the differences of investment disputes highlighted above, it would be best to have its own Convention to cover up all the loopholes and give investment mediation a stronger background.

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79 <https://icsid.worldbank.org/sites/default/files/WP_4_Vol_1_En.pdf> accessed 01 January 2024.

80 <https://www.ibanet.org/Document/Default.aspx?DocumentUid=8120ED11-F3C8-4A66-BE81-77CB3FDB9E9F> accessed 01 January 2024.

81 Adrian Cole and Guillaume A. Hess, Middle East – A Mediation Desert, Corporate Disputes Magazine, Jan-Mar (2019) 104.

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LEGAL ISSUES OF THE METAVERSE: A PUBLIC INTERNATIONAL LAW PERSPECTIVE*

Metaverse'in Hukuki Sorunları: Uluslararası Kamu Hukuku Perspektifi

Hatice Kübra ECEMİŞ YILMAZ**

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ABSTRACT

The advent of the Metaverse undeniably presents a myriad of complexities in the realm of international law enforcement. Given the inherent transnational nature of the Metaverse, it becomes apparent that the application of national legal frameworks to virtual actions becomes a complex and challenging endeavor. The very essence of the Metaverse, with its ability to transcend traditional national boundaries, poses significant obstacles to the straightforward application of domestic laws. The regulation of virtual activities necessitates the establishment of a comprehensive and universally applicable framework under the auspices of public international law. One additional concern that arises pertains to the potential displacement of legislation by technological advancements. In the realm of the Metaverse, one can observe a rapid pace of technological progress. The realm of international law grapples with the formidable challenge of effectively regulating virtual activities in accordance with established international norms and principles, given the dynamic nature of these transformations.

The imperative for the international legal system to adapt to the realm of virtual activities is undeniable, as it is crucial for addressing the multifaceted concerns that arise in this domain. The subject matter at this article to the contemporary process of updating international agreements and legal structures, the formation of international regulatory bodies, and the encouragement of global cooperation and harmonization. As the Metaverse undergoes its evolutionary process it is imperative for international law to adapt accordingly and effectively regulate conduct within the virtual realm.

Keywords: Metaverse, international law, sovereignty, national security, human rights.

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

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ÖZET

Metaverse'nin gelişi, inkar edilemez bir şekilde uluslararası hukuk yaptırımı alanında sayısız karmaşıklık sunmaktadır. Metaverse'nin ulusötesi doğası göz önüne alındığında, ulusal yasal çerçevelerin sanal eylemlere uygulanmasının karmaşık ve zorlu bir süreç haline geldiği açıktır. Geleneksel ulusal sınırları aşma yeteneği ile Metaverse'nin özü, ulusal yasaların doğrudan uygulanmasının önünde önemli engeller oluşturmaktadır. Sanal faaliyetlerin düzenlenmesi, uluslararası kamu hukuku himayesinde kapsamlı ve evrensel olarak uygulanabilir bir çerçevenin oluşturulmasını zorunlu kılmaktadır. Ortaya çıkan ek bir endişe, teknolojik gelişmelerin mevzuatın potansiyel olarak yerini almasıyla ilgilidir. Metaverse aleminde, hızlı bir teknolojik ilerleme hızı gözlemlenebilir. Uluslararası hukuk alanı, bu dönüşümlerin dinamik doğası göz önüne alındığında, sanal etkinlikleri yerleşik uluslararası normlara ve ilkelere uygun olarak etkin bir şekilde düzenlemenin zorlu zorluğuyla karşı karşıyadır.

Uluslararası hukuk sisteminin sanal faaliyetler alanına uyum sağlama zorunluluğu yadsınamaz, çünkü bu alanda ortaya çıkan çok yönlü endişelerin ele alınması çok önemlidir. Bu makale, uluslararası andlaşmaların ve yasal yapıların güncellenmesi, uluslararası düzenleyici kurumların oluşturulması ve küresel işbirliği ve uyumun teşvik edilmesiyle ilgili çağdaş süreçle ilgilidir. Metaverse, evrim sürecinden geçerken uluslararası hukukun buna göre uyum sağlaması ve sanal alemdeki davranışları etkin bir şekilde düzenlemesi zorunludur.

Anahtar Kelimeler: Metaverse, Uluslararası Hukuk, Egemenlik, Ulusal Güvenlik, İnsan Hakları.

INTRODUCTION

To put it simply, international law is a body of norms governing interactions between states and other entities.[1] International law originates from the body of rules to which all subjects of international law must adhere in order to effectively exercise their rights and fulfill their obligations on a global scale.[2] It goes without saying that states remain the primary focus of international law.[3] Yet, with the arrival of international non-governmental organizations on the agenda, the relevance of international organizations and individuals is growing.[4] International law also focuses on the norms and principles governing the relationships between states and their citizens, as well as the rights and responsibilities of individuals in the international community. Traditionally, international law has been defined as the branch of law that regulates legal relations between independent states, such as the law of the sea and the law of war.[5] International law also, includes the laws of peace, the protection of

1 Yusuf Aksar, Teoride ve Uygulamada Uluslararası Hukuk I (4th edn, Seçkin, 2017) 34-35
2 Aksar (n 1) 35
3 Aksar (n 1) 35
4 Aksar (n 1) 35
5 Valerie Epps, International Law (4th edn, Carolina Academic Press, 2009) 3

human rights, the regulation of international trade and commerce, and the development and management of international organizations.

People will soon be able to engage in real-time communication and collaboration in a virtual world known as the Metaverse. As this emerging online community continues to grow, it is crucial to think about how it will be regulated and policed under public law. The development of the Metaverse will be significantly influenced by international law, the collection of laws that regulates relations between nation-states and the rights and obligations of individuals. International law will play a crucial role in creating the governance and regulation of this new virtual realm in the framework of the Metaverse. As the Metaverse expands and evolves, it is essential to analyze how international law may affect the rights and duties of individuals and nation-states.

A virtual world is an online environment in which users can have live, interactive conversations with one another and with artificial intelligence-powered artificial intelligence bots. In popular imagination, the Metaverse is a place where people can fully immerse themselves in a variety of different activities and surroundings that would be impossible in the real world. It will certainly have far-reaching effects on many facets of society, including public international law, as it grows into a significant element of the global economy. Considering the public law implications of the growing prevalence of the Metaverse is crucial as we move toward full integration of this new medium. The future of the Metaverse and making sure it's a secure and equitable space for all users, will be heavily influenced by issues like jurisdiction, human rights, and the role of international organizations. As a global, borderless virtual world, jurisdiction is an important consideration in the Metaverse. It's not easy to tell which state's laws apply to your Metaverse actions. International law faces a problem in this area because it must ensure that virtual activities are controlled in a uniform and open fashion across national boundaries.

Concern for human rights is another vital topic in the Metaverse. Thus, it is crucial to reconsider the appropriateness of governance structures for the protection of human rights in the really digital age.[6] Individuals' ability to express their human rights in the virtual sphere is expanding, but it also comes with new and different problems. There is a risk, for instance, that discrimination[7] and exploitation in the Metaverse will emerge in ways that aren't addressed by current human rights legislation. Human rights in the

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6 Kuzi Charamba, 'Beyond the Corporate Responsibility to Respect Human Rights in the Dawn of a Metaverse' (2022) 30 (1) University of Miami International and Comparative Law Review 110,110

7 Anja Lambrecht and Catherine Tucker, 'Algorithmic Bias? An Empirical Study into Apparent Gender-Based Discrimination in the Display of STEM Career Ads' (2019) 66(7) Management Science 2966, 2976-2978

Metaverse must be protected by international law, which must also guarantee that no harm will come to users from their participation in the online world. In order to develop international rules and standards for virtual activities and to promote international collaboration and coordination, international organizations can play a crucial role. Businesses and governments are unprepared to handle the privacy and security threats posed by the metaverse.[8] Not enough skilled workers are available to manage the metaverse's intricate infrastructure and create safe, reliable solutions.[9] The future of the Metaverse will be shaped by problems like jurisdiction[10], human rights, and the role of international organizations, all of which are essential to making it a safe and equitable space for all users. The development of international law is required to meet these problems and guarantee that Metaverse virtual activities are regulated in accordance with universally accepted principles and values. By taking an active role in Metaverse governance, we can ensure that all events in the virtual world are safe, equitable, and consistent with universal ideals.

I. TERMINOLOGY AND JURISDICTIONAL ISSUES

A. Definition of the Metaverse

Whilst the term "metaverse" has only recently entered common usage among tech critics and academics, it was first coined in 1992 by Neal Stephenson in his novel Snow Crash.[11] In the story, the metaverse is portrayed as a virtual reality environment where internet is used by avatars and software agents.[12] According to some authors[13], the multimedia platform Second Life, developed by Linden Lab and released in 2003, can be considered a precursor to the metaverse because it enables users to create and operate avatars and engage in social interaction within a virtual world. While virtual worlds like Second Life and Metaverse have been around since the Internet's infancy,

8 Yogesh K. Dwivedi et al., 'Metaverse Beyond the Hype: Multidisciplinary Perspectives on Emerging Challenges, Opportunities, and Agenda for Research, Practice and Policy' (2022) 66 International Journal of Information Management 1,10

9 Dwivedi et al. (n 8) 10

10 When the metaverse is at stake, even the most fundamental problems about jurisdiction, venue, choice of law, and conflicts of law take on a new level of complexity. Michael D. Murray, 'Ready Lawyer One: Lawyering in the Metaverse' SSRN <https://ssrn.com/abstract=4082648> Last accessed 19 February 2023

11 Neal Stephenson, Snow Crash, (Bantam Books, 1992)

12 Judy Joshua, 'Information Bodies: Computational Anxiety in Neal Stephenson's Snow Crash'(2017) 19(1) Interdisciplinary Literary Studies 17, 17-47

13 Edd Gent, 'Lessons from a Second Life> Before Meta, Philip Rosedale Created an Online Universe' (2022) 59(1), IEEE Spectrum 19 <https://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=9676346> Last accessed 20 February 2023; Peter Ludlow and Mark Wallace, The Second Life Herald: The Virtual Tabloid That Witnessed the Dawn of the Metaverse (MIT press 2009)

they lack cross-platform support and robust features.[14] An growing amount of discussion and debate from academics and practitioners on the various societal ramifications for many people across the world has been sparked by the announcement that Meta Platforms will release Horizon Worlds in 2021 and the vision of how the metaverse might potentially impact many elements of how we work and socialize.[15] In this article the, metaverse refers to a comprehensive digital ecosystem, envisaged as a continuum of interconnected virtual spaces. Originating from early science fiction, it exemplifies a realm where users, represented by avatars, can communicate, collaborate, and interact in real-time, harnessing the vast capabilities of the internet. This expansive digital arena seeks to emulate, and in some instances, enhance real-world experiences, potentially reshaping the manner in which we engage, work, and form connections. The metaverse represents an expansive digital frontier, serving as an interactive realm that exists online. Beyond mere virtual existence, it facilitates real-time interactions between users and sophisticated digital entities. Often conceptualized as an alternate dimension, the metaverse offers experiences and scenarios far beyond terrestrial confines. However, as it intertwines with our global economy and societal fabric, it ushers in profound legal and ethical challenges. Among these are matters of jurisdiction, human rights interpretations within the digital domain, and the engagement of international bodies to uphold core principles. This dynamic virtual ecosystem is not only a hub of activity and imagination but also a canvas upon which the future paradigms of law, ethics, and governance will be painted.

B. Jurisdictional Issues

1. Criminal Jurisdiction

The identification of crime holds significant importance within the metaverse under the criminal jurisdiction. That is important understanding the nature of the crime. Are we dealing with cyberbullying, theft of virtual assets, digital fraud, or another type of misconduct? When considering the issue of criminal jurisdiction inside the metaverse, one encounters various challenges related to the determination of location.[16] While in the physical world, jurisdiction is often tied to where the crime occurred; the metaverse's lack of tangible presence complicates this. An initial approach could be to base jurisdiction on the location of the server where the activity occurred or the domicile of the perpetrator or victim. Determining the location of offenses committed in

14 Dwivedi et al. (n 8) 1-2

15 Carlos Bermejo Fernandez and Pan Hui, 'Life, the Metaverse and Everything: An Overview of Privacy, Ethics, and Governance in Metaverse', (2022), 2022 IEEE 42nd International Conference on Distributed Computing Systems Workshops (ICDCSW) 272, 272-277

16 Gilad Yadin, 'Virtual Reality Intrusion' (2016) 53 Willamette L Rev 63, 73

virtual reality environments poses a significant challenge. The offender and the victim in crimes committed within virtual reality might be situated in vastly distant parts of the world from each other. [17] Also, collaboratively should be formulated an internationally recognized set of cyber offenses specifically tailored for the metaverse. This would ensure that certain acts are universally recognized as crimes. It is imperative to establish agreements to ensure individuals who commit crimes in the metaverse can be extradited and tried in the appropriate jurisdiction. Given the transnational nature of the metaverse, the form should be a dedicated international task force that assists countries in investigating and prosecuting metaverse-related crimes.

2. Legal Jurisdiction

The rise of the Metaverse introduces a novel domain where private law relations come into play.[18] Within the Metaverse, users communicate using avatars, engage in digital trade, possess virtual properties, and partake in community events.[19]Such engagements lead to the formation of contracts, ownership rights, and potential liabilities, requiring an appropriate legal structure to oversee them. Hence, private law will be essential within the Metaverse to ensure trust, protection, and the upholding of rights and responsibilities. Since many interactions in the metaverse will likely be underpinned by contracts (e.g., purchase of virtual assets, virtual employment agreements), these contracts should clearly specify the governing jurisdiction in case of disputes. That is necessary to establish an international protocol for recognizing and enforcing rights related to virtual assets and intellectual property in the metaverse. That can be possible to develop and promote the use of international arbitration and mediation for resolving civil disputes in the metaverse. This could bypass some of the jurisdictional complexities of traditional courts. The creation of virtual courts within the metaverse can apply a universally recognized set of laws and regulations. These could serve as the primary institutions for resolving civil disputes. Guidelines can be developed to ensure that users of the metaverse are not exploited by virtual entities, ensuring fairness in transactions and interactions.

3. Shared Approaches

The establishment of a multinational entity or treaty organization to oversee jurisdictional matters in the metaverse should be considered, ensuring uniformity

[17] Mark A. Lemley & Eugene Volokh, 'Law, Virtual Reality, and Augmented Reality' (2018) 166 University of Pennsylvania Law Review 1051, 1072.

[18] Turdialiev Muhammadali PoLatjon Og, 'Prospects For The Development Of Private Law Relations In The Metaverse' (2023) 5(7) The American Journal of Political Science Law and Criminology 64, 66

[19] OG (n18) 66

and fairness. In order to construct a comprehensive jurisdictional framework for the metaverse, it becomes imperative to actively solicit the collaboration of state actors, intergovernmental bodies, private-sector stakeholders, and metaverse participants. Such a holistic engagement strategy ensures that a panoply of perspectives and requisites are judiciously integrated into the deliberative process. It is essential to guarantee that participants within the metaversal domain are comprehensively apprised of their inherent rights, the prevailing juridical structures, and the prescribed procedural avenues available for redress in instances of disputes or illicit activities. Digital communities should uphold common principles, encompassing a regard for, and potentially a duty to safeguard, the welfare of their participants [20]In light of the metaverse's continually evolving landscape, it is paramount that juridical structures exhibit a degree of flexibility and adaptability. Consequently, there should be systematic reviews and subsequent recalibrations of legal provisions to ensure congruence with the mutable characteristics of this virtual environment.

4. Public International Law Perspective

In public international law, jurisdiction has long been tied to the concept of sovereignty, which enables states to exercise their independence.[21] Sovereignty functions as both an enabling concept and a constraining mechanism, informing the creation of international laws limiting the exercise of State jurisdiction.[22]

Public international law reflects and limits nations' "sovereignty" through norms of jurisdiction that determine the bounds of coexisting "sovereigns" powers, especially the scope of states' regulatory authority under international law. [23] While the term "jurisdiction" has a much broader meaning in public international law than it does in domestic or private international law, effectively encompassing any exercise of regulatory power, the general domestic definition of "jurisdiction," especially in relation to the powers of courts, is also used in international legal studies to examine the distinct topic of the regulatory power of international courts and tribunals.[24] In the context of norms creating the regulatory authority of nations, public international law

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20 Kuzi Charamba, 'Beyond the Corporate Responsibility to Respect Human Rights in the Dawn of a Metaverse' (2022) 30(1) University of Miami International and Comparative Law Review, 110, 147

21 Cedric Ryngaert, 'The Concept of Jurisdiction in International Law' (2015) 1-3 < https://unijuris.sites.uu.nl/wp-content/uploads/sites/9/2014/12/The-Concept-of-Jurisdiction-in-International-Law.pdf> Last accessed 18 February 2023

22 Ryngaert (n 21) 1-3

23 Alex Mills, 'Rethinking jurisdiction in international law' (2013) 84(1) British Yearbook of International Law 187, 194

24 Mills (n 23) 194

traditionally recognizes three primary categories of jurisdiction.[25]

One of the key issues that arises at the intersection of the Metaverse, and public international law is jurisdiction. The issue of jurisdiction is crucial in determining who has the authority to govern and regulate the Metaverse, as well as how disputes and conflicts arise in this virtual space. The highly interconnected and transnational nature of the Metaverse is one of the most difficult challenges in establishing jurisdiction in this virtual space. In the realm of contemporary global interconnectedness, the convergence of users hailing from diverse jurisdictions poses a formidable challenge in ascertaining the appropriate legal framework to govern their interactions in real time. The fluid nature of this digital landscape complicates the identification and application of pertinent laws and regulations that ought to govern a given situation. Moreover, given the transnational nature of the Metaverse, ascertaining the competent nation-state vested with regulatory authority becomes a complex undertaking. To surmount these challenges, it is imperative for international organizations to engage in collaborative efforts aimed at formulating a comprehensive legal framework that possesses the requisite capacity to proficiently govern the Metaverse.

Public relations are rapidly evolving in the electronic space with the help of digital technologies, and other technologies, some of which may restrict human rights and freedoms but are not currently regulated by law.[26] Developing a new set of social relationships in the metaverse necessitates the establishment of a jurisdiction, defined as the extent to which opportunities apply on the basis of subject competence or the domain in which the right applies.[27] Along with establishing jurisdiction, it will be critical to address the issue of human rights in the Metaverse. It is imperative to emphasize the imperative nature of safeguarding users' fundamental rights to freedom of expression, privacy, and access to information, irrespective of their geographical location or nationality. In order to ensure the equitable enjoyment of the Metaverse, it becomes imperative to safeguard users against any form of discrimination and harassment. Additionally, it is crucial to prioritize the accessibility of the Metaverse for individuals with disabilities. International organizations shall undoubtedly assume a pivotal role in the regulation of the Metaverse, given their unparalleled capacity to tackle the intricate and transnational challenges

[25] Ilias Bantekas, 'Criminal jurisdiction of states under international law' (2011), Max Planck Encyclopedia of Public International Law <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://spacelaw.univie.ac.at/fileadmin/user_upload/p_spacelaw/EPIL_Criminal_Jurisdiction_of_States_under_International_Law.pdf> Last accessed 18 February 2023

[26] O. V. Kostenko, 'Electronic Jurisdiction, Metaverse, Artificial Intelligence, Digital Personality, Digital Avatar, Neural Networks: Theory, Practice, Perspective' (2022) 1(73) World Science 1, 1-13

[27] Kostenko (n 26) 1

that are anticipated to emerge. The objectives encompassed herein entail the establishment of a universally accepted framework of legal norms, facilitation of mechanisms for resolving conflicts, and guaranteeing the operation of the Metaverse in a manner that is both transparent and accountable.

Ultimately, the trajectory of the Metaverse and its relationship with international law will be significantly influenced by the collective actions undertaken by international organizations, governments, and the private sector. These key actors possess the capacity to exert considerable influence over the development and implementation of legal frameworks that govern the Metaverse on a global scale. As such, their decisions and initiatives will play a pivotal role in shaping the future landscape of this emerging virtual realm within the parameters of international law. Through collaborative efforts, it is indeed conceivable to establish a virtual realm that embodies principles of safety, equity, and accessibility for all its users. The absence of a tangible presence poses an additional challenge in ascertaining jurisdiction within the Metaverse. In physical reality, a person or entity's location determines jurisdiction. The Metaverse deviates from rules and principles, contrary to popular belief. Due to its lack of a physical presence in any nation-state, a virtual firm in the Metaverse may have trouble defining its regulatory jurisdiction. Virtual entities, like as companies and people, can exist in several jurisdictions, complicating jurisdiction in the Metaverse. Metaverse entities sometimes struggle to determine their legal structure due to contradictory laws and rules. In the lack of a clear legal framework, dominating nation-states may try to rule the Metaverse and its entities, creating a fragmented and unequal virtual world. The international community must work together to establish clear, unified Metaverse jurisdiction norms to address these issues. A multilateral treaty or multinational body to manage the Metaverse is one option. To provide a fair, unbiased, and inclusive Metaverse, establishing jurisdiction requires international cooperation. To handle the Metaverse's unique characteristics, international law may need to be revised. The above argument may require new legal frameworks and flexible methods for determining jurisdiction in virtual environments. To create a complete and unified Metaverse governance structure, sovereign nation-states must cooperate and coordinate. The resolution of these jurisdictional issues holds paramount importance in guaranteeing that the Metaverse operates as a secure and just milieu for all its users.

II. THE METAVERSE AND INTERNATIONAL LAW

A. The Concept of Sovereignty in the Metaverse

Sovereignty is a fundamental concept in international law that refers to a state's authority to govern itself and its territory. [28] *Jean Bodin* initially articulated

[28] Melda Sur, Uluslararası Hukukun Esasları (16th edn, Beta 2022) 121

the concept of sovereignty. *Bodin* drew the idea of sovereignty from the Latin word "*superanus*," which means "the greatest, the highest." According to Bodin, "*souveraineté*" (sovereignty) is the "absolute and permanent power of a state" based on this phrase.[29] The phrase "*Liberi populus externus is qui nullius alterius populi potestatis est subjectus*" is widely regarded as the first known definition of sovereignty, which can be found in Justinian's Digest.[30] To ensure lasting peace in Europe, the peace treaties of Westphalia (1618–1648) firmly established the State-nation as the primary international actor, endowed with absolute sovereignty.[31] The Treaties of Westphalia were essential in shaping contemporary states because they established a connection between authority and land, formalizing the idea that each nation-state can act independently within its own borders.[32] This marked the beginning of the modern era.[33]

Sovereignty is an important concept in public international law because it provides a framework for how states interact with one another. Sovereignty implies that states have the right to self-determination and the ability to govern their own affairs independently of other states. It also implies that states have a responsibility to respect other states' sovereignty. By the close of the eighteenth century, there emerged novel approaches to questions of authority. When power is passed from a monarch to the nation and its citizens, state sovereignty evolves into national sovereignty. How the traditional notion of sovereignty has evolved from the very beginning, proponents of state theory have sought to restrict the use of power to individuals' inherent, inalienable "natural rights" at birth. Until after World War II, however, these efforts to rein in spending remained purely theoretical.[34] To be more specific, the emergence of the "state of law" understanding has resulted in states taking on a theoretical obligation to safeguard the rights of individuals who are obligated to them as citizens; it is assumed that the relevant state will spontaneously and without any other initiative obey these rights. In the United States, where these ideas were first developed, the Virginia Constitution, ratified on 12 July 1776, and the American Declaration of Independence, signed on 4 July 1776, both include provisions that state power is limited to individual rights and transfer these rights from doctrine to legal practices[35] The political power is bound

29 Jean Bodin, On Sovereignty (6th edn, Cambridge University Press 2003) 1

30 Adrian Alexe, End of the Free World (Aldo Press 2009) 152

31 Jana Maftei, 'Sovereignty in International Law' (2015)11 (1) Acta Universitatis Danubius Juridica 54, 57

32 Daniel Phillpott and Robert J. Jackson, 'Westphalia, Authority and International Society' in Robert J. Jackson (ed), Sovereignty at the Millennium(Blackwell Pub 1999)144, 144-167

33 Maftei (n 31) 57

34 Chris Brown, Sovereignty, Rights and Justice: International Political Theory Today (Polity Press 2002) 7

35 Münci Kapani, Kamu Hürriyetleri (7th edn, Yetkin 1993) 45

by principle to uphold the rights specified in these documents, which have a national character in terms of their application. In fact, the state takes on the role of protector of individual liberties in certain situations. Recognizing human rights in law is an important step, but it won't accomplish much on its own.[36] The construction of universal-scale, sanction-enforceable oversight mechanisms to ensure the state's compliance with these rights and supervise the implementation is more vital than the legality of the rights themselves, but legality is critical. The necessity to discover a subject that is at least as strong as the state itself motivates the discussion of universal-scale control.

1776 the American Declaration of Independence[37], 1789 the Declaration of the Rights of Man and of the Citizen[38], and 1791- 1793 the French Constitutions [39] all eloquently represent this trend.[40] The concept of national sovereignty is originally articulated in Article 3 of the Declaration of the Rights of Man and Citizen[41]:The nation is the primary locus of all legitimate authority. Nothing or no one can use power that does not directly come from it. Article 1 of Title II of the French Constitution from 1791[42] established the idea of national sovereignty by stating that it is indivisible, inalienable, and irrevocable. As a result, the idea of national sovereignty established the nation as a distinct political entity with unique identity, principles, and interests that were non-transferable to other states or bodies. The nation as a whole, not a single person or small group within it, is the only entity that is permitted to exercise sovereignty. This idea of national sovereignty serves to shield the country from outside interference, enabling it to pursue its own objectives and interests without worrying that a foreign power will take control.

The 1907 Hague Convention mainly regulates the law of war, but it also includes the prohibition of the slave trade in the 19th century and the complete

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36 Mithat Sancar, "Devlet Aklı" Kıskacında Hukuk Devleti (3 edn, İletişim Press 2004) 120

37 US Congress, 'Declaration of independence 1776' <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/http://bri-docs.s3.amazonaws.com/BAA-001-HandoutE.pdf> Last Accessed 20 February 2023

38 Marquis De Lafayette, 'Declaration of the Rights of Man and of the Citizen 1789' <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://courses.kvasaheim.com/common/docs/drmc.pdf> Last Accessed 20 February 2023

39 'The Constitution of 1791' <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://wp.stu.ca/worldhistory/wp-content/uploads/sites/4/2015/07/French-Constitution-of-1791.pdf> Last Accessed 20 February 2023

40 Maftei (n 31) 57

41 De Lafayette (n 38)

42 'The Constitution of 1791, Title II of the Division of the Kingdom and of the Status of Citizens' <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://wp.stu.ca/worldhistory/wp-content/uploads/sites/4/2015/07/French-Constitution-of-1791.pdf > Last Accessed 16 February 2023

abolition of slavery at the beginning of the 20th century,[43] as well as the efforts to protect the rights of workers and ethnic minorities during the same period.[44] Indeed, II. after World War II, the "absolute" sovereignty of states began to be questioned; under the influence of the Nazi experience, the idea that an understanding of absolute sovereignty could cause the violation of individual and group rights and that the securing of individual rights and freedoms could not be left to the initiative of states alone brought along the search for a normative order based on ethical principles at the international level. The 20th century will be remembered as the period during which the concept of sovereignty evolved toward its current form, with interstate cooperation emphasizing respect for the obligations assumed by States as international actors, moving away from more lenient and flexible interpretations in the classical senses. In the first half of the 20th century, several authors looked into the subject of state sovereignty.[45] The example of Pasquale Fiore demonstrates that a state can function independently of other nations while still adhering to the constraints of international law.[46] Arbitrator Max Huber, writing for the Permanent Court of Arbitration in the Island of Palmas Case Decision (1928), emphasized the criterion of "independence" in the definition of sovereignty in interstate relations.[47] After World War II, many people develop pessimistic views of sovereignty because they believe that sovereignty in the traditional sense enabled abuse of power and the conflict. Fundamental inconsistencies were discovered between his total character-building and the necessity to establish international legitimacy, leading many to conclude that sovereignty is incompatible with international law. They appear to have reconciled state sovereignty with ensuring international legality after 1945, with the adoption of necessary documents on this regard underlying the international legal system.[48] Principles are established for inter-state cooperation, and among these is the recognition that respecting each other's sovereignty is crucial.[49] The European Court of Human Rights, created within the Council of Europe, is an early and influential example of efforts to avoid leaving the law primarily to the initiative

43 Stephen Krasner, Sovereignty: Organized Hypocrisy (Princeton University Press 2001) 105-109

44 Jack Donnely and T. Dunne and N. J. Wheeler, (eds.), 'The Social Construction of International Human Rights' in T. Dunne and N. J. Wheeler, (eds), Human Rights in Global Politics (Cambridge University Press 1999) 71

45 Maftei (n 31) 58

46 Maftei (n 31) 58

47 Max Huber, 'Island of Palmas case (Netherlands, USA)' (Reports of International Arbitral Awards, 1928, 2.829-71) < https://legal.un.org/riaa/cases/vol_II/829-871.pdf> Last Accessed 26 March 2023; Sur (n 28) 121

48 ALEXE, (n 25) 154; Maftei (n 31) 58

49 Maftei (n 31) 58

of governments.[50] With the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was signed by the member states of the Council of Europe and went into effect in 1953, it was planned that human rights violations in the member states would be closely watched and swift action would be taken to stop them.[51] The European Court of Human Rights was set up to protect people whose rights were violated by the government.[52] The territorial integrity and political independence of each state are sacred and cannot be compromised, and the right to self-determination and self-government is an inalienable human right.

Article 2, paragraph 1 of the Charter[53] establishes the idea of sovereign equality as the basis for cooperation among United Nations member states. As a result, it owes it to all other states to uphold their international personalities and sovereignty and to act in good faith when it comes to its international obligations. A sovereign state makes sure the maintenance of the global order by doing this. Unquestionably, national sovereignty is one of the fundamental principles on which contemporary international law is based. The conflict between nation-states and international organizations as participants in international relations governed by international law and the exercise of sovereignty by States inside international organizations add another dimension to this idea. Article 21 of the United Nations Charter[54] states that the organization is founded on the principle of sovereign equality of Member States; the objectives and principles of the United Nations Charter are also mentioned in the preamble of the North Atlantic Treaty[55]; thus, implicitly, the principle of sovereign equality is also a part of the preamble of the North Atlantic Treaty. Sovereignty has been central to the development of international law, particularly in areas such as force, human rights, and trade. The United Nations Charter, for example, which is a foundational document of international law, recognizes the principle of sovereignty and states' right to non-interference in their internal affairs.

It's important to consider the repercussions of giving the state absolute power in the country. The legitimacy of national norms and the exercise of state power are both assumed to occur within the confines of the law.[56] As in the *Lanoux*

50 H. Emrah Beriş, ‚Egemenlik Kavraminin Tarihsel Gelişimi ve Geleceği Üzerine Bir Değerlendirme' (2008) 63(01) Ankara Üniversitesi SBF Dergisi 55, 66

51 Beriş (n 50) 66

52 Beriş (n 50) 66

53 'Charter of the United Nations' (1945) 31(8) American Bar Association Journal 388, 388-399

54 Article 21 of the Charter of the United Nations (n 53)

55 'North Atlantic Treaty; Documents Relating to the North Atlantic Treaty' (1949) U.S. Govt. Print. Off.

56 Sur (n 28) 127

arbitration[57] decision of 6 November 1957, any restrictions imposed will be done so at the state's own discretion and through international commitment.[58] Contracts between the state and private parties should be interpreted in a way that restricts the scope of the state's authority as much as possible.[59] Although there were "stability records" in the concession agreement with a foreign oil company, Kuwait retained the power to make some changes in its economic policy, as was acknowledged in the *Aminiol*/Kuwait arbitration[60] decision of 24 March 1982.[61] Also, sovereignty is an important concept in public international law because it serves as the foundation for state relationships and contributes to the international system's stability and order. It is imperative to emphasize the imperative nature of safeguarding the fundamental rights of individuals, such as the right to freedom of expression, privacy, and access to information, irrespective of their geographical location or nationality. In order to ensure the equitable enjoyment of the Metaverse, it becomes imperative to safeguard users against discriminatory practices and unwarranted harassment. Additionally, it is crucial to prioritize the accessibility of the Metaverse for individuals with disabilities. International organizations will undoubtedly assume a pivotal role in the regulation of the Metaverse, as they possess the most suitable capabilities to effectively tackle the intricate and transnational challenges that are anticipated to emerge. The objectives encompassed herein encompass the establishment of a universally accepted framework of legal norms, provision of support in the resolution of conflicts, and guaranteeing the operation of the Metaverse in a manner that is both transparent and accountable.

Ultimately, it is imperative to recognize that the trajectory of the Metaverse and its relationship with international law will be significantly influenced by the collective endeavors of international organizations, governments, and the private sector. These key actors hold considerable sway in determining the course of events and shaping the legal framework that will govern this emerging digital realm. By fostering collaborative efforts, it is conceivable to engender a virtual realm that embodies the principles of safety, equity, and accessibility for all its users. The absence of a tangible presence poses an additional obstacle to the establishment of jurisdiction within the Metaverse. In the realm of physicality, the determination of jurisdiction often hinges upon the geographical situation of an individual or entity. Contrary to prevailing assumptions, the situation in the Metaverse does not consistently adhere to

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57 Lac Lanoux Arbitration (France v. Spain), 24 I.L.R. 101, 1957.

58 Sur (n 28) 127

59 Sur (n 28) 127

60 Fernando R. Teson, 'State Contracts and Oil Expropriations: The Aminoil-Kuwait Arbitration' (1984) 24(2) Virginia Journal of International Law 323,323

61 Sur (n 28) 127

established norms and principles. Due to its lack of a physical presence in any nation-state, a virtual firm in the Metaverse may have trouble defining its regulatory jurisdiction. Virtual entities, like as companies and people, can exist in several jurisdictions, complicating jurisdiction in the Metaverse. Diverse legal frameworks and rules can make it difficult for Metaverse companies to determine their legal obligations. In the lack of a clear jurisdictional framework, dominating nation-states could try to control the Metaverse and its elements, creating a fragmented and unequal virtual world. The international community must work together to establish clear, unified Metaverse jurisdiction norms to address these serious issues. A multilateral treaty or international agency that oversees and regulates the Metaverse could solve its governance issues. In essence, the matter of establishing jurisdiction within the Metaverse presents a multifaceted challenge that calls for a collaborative endeavor among nations to guarantee a just, impartial, and inclusive virtual realm. In light of the challenges at hand, it may be necessary to consider potential revisions to the framework of international law in order to adequately address the distinct attributes of the Metaverse. The resolution of these jurisdictional matters holds paramount importance in guaranteeing the establishment of a secure and just milieu within the Metaverse, catering to the interests and rights of all its users.

The notion of sovereignty holds paramount significance within the realm of international law, as it assumes a pivotal role in the regulation of the Metaverse. In the realm of international law, the concept of sovereignty pertains to the preeminent power wielded by a nation-state in governing its territorial domain and exercising control over the conduct of its populace. The intricate nature of sovereignty is further compounded within the Metaverse, as this virtual realm transcends conventional national boundaries, enabling users hailing from diverse countries to engage in real-time interactions. The utilization of the principle of sovereignty within the Metaverse is poised to engender profound ramifications concerning the regulation of virtual activities and the safeguarding of human rights. In the Metaverse, a nation-state might regulate its inhabitants' behavior by claiming sovereignty. This includes the ability to restrict free speech, enforce laws, and collect taxes. Sovereignty in the Metaverse raises several legal and ethical issues. When a nation-state claims a Metaverse sector, public international law may be affected. This could violate other nations' sovereignty, causing problems. Additionally, Metaverse restrictions on freedom of expression and other fundamental rights may raise human rights concerns. To address these issues, international law may need to be reevaluated to account for Metaverse characteristics. The aforementioned proposition may necessitate the evolution of novel legal frameworks, alongside the adoption of adaptable methodologies for ascertaining sovereignty within the realm of virtual spaces. Moreover, it is imperative to underscore the

significance of international collaboration and coordination among sovereign states in the establishment of a comprehensive and coherent regulatory structure for the governance of the Metaverse.

In essence, the intricate and challenging matter of sovereignty within the Metaverse calls for a sophisticated and deliberate approach from the global community. The resolution of these jurisdictional matters will play a pivotal role in guaranteeing the safety and fairness of the Metaverse for all its users, while also safeguarding the sovereignty of nation-states.

B. Human Rights in the Metaverse

The international community's tragic experiences during the second world war pushed the protection of human rights to the forefront of the United Nations' founding objectives. Belief in fundamental human rights, human dignity and worth, equality between men and women, and the equality of all nations, whether large or small, is expressed in the second paragraph of the preamble to the United Nations Charter. In a similar vein, Article 55[62] emphasizes the de facto respect for the human rights and fundamental freedoms of all people, regardless of "race, sex, language, or religion". According to Article 56[63], in order to achieve these goals, member states have committed to cooperate with the United Nations individually or together. The United Nations General Assembly's 1948 Universal Declaration of Human Rights[64] followed the provisions of the United Nations Charter.[65] The Universal Declaration of Human Rights is a document with limited legal force. He was a pioneer in the development of significant texts on human rights law. The International Covenant on Civil and Political Rights[66] and the International Covenant on Economic, Social, and Cultural Rights[67] from 1966 are examples. The 1993 Vienna Declaration and program action[68] is one of the most significant steps

62 Article 55 of the Charter of the United Nations (n 53)

63 Article 56 of the Charter of the United Nations (n 53)

64 UN General Assembly, 'Universal declaration of human rights' (1948) 302(2) UN General Assembly 14, 14-25.

65 No nation has opposed it. However, 8 states chose to abstain. Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa, the Soviet Union, Ukraine, and Yugoslavia. 'Universal Declaration of Human Rights' <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e887?prd=EPIL> Last Accessed 18 April 2023

66 'International Covenant on Civil and Political Rights' <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights > Last Accessed 18 April 2023

67 'International Covenant on Economic, Social, and Cultural Rights' <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights> Last Accessed 18 May 2023

68 UN General Assembly, 'Vienna Declaration and Programme of Action' (12 July 1993), A/

taken by the United Nations to safeguard human rights. Despite the fact that this is not legally binding, the fact that it was accepted by consensus at the World Conference on Human Rights is significant in terms of the universal nature of human rights and the United Nations' pioneering role in human rights.[69]

Human rights are an essential component of public international law and play a crucial part in the Metaverse's rule. The burgeoning development of the Metaverse presents a revolutionary shift not only in the realm of technology but also in the broader spectrum of societal dynamics. When examining the potential ramifications of this virtual domain on society, a comprehensive evaluation is necessary to discern the nuances of its impact. One of the central tenets in this assessment revolves around the human rights dimension. The notion of human rights, entrenched in the foundational principles of dignity, liberty, equality has been historically formulated with the tangible, physical world in mind. However, the introduction of the Metaverse, an environment where the lines between virtuality and reality blur, necessitates a recalibration of these principles to ensure their relevance and applicability. Within the Metaverse, rights related to privacy and freedom of expression assume a renewed significance. Given the immersive nature of this platform, users might find their personal data at a heightened risk of exposure or misuse. Simultaneously, the potential for virtual anonymity could both empower free speech and introduce challenges related to misinformation or virtual harassment. Moreover, issues of accessibility and non-discrimination are paramount. As the Metaverse evolves, there's a pertinent need to ensure that access isn't solely reserved for a privileged few, inadvertently perpetuating socio-economic disparities. Every individual, regardless of their background, should be able to experience and participate in the Metaverse without facing discrimination or bias.[70] Additionally, economic rights within the Metaverse, particularly concerning virtual assets, properties, and digital currencies, warrant rigorous legal scrutiny. Defining ownership, rights to transfer, and potential taxation within this virtual environment can be complex, yet are essential for a fair and just virtual society. Furthermore, cultural rights, including the right to participate in the virtual cultural life, freedom of artistic expression, and protection of virtual cultural heritage, could be novel areas that emerge with the Metaverse's growth.

Human rights are protected in the physical world by international treaties and agreements as well as by the legislation of individual nation-states. In

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69 Kevin Boyle, 'Stock-taking on human rights: The world conference on human rights, Vienna 1993' (1995) 43(1) **Political Studies** 79, 79-95

70 Peter High, 'Technology's Role In Driving Progress In Black Lives Matter' FORBES <www.forbes.com/sites/peterhigh/2020/07/30/technologys-role-in-driving-progressin-black-lives-matter/?sh=2a485b 1b687e> Last accessed 29 August 2023

the realm of Metaverse, people have witnessed a series of unfortunate events that have entangled the company in scandals pertaining to the dissemination of hate speech, disinformation, and the imposition of internet censorship.[71] Amnesty International has posited a connection between these occurrences and the company's purported 'surveillance business model predicated upon violations of human rights'.[72] The aforementioned damages have given rise to tangible manifestations of violence, political instability, and a regression in democratic principles.[73] One of the most difficult aspects of defending human rights in the Metaverse is ensuring that these rights are honored in cross-national virtual places. In order to safeguard and uphold human rights within the Metaverse, it becomes imperative to engage in collaborative efforts with other sovereign states. This necessitates a collective approach to ensure the protection and enforcement of these fundamental rights, irrespective of the geographical location within the Metaverse where such violations may transpire. An additional challenge that arises when seeking to protect human rights within the Metaverse pertains to the imperative of upholding these rights amidst the proliferation of advancing technologies, including virtual reality and artificial intelligence. The utilization of such technologies within the Metaverse, for instance, has the potential to give rise to substantial concerns regarding privacy and security, thereby posing challenges in ensuring the protection of human rights within these virtual realms. In order to surmount these challenges, it may become imperative to modify the framework of international law to accommodate the distinctive attributes inherent in the Metaverse. The potential resolution of this matter necessitates the formulation of novel legal frameworks and the implementation of more flexible approaches to safeguarding human rights within virtual domains. Furthermore, it is imperative to underscore the indispensability of international collaboration and coordination among sovereign states in order to establish a robust and coherent framework of governance for the Metaverse. In summation, the safeguarding of human rights within the Metaverse presents a multifaceted and arduous matter necessitating the international community's adoption of a discerning and intentional methodology. The resolution of these human rights concerns is imperative in order to guarantee that the Metaverse functions as a secure

71 'The Facebook Papers: What Do They Mean from a Human Rights Perspective?' Amnesty International (4 November 2021) <https://www.amnesty.org/en/latest/campaigns/2021/11/the-facebook-papers-what-do-theymean-from-a-human-rights-perspective/> Last accessed 13 June 2023

72 'The Facebook Papers (n 71)

73 Dan Milmo, 'Rohingya Sue Facebook for £150bn over Myanmar Genocide' The Guardian (6 December 2021) <https://www.theguardian.com/technology/2021/dec/06/rohingya-sue-facebook-myanmar-genocide-usuk-legal-action-social-media-violence> Last accessed 13 June 2023.

and just environment for all participants, while simultaneously upholding the fundamental human rights of every individual involved.

C. National Security Considerations

Even though the term "national security" is well-established in the political discourse of international relations, it has many different meanings to different people, including policymakers and average citizens.[74] It's possible that the idea of national security, which gained prominence in the United States after World War II, will be presented first. The United States passed its first piece of national security legislation in 1947, and it was called the "national security law."[75] Until the 1980s, many obvious aspects of national security remained in place.[76] Military assaults were initially regarded as the greatest threat to the nation. As a result, national security issues such as the arms race, disarmament treaty, and military alliance have been prominent for a long time. [77] As a result, the United Nations Charter enshrines fundamental principles such as the non-use or threat of force, as well as the peaceful resolution of international disputes. The United Nations Charter, in contrast to the League of Nations Covenant, included economic, social, cultural, and human rights as "new agendas," but their relevance to national security appeared to be minimal. That was the state's primary responsibility to ensure national security.[78] In traditional national security discourse, the term "attack" predominantly refers to a direct or indirect aggressive action, which can either be physical (like a military strike) or intangible (like a cyberattack). Article 2(4) of the U.N. Charter constrains its understanding of uses of force to a distinct geographical region.[79] This implies that any compromise to this untouched state indicates a territorial breach. However, the traditional interpretation struggles to encompass cyberspace. An electronic assault via a country's communication networks doesn't equate clearly to an infringement of its sovereignty, like unauthorized aerial trespass would. Essentially, cyberspace has blurred the traditional linkage between land and sovereign rights.[80] Also, with the evolution of digital realms such as the

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74 Lisa A. Rich, 'New Technology and Old Law: Rethinking National Security' (2015) 2(4) **Texas A&M Law Review** 581, 581-582

75 'National Security Law of 1947'< https://global.oup.com/us/companion.websites/9780195385168/resources/chapterl0/nsa/nsa.pdf > Last Accessed 20 May 2023

76 Congyan Cai, 'Enforcing a New national Security - China's National Security Law and International Law' (2017) 10 (1) Journal of East Asia and International Law 65, 67-68

77 Cai (n 76) 67-68

78 Cai (n 76) 67-68

79 Scott J. Shackelford, 'From Nuclear War to Net War: Analogizing Cyber Attacks in International Law' (2009) 27(1) Berkeley Journal of International Law 192, 214

80 Shackelford (n 79) 214

Metaverse, our understanding of what constitutes an "attack" has considerably expanded. In the Metaverse, an "attack" might not only mean a direct assault on digital assets or infrastructure. It can also encompass psychological operations, misinformation campaigns, and even cultural subversion. Given the immersive nature of the Metaverse, where individuals' perceptions can be easily influenced, these non-traditional forms of attacks can have profound implications on a nation's security. Much like our current internet, the Metaverse will be susceptible to cyber-attacks. This could range from data breaches, which could expose sensitive personal information, to more sophisticated attacks aimed at destabilizing the virtual environment itself. From a national security perspective, these cyber threats in the Metaverse can have real-world repercussions, such as undermining trust in digital platforms or even extracting sensitive national intelligence. The Metaverse provides an ideal platform for information warfare. Adversarial entities can manipulate virtual environments or narratives to influence public opinion, propagate divisive ideologies, or even recruit for extremist causes. Detecting and countering these operations will be a significant challenge for national security agencies. As virtual assets, currencies, and economies grow within the Metaverse, they can become targets for attacks. Economic destabilization within the Metaverse, whether through fraud, asset theft, or market manipulation, could have cascading effects on real-world economies, especially if the Metaverse economy becomes significantly intertwined with the global financial system. Given the decentralized and boundary-less nature of the Metaverse, determining the origin, perpetrator, and even the jurisdiction of an attack becomes complex. Traditional notions of retaliation, deterrence, and defense have to be re-evaluated in this new context. The Metaverse can also be a platform for cultural exchange. While this promotes global unity and understanding, it also provides avenues for cultural infiltration and shifts in national identity, which can be viewed as non-traditional forms of "attack" on a nation's social fabric. Therefore , as the Metaverse grows in prominence, it becomes essential for national security apparatuses worldwide to recalibrate their strategies and tools. Recognizing and understanding the multifaceted nature of "attacks" within this digital realm is the first step towards ensuring both the integrity of the Metaverse and the security of the nation-state in an increasingly interconnected digital age.

Since there seems to be a significant potential threat to our national security every day in the twenty-first century, policymakers, stakeholders, and citizens are being urged to reevaluate our legal, social, economic, and military structures to determine whether they are sufficient to meet the objectives, difficulties, and ideals of the ensuing months, years, and decades.[81] In the modern era, there

[81] Rich (n 74) 592

are not only exciting new advancements in science, technology, and human understanding, but there are also reports of widespread threats to our national security, whether they are domestic or foreign, natural or artificial.[82]

National security is indeed a paramount consideration for sovereign nation-states and constitutes an indispensable element within the realm of public international law. The intricacies surrounding the safeguarding of national security in the Metaverse are heightened due to the transnational nature of virtual space, wherein users hailing from different nations can engage in real-time communication. The challenge that nation-states encounter in effectively monitoring and regulating virtual activities that pose a risk to their security is indeed a significant impediment to safeguarding national security interests within the Metaverse. The matter at hand necessitates the exploration of novel technological advancements and methodologies for overseeing virtual undertakings, alongside the establishment of legal structures that empower nation-states to address virtual activities posing security threats. One must acknowledge that safeguarding national security in the Metaverse poses a formidable challenge, primarily centered around the imperative of upholding the sovereignty and jurisdiction of nation-states in regulating virtual undertakings transpiring within their territorial confines. The potential need for the establishment of novel legal frameworks enabling nation-states to exercise control over virtual activities and ensure their alignment with national security interests may arise. In order to surmount these challenges, it may be imperative to make adjustments to the framework of international law so as to effectively accommodate the distinctive attributes inherent in the Metaverse. The potential resolution of this matter may necessitate the development of novel legal frameworks and the adoption of adaptable methodologies for overseeing virtual undertakings that pose a risk to the security of nation-states. Furthermore, it is imperative to underscore the indispensability of international collaboration and coordination among sovereign states in order to establish a robust and coherent framework of governance for the Metaverse. In summation, the safeguarding of national security within the Metaverse presents a multifaceted and intricate matter necessitating a discerning and intentional stance on the part of the global community. The resolution of these national security challenges shall assume paramount importance in guaranteeing the establishment of a safe and secure environment within the Metaverse, thereby safeguarding the sovereignty and security of nation-states.

Metaverse is a new virtual world that is rapidly developing, and there is no consensus on its nature or activities. International law struggles to manage virtual actions and guarantee they comply with global standards and values due to this lack of clarity. Because the Metaverse's boundaries are unclear

[82] Rich (n 74) 592

and virtual actions may overlap with physical ones or take place in numerous jurisdictions, it's hard to tell which state regulates a specific activity. This makes it hard to determine which state regulates an activity. Due to a lack of defined definitions and borders, it is difficult to determine which actors are accountable for preserving human rights and guaranteeing national security in virtual areas.

Public international law also struggles to enforce laws across boundaries in the Metaverse. Virtual actions can happen everywhere, thus they're not subject to any state's jurisdiction. Because of this, it is difficult for states to regulate and enforce laws related to actions in virtual spaces while simultaneously adhering to international norms and principles. A Metaverse crime committed by an actor in one jurisdiction may have affected a victim in another. If the culprit is in a country without an extradition treaty with the victim's state, it may be difficult to file criminal charges against them. This makes it harder for states to enforce laws and protect individuals from internet crimes, creating a gap. Online activity may not be traceable, making it harder for law authorities to identify and charge criminals. For instance, tracing the origin of virtual assets like cryptocurrencies and identifying the people behind anonymous virtual accounts may be challenging.

Technical advancement is outpacing legal frameworks, making public international law implementation in the Metaverse difficult. Technical innovation is outpacing the creation of legal frameworks to monitor and govern virtual behaviors in the Metaverse, a constantly changing virtual realm. The Metaverse is researching and implementing blockchain and AI technology. These technologies could impact the economy, environment, and human rights. However, the legal frameworks meant to oversee these technologies are still being developed, and they may not be able to keep up with the Metaverse's rapid developments. Public international law in the Metaverse is difficult since technical growth is surpassing legal framework development. This challenge requires a coordinated effort to guarantee that virtual activities comply with international norms and values and do not harm society. This necessitates international collaboration and coordination to ensure that virtual activities comply with international norms and that virtual criminals are held accountable. This may require new legal frameworks, strengthened international treaties, and international regulatory agencies with the competence and resources to efficiently oversee the Metaverse.

III. THE ROLE OF INTERNATIONAL ORGANIZATIONS IN REGULATING THE METAVERSE

States may find it more advantageous to act collaboratively and work together to attain specific objectives.[83] An international organization is the

[83] Yücel Acer and İbrahim Kaya, Uluslararası Hukuk (12th edn, Seçkin 2021) 132

formal and continuous cooperation structure of multiple states for a specified purpose or reasons.[84] For example, more than three-quarters of the resolutions adopted in 2017 by the United Nations Security Council dealt with ongoing conflicts in specific countries or regions, while the remaining resolutions dealt with a variety of thematic issues, such as the adoption of the first resolutions dealing with cultural heritage and landmines.[85] Armed conflict, unconventional and digital warfare, mass migration, human trafficking and smuggling, ethnic cleansing, genocide, and terrorism were all new and increasingly complex challenges for the Security Council.[86] Then, an United Nations Group of Governmental Experts struggled to reach a consensus on the applicability of international law and international humanitarian law to cyber conflicts, despite the proliferation of cyber threats. [87]After thirteen years of discussions, the United Nations Security Council's Chapter VII powers to maintain international peace and security remain unresolved, as do the use of force and the right of self-defense by individual states.[88] As evidenced by these instances, international organizations can play a crucial role in the regulation of the Metaverse, since they contribute to the establishment of worldwide standards and norms for virtual activity. In addition to coordinating the activities of nation-states to regulate the Metaverse, these organizations provide a venue for the resolution of potential disputes in virtual areas. International organizations develop and enforce virtual activity laws to regulate the Metaverse. International organizations may set Metaverse privacy, security, and intellectual property rules. International norms and values, when applied to the Metaverse through established standards, ensure a protective environment for all its users. Global entities are instrumental in overseeing the Metaverse, offering solutions for virtual disagreements. They might also mediate between nations on matters of virtual activity guidelines and digital property rights, aiming for swift, equitable resolutions and curbing the potential for digital disputes to intensify.

To sum up, the participation of global institutions in shaping the Metaverse's rules is pivotal to align virtual operations with international standards. Their regulatory influence is paramount for maintaining the Metaverse's integrity, making it a beneficial and thriving component of the world's economic landscape, and fostering its advancement as an inventive digital frontier.

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84 Acer and Kaya (n 83) 132

85 Renee Dopplick et al., 'United Nations and International Organizations' (2018) 52, Year in Review: An Annual Survey of International Legal Developments and Publications of the ABA / Section of International Law 479, 479

86 Dopplick et al. (n 85) 479

87 Dopplick et al. (n 85) 481

88 Dopplick et al. (n 85) 481

CONCLUSION

The Metaverse introduces unique challenges to established ideas of sovereignty, jurisdiction, national security, and human rights. Navigating legal boundaries in the Metaverse is intricate due to its global expanse, prompting the need for creative strategies, which may hinge on factors like server placements, user locations, or globally accepted digital infractions. The essence of sovereignty in international law is reshaped in this virtual space, striving to harmonize state authority with individual freedoms. Furthermore, the Metaverse heightens issues related to personal rights, such as privacy, freedom of speech, and inclusivity, urging a coordinated international approach to safeguard them. As for national security, the Metaverse introduces threats beyond traditional military concerns, encompassing cyber-attacks, information warfare, and cultural subversion. International organizations, like the UN, play a crucial role in addressing these challenges by facilitating collaboration among states and setting global standards. Their involvement is vital for ensuring the Metaverse's safety, alignment with global norms, and successful integration into the world economy.

International law covers several important issues in the Metaverse. These include sovereignty in the virtual realm, human rights, national security, and international institutions' crucial role in Metaverse governance. Transnational law enforcement, technical improvements outpacing legal frameworks, and multinational institutions regulating the Metaverse provide further issues. International cooperation and coordination are crucial to navigating the Metaverse. This requires promoting international cooperation to meet the complex digital concerns. Additionally, Metaverse-specific legal frameworks must be created. People can keep international treaties relevant and effective in this new area by adapting and innovating them. International regulatory institutions with knowledge and resources are also essential. These entities will ensure Metaverse compliance and protect all parties. This requirement must be met for effective Metaverse regulation. The unique characteristics of virtual space and the problems created by rapid technological progress must be recognized and appreciated before international law can appropriately address the growing Metaverse. It is of utmost importance to acquire a comprehensive understanding of the complexities inherent in the Metaverse and the foundational technologies that underpin it, as this knowledge is indispensable in effectively tackling the various challenges it presents. International organizations, which serve as proponents of collective endeavors and harmonization, espouse this perspective. In order to effectively govern virtual undertakings, it may be imperative to contemplate potential amendments to international legal instruments and frameworks. Such modifications would serve the purpose of establishing a harmonized and transparent system of supervision, while

also affording opportunities for public scrutiny and evaluation. In order to ensure the preservation of global norms within the Metaverse, it is imperative to engage in thoughtful deliberation regarding the implementation of novel legal frameworks and the establishment of international agreements. One plausible avenue for consideration could entail the establishment of dedicated international regulatory entities. It is imperative that these organizations possess the requisite knowledge and resources to effectively oversee the intricacies of virtual dynamics. This encompasses not solely the capacity to formulate and implement regulations, but also to effectively address and settle disputes. It is of utmost importance for global institutions to proactively engage in the exploration and comprehension of the Metaverse and its underlying technologies in order to effectively navigate the intricate challenges it poses. The imperative to adapt and refine established international agreements and governance frameworks to effectively address the dynamic nature of virtual interactions cannot be overstated. This is crucial in order to maintain a robust system of consistent and transparent oversight. The paramount objective lies in accentuating the expansion of global synergy and alignment, as this serves as a crucial mechanism to guarantee that virtual engagements are in line with universally recognized principles, while simultaneously mitigating any potential societal drawbacks.

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THE CRIME OF MONEY LAUNDERING AS A TOOL IN COMBATING ORGANIZED CRIME: A TURKISH LAW PERSPECTIVE VERSUS THE FINANCIAL ACTION TASK FORCE'S VIEW*

Organize Suçlulukla Mücadelede Bir Araç Olarak Suçtan Kaynaklanan Malvarlığı Değerlerinin Aklama Suçu: Mali Eylem Görev Gücü'nün (FATF) Yaklaşımına Karşı Türk Hukuku Perspektifi

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ABSTRACT

Türkiye faces significant money laundering and terrorist financing risks because of its geographic location as the Financial Action Task Force on Money Laundering (FATF) emphasizes frequently. Indeed, penalization of money laundering as a tool to combat organized crime for the first time appeared as an international demand and even pressure on Turkish law just as many other jurisdictions. As such, punishing the acts of money laundering is always confronted by various principles in the Turkish law, but most particularly by the legality principle. Further, money laundering appears as a contemporary type of crime for the Turkish law. Considering money laundering plays a pivotal role in combatting organized crime, a strong necessity for an effective national law which is in compliance with the international conventions exist. This study, therefore, aims to compare the Turkish criminal law perspective with the FATF's views. Such being the case, firstly it provides some insight into historical developments in Türkiye, *e.g.,* main impulses leading to criminalization of the transactions of the proceeds of crime. Then it outlines when and how money laundering occurs as a criminal act pursuant to the Turkish Penal Code in 2005, with a particular focus on the FATF's critics and recommendations (Mutual Evaluation in 2019 and Follow-Up Report 2023) on Türkiye's case on the matter.

Keywords: Money laundering, the proceeds of crime, predicate offence, Turkish Criminal law, The FATF, organized -crime, financing of terrorism

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

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ÖZET

Mali Eylem Görev Gücü'nün (FATF) sıklıkla vurguladığı üzere Türkiye coğrafi konumu nedeniyle ciddi suçtan kaynaklanan malvarlığı değerlerinin aklanması (kara para) ve terörün finansmanı riskleriyle karşı karşıya kalmaktadır. Nitekim Türk hukukunda organize suçlulukla mücadele aracı olarak suçtan kaynaklanan malvarlığı değerlerinin aklanmasının cezalandırılması, ilk kez uluslararası bir talep ve hatta baskı sonucu olmuştur. Bu itibarla suçtan kaynaklanan malvarlığı değerlerinin aklama fiillerinin cezalandırılması, Türk hukuku açısından suç ve ceza politikalarının temel ilkeleri ile, özellikle de kanunilik ilkesiyle ilgili tartışmaları gündeme getirmiştir. Keza suçtan kaynaklanan malvarlığı değerlerinin aklama suçu, Türk ceza hukukunda görece yeni bir suç türüdür. Bu suç türüyle mücadelenin organize suçlulukla mücadelede önemli bir rol oynadığı göz önüne alındığında, uluslararası sözleşmelerle uyumlu, etkili hukuki düzenlemelere güçlü bir ihtiyaç bulunmaktadır. Bu nedenle bu çalışma, Türk ceza hukuku perspektifini FATF'ın görüşleri ile karşılaştırmayı amaçlamaktadır. Buna göre öncelikle Türkiye'deki suçtan kaynaklanan malvarlığı değerlerinin aklama suçunun düzenlenmesine ilişkin tarihi arka plan ve bu şekilde 2005 yılında Türk Ceza Kanunu'nda suçtan elde edilen gelirin aklanmasının münhasır bir suç tipi (md. 282) olarak yer verilmesine giden süreç incelenecektir. Daha sonra, FATF'ın Türkiye ile ilgili 2019 Karşılıklı Değerlendirme Raporu ve 2023 Ara Raporu ışığında bu suç tipine ve uygulamasına dair FATF'ın eleştirileri ve tavsiyeleri ele alınacaktır. Bu şekilde FATF'ın bu suç türüyle ilgili Türk ceza hukukuna yaklaşımlarıyla ilgili analitik bir değerlendirme ortaya konulması hedeflenmektedir.

Anahtar Kelimeler: Karapara aklama, suçtan kaynaklanan malvarlığı değerleri, öncül suç, Türk ceza hukuku, Mali Eylem Görev Gücü (FATF), organize suçluluk, terörün finansmanı

INTRODUCTION

Money laundering as a particular type of crime has a quite short history in Türkiye. Indeed, this was a foreign concept to the Turkish law until 1980s.[1] In 1991, Türkiye became a member of the Financial Action Task Force on Money Laundering (The FATF)[2] established at G-7 submit in 1989.[3] Among the FATF

[1] Umut Türkşen, İsmail Ufuk Mısırlıoğlu and Osman Yükseltürk, 'Anti- Money Laundering Law of Turkey and the EU: An Example of Convergence?' (2011) 14 (3) Journal of Money Laundering Control 279, 280; Murat Volkan Dülger, *Suç Gelirlerinin Aklanmasına İlişkin Suçlar ve Yaptırımlar* (Seçkin, Ankara, 2011) 412.

[2] FATF, Countries: Turkey, <https://www.fatf-gafi.org/en/countries/detail/Turkey.html> accessed 25 September 2023.

[3] FATF, History of the FATF, <https://www.fatf-gafi.org/en/the-fatf/history-of-the-fatf.html> accessed 25 September 2023. The FATF, as an international organization as "largely United States of America prompting". See Phil Williams, 'Money laundering'

countries, Türkiye has been one of the last countries to have introduced a law on money laundering.[4] An anti-money laundering law was introduced through the Code 4208 within the framework of organized crime in 1996, in order to comply with so called *Forty Recommendations* of the FATF[5] and other international conventions, *inter alia*, the Vienna Convention of 1988.[6] Prior to this, it was considered a classic crime called *destroying, concealing and transforming evidence of the committed crime*, or even as *crime of harbouring an outlaw.*[7] Indeed, money laundering can be classified as a contemporary type of crime in some jurisdictions.[8] In any case, as a general rule, the proceeds obtained through the commission of a crime was subject to the law of confiscation, just as it is applied to any crime today. Because the main principle that has prevailed in Turkish criminal law is that it is not allowed that commission of crime serves as a source of a financial gain.[9] Indeed, Türkiye's confiscation practices are rated as 'largely compliant' by the FATF in 2019[10] and "fully met" in its Follow- Up Report in 2023.[11]

Why is benefiting from the assets that are obtained from the commission of a crime considered as a particular type of crime? Is that the natural outcome that perpetrator benefit from a criminal act? For example, a burglar who steals

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1997 5 (1) South African Journal of International Affairs 71, 87 <https://doi.org/10.1080/10220469709545210> accessed 20 November 2023.

4 Olgun Değirmenci, 'Mukayeseli Hukukta ve Türk Hukukunda Suçtan Kaynaklanan Malvarlığı Değerlerinin Aklanması Suçu (TCK m. 282)' (PhD Thesis, Marmara University 2006) 456.

5 Neslihan Coşkun, 'Karaparanın Aklanması Suçu' (2004) 12 (3-4) Selçuk Üniversitesi Hukuk Fakültesi Dergisi 229, 229- 230; Dülger (n 1) 409.

6 Alev İzci, 'Turkey: Efforts to Prevent Money Laundering' (1998) 1 (4) Journal of Money Laundering Control 374 <https://doi.org/10.1108/eb027163 > accessed 25 September 2023; Değirmenci (n 4) 456; Dülger (n 1) 413-414; Selman Dursun, 'Geldwäsche im türkischen Strafrecht' (2016) 4 (2) Journal of Penal Law and Criminology 97, 100.

7 Ümit Kocasakal, Karapara Aklama Suçu (PhD Thesis, İstanbul University 2000) 324; Değirmenci (n 4) 461 ff.; İzzet Özgenç, *Türk Ceza Kanunu Gazi Şerhi* (3 edn, Ankara Açık Ceza İnfaz Kurumu Matbaası 2006) 1050.

8 Mahdi Salehi and Vahid Molla Imeny, 'Anti-money laundering developments in Iran: Do Iranian banks have an integrated framework for money laundering deterrence?' (2019) 11 (4) Qualitative Research in Financial Markets 387, 394 <https://doi.org/10.1108/QRFM-05-2018-0063> accessed 25 September 2023.

9 İzzet Özgenç, *Suç Örgütleri* (12th edn, Seçkin, Ankara 2019) 154.

10 FATF, Anti-money Laundering and Counter-terrorist Financing Measures – Turkey, Fourth Round Mutual Evaluation Report (Paris, 2019) 167 <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Turkey-2019.pdf> accessed 25 September 2023.

11 FATF, Anti-money Laundering and Counter-terrorist Financing Measures –Türkiye, Follow- Up Report [3rd Enhanced] & Technical Compliance Re-Rating (Paris, July 2023) 21 <https://www.fatf-gafi.org/content/dam/fatf-gafi/fur/Türkiye-Follow-Up-Report-2023.pdf.coredownload.pdf> accessed 25 September 2023.

jewellery from someone does not confine himself to the act of taking other's belonging, but he/she also conducts other various acts in order to benefit from that item. However, the mere existence of these crimes were seen as insufficient, in particular regarding combatting cross-border organized crime.[12] Indeed, in comparative law, money laundering is viewed as a crime in the context of the organized crime[13] as confiscating the proceeds of a crime serves as a limiting tool to prevent the perpetrators from benefitting from their criminal acts.[14] In fact, money laundering appears as one of the main financial resources of these criminal organizations and as such demands a *wider approach.*[15] By virtue of its obligations stemming from international and regional organizations, Turkish law-makers stipulated that money laundering shall be a separate crime. As such, the FATF states that:

> "Located at an inter-continental junction, Türkiye faces significant money laundering (ML) and terrorist financing (TF) risks. This includes serious threats from illegal activities of criminal organisations, terrorist organisations and foreign terrorist fighters (FTFs) seeking to exploit domestic and cross-border vulnerabilities, given Türkiye's geographic location".[16]

Türkiye is geographically located between the Europe and the Middle East. Whereas in Europe there are regional and international legal frameworks and organizations against money laundering, in the Middle East, there are some countries, in some of which criminal organizations easily nest as the civil war exists.[17] Consequently, smugglers use Türkiye as a transit to Europe and to the Middle East.[18] Further, empirical studies display that Türkiye still lies at the

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12 Kocasakal (n 7) 3; Veli Özer Özbek, 'Suçtan Kaynaklanan Malvarlığı Değerlerini Aklama Suçu (TCK md.282)' in Yener Ünver (eds), *Kamusal ve Ticari Yaşamda Hukuk ve Etik Açısından Yolsuzlukla Mücadele* (Seçkin, Ankara 2014) 163, 164.

13 Norman Mugarura, *The Global Anti-Money Laundering Regulatory Landscape in Less Developed Countries* (Routledge, London- New York 2016) 75-77; Verena Zoppei, *Anti-money Laundering Law: Socio-legal Perspectives on the Effectiveness of German Practices* (Springer, Berlin-Heidelberg 2017) 69-70; Yener Ünver, *İftira, Suç Uydurma, Suç Üstlenme, Yalan Tanıklık ve Bilirkişilik, İnfaz Kurumlarından Kaçma (TCK'da Düzenlenen Adliyeye Karşı Suçlar)* (5th edn, Seçkin, Ankara 2019) 447; Özbek (n 12) 164.

14 FATF (n 10) 45.

15 *Ibid.*

16 *Ibid.* 5.

17 Alexander R. Dawoody, 'Terrorism in the Middle East: Policy and Administrative Approach' in A.R. Dawoody (eds), *Eradicating Terrorism from the Middle East Policy and Administrative Approaches* (Springer, Switzerland 2016) 3, 14.

18 Şule Toktaş and Hande Selimoğlu, 'Smuggling and Trafficking in Turkey: An Analysis of EU–Turkey Cooperation in Combating Transnational Organized Crime' (2012) 14 (1) Journal of Balkan and Near Eastern Studies 135, 137 <https://doi.org/10.1080/19448953.2012.656970> accessed 25 September 2023.

centre of irregular immigration from the Middle East.[19] The existence of even the smallest legal loophole in Turkish law or any failure with respect to cooperation with other countries, in particular with the European countries, may hamper the fight against organized crime on both the national and the international level. Indeed, the FATF draws attention to the fact that Türkiye has been "*a target of many domestic and international terrorist organisations"*.[20] Money laundering constitutes a pivotal source of finance for criminal organizations.[21] In that context, from a historical view, it is concluded that Türkiye has consistently supported international initiatives (e.g., the FATF) regarding anti-money laundering law[22] and has had similar legislative framework as the EU Member States.[23] Nevertheless, the FATF provides critiques of many aspects of the crime of money laundering as well as new recommendations to Türkiye. To illustrate, the FATF Report in 2019 states that:

> "The main shortcomings include the definition of ML as being not totally in line with the Conventions as act of concealing and disguising assets requires a specific intention, minor shortcoming with regard to self-money laundering in addition to the non-dissuasiveness of sanctions applied to legal persons".[24]

The same critiques are repeated in the 2021 and 2023 follow-up reports for Türkiye. It considers the sanctions, particularly for legal persons as very low and not dissuasive.[25] Could these critiques contained in the FATF Report indeed be totally in line with the principles of criminal law in a democratic society *under rule of law*? The EU Türkiye Report of 2020 calls upon Türkiye to further improve the legal framework regulating the fight against money laundering and terrorist financing by considering the FATF's Report in 2019.[26]

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19 Ahmet İçduygu and Şule Toktaş, 'How Do Smuggling and Trafficking Operate via Irregular Border Crossings in the Middle East? Evidence from Fieldwork in Turkey' (2002) 40 (6) International Migration 25, 32 <https://doi.org/10.1111/1468-2435.00222> accessed 25 September 2023.

20 FATF (n 10) 17.

21 Williams (n 3) 71.

22 Türkşen, Mısırlıoğlu and Yükseltürk (n 1) 280, 289.

23 Türkşen, Mısırlıoğlu and Yükseltürk (n 1) 289; Toktaş and Selimoğlu (n 18) 136: Güneş Okuyucu, 'Anti-money laundering under Turkish law' (2009) 12 (1) Journal of Money Laundering Control 88 <https://doi.org/10.1108/13685200910922679> accessed 25 September 2023.; Güneş Okuyucu Ergün, 'Anti-Corruption Legislation in Turkish Law' (2007) 8 (9) German Law Journal 903; Salehi and Imeny (n 8) 395.

24 FATF (n 10) 167.

25 FATF, Anti-money Laundering and Counter-terrorist Financing Measures –Türkiye, Follow- Up Report [2nd Enhanced] & Technical Compliance Re-Rating (Paris, May 2022) 3 <https://www.fatf-gafi.org/content/dam/fatf-gafi/fur/Follow-Up-Report-Turkey-2022.pdf.coredownload.inline.pdf> accessed 25 September 2023; FATF (n 11) 21.

26 European Commission, Turkey 2020 Report (Brussels, 2020) 43 <https://neighbourhood-

At the outset, it should be noted that Türkiye implements a dual system in the fight against money laundering, including the financing of terrorism, in which measures of both administrative[27] (administrative offences and institutions such as MASAK, abbreviation of the Turkish Financial Intelligence Service authority in Turkish)[28] and criminal law provisions (in the Turkish Penal Code and supplementary laws) exist in parallel, because imposing only criminal law sanctions for money laundering were considered insufficient.[29] Further, the financing of terrorism is stipulated as a separate crime.[30]

This chapter, however, confines itself to the crime of money laundering, which is regulated in the Turkish Penal Code. As such, the chapter seeks to explore whether or not the FATF's critiques and recommendations regarding the crime of money laundering in mutual evaluation report of 2019 and the follow up report of 2021 for Türkiye's case are legitimate in view of the principles of Turkish criminal law. The main limitation of the study is that the aforementioned FATF's reports were not merely dedicated to money laundering, but also counter-terrorist financing measures which covers a range of crime types and surrounding issues. The study does not come up with a detailed analysis, but it considers the main critical aspects in the reports regarding crime of money laundering in order to open up the debate.

To that end, the chapter begins with displaying the tension between the legality principle and State's international obligations stemming from being member of the FATF[31] through a case from 2011. Then it respectively outlines the legal interest behind the crime of money laundering and the legislative framework, e.g., when and how money laundering occurs as a criminal act pursuant to the Turkish law. It analyses money laundering as a type of crime in Turkish criminal law, with a particular focus on the FATF's critiques and recommendations for Türkiye.

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enlargement.ec.europa.eu/system/files/2020-10/turkey_report_2020.pdf> accessed 25 September 2023.

27 These includes "customer identification, record-keeping and the reporting of suspicious transactions" as Palermo Convention in Art. 7 requires. See the UN, United Nations Convention against Transnational Organized Crime and the Protocols Thereto, 9 <https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf> accessed 25 September 2023.

28 Türkşen, Mısırlıoğlu and Yükseltürk (n 1) 281; Dursun (n 6) 105-106.

29 Dülger (n 1) 409.

30 In Art. 4 of the Code no 6415, taken in force on 07 February 2013. See Havva Begüm Tokgöz, Uluslararası Hukuk Bağlamında Terörizmin Finansmanının Önlenmesi (Master Thesis, Istanbul University 2018) 134 ff.

31 See e.g. FATF (n 10) 10.

1. Cross-border Feature of Money Laundering and State's International Obligation

Consider the following, considerably old, case where a company, with representation of the defendant A and with the participation of the defendant B, joined in a tender held by a Company belonging the State of India. According to the letter of Interpol-India, the company won the tender because of the commission of fraud, bribery, and forgery of documents and then the contract price was transferred to the bank accounts of the defendants in Switzerland on 29 November 1995. It was noticed that from those accounts', money was transferred multiple times to various countries, including Türkiye between 30 November 1995 - 01 August 1997. The money in these accounts was subjected to various actions before and after these dates. In Türkiye, it was on 13 November 1996 when the crime of money laundering was first regulated with the Code 4208. The Turkish Court of Cassation *(Yargıtay)*, therefore, ruled that since the date on which it is alleged that the money was laundered by the defendants was before the date the Code 4208 came into force, it is not possible to accept that the actions of transferring the money are subject to punishment on account of crime of the money laundering due to the principle of legality *(nullum crimen, nulla poena sine lege)* ensured in the Constitution (Art.38), ECHR (Art.7) and Penal Code (Art. 2).[32]

Although the illicit acts in this case were conducted between 1995 and 1997, it was the 2011 when the case could be ultimately ended. This case led to controversies among the first Instance Court and the 7th Chamber of the Turkish Court of Cassation and finally ended up before the Assembly of Criminal Chambers of the Turkish Court of Cassation in 2011. This case illustrates very well that money laundering acts have the cross-border features, and the sole existence of international conventions does not suffice. Indeed, there is a strong necessity for the existence of effective national laws. Therefore, even if the Turkish Court of Cassation gave preference to the legality principle, as such, to the principle State under the rule of law, which is admirable from the point of criminal law, this can be viewed as creation of obstacle to the struggle against money laundering effort at the international area. Penalization of money laundering, through the introduction of a separate crime type, as a tool to combat organized crime first appeared as an international demand and even pressure in Türkiye[33] just as it does in other jurisdictions.[34] Therefore,

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32 Yargıtay Ceza Genel Kurulu [The Assembly of Criminal Chambers of the Court of Cassation], Date: 01.11.2011, E. 2011/31, K. 2011/219 <https://www.lexpera.com.tr/ictihat/yargitay/cgk-e-2011-7-31-k-2011-219-t-01-11-2011> accessed 3 May 2021.

33 Değirmenci (n 4) 361; Dülger (n 1) 413-414; Dursun (n 6) 102.

34 For other jurisdiction example, see Peter Lewisch, 'Money Laundering Laws as a Political Instrument: The Social Cost of Arbitrary Money Laundering Enforcement' (2008) 26 Eur J

punishing money laundering have always been confronted by various principles in the Turkish law, but most particularly by the legality principle. To be more concrete, the long-established understanding and application of the core principles of criminal law in each jurisdiction may not be easily matched with the international expectations.

2. Criminalization of Money Laundering and The Legal Interest

It is noted that two main methods exist in regulating money laundering in criminal law: (1) Within the framework of acts of criminal organization and (2) as crimes against the functioning of judiciary in the penal code just as in Switzerland.[35] In 1996, it was dealt with within the framework of organized crime and therefore it was regulated with a separate code.[36] This was Türkiye's response to money laundering in the wake of International Conventions. However, in the criminal law reform period in 2000s, which sought the creation of legislative system in criminal law maintaining consistency in terms of criminal law's core principles[37], money laundering is included in the system of the Penal Code. In that regard, terminology changed, *i.e.*, jargon like "dirty money" or "black money" were abandoned.[38] Accordingly, the title of new crime regarding money laundering reads as "laundering the proceeds obtained through the commission of a crime". Further, the EU Türkiye progress report in 2001 pinpointed that Türkiye needed to strengthen its money laundering legislation and ensure compliance with the FATF's recommendations.[39] The explanatory memorandum regarding the crime of money laundering in Penal Code, focuses on the particular importance of *general prevention of punishment*[40] in money laundering by pointing out that:

> "The inclusion of the economic values obtained by committing a crime or by giving the image of legitimacy to the economic system also leads to transforming and concealing evidence of the committed crime, which serves harbouring criminals".[41]

Consequently, as of 2005, with the new Penal Code no 5237, Türkiye followed the Swiss (Art. 305bis) and German (Art. 261) Penal codes, where

Law Econ 405 <https://doi.org/10.1007/s10657-008-9073-7> accessed 3 May 2021.

35 Jörg Rehberg, *Strafrecht IV: Delikte gegen die Allgemeinheit* (2 edn, Schulthess Polygraphischer Verlag, Zürich 1996) 360.

36 Kocasakal (n 7) 328.

37 Also the former Penal Code no 765 was based on the core principles, however, it did loose its consistency after the remerkable amount of amendments during its application period.

38 Özgenç (n 9) 155.

39 Toktaş and Selimoğlu (n 18) 141.

40 Özbek (n 12) 166.

41 *Ibid*.

money laundering is stipulated as a separate crime in Art. 282.[42] This crime is listed in the Penal Code among the crimes against *the functioning of judiciary* which lies under the section called *the crimes against nation and State,* just as with the crime of perjury. In terms of legal interest, which is protected through the crime of money laundering, in 2018, the Turkish Cassation Court states:

> "The legal interest that is protected through this crime, which is a crime committed against the legal interests of the State, is the right to a fair trial. Because the acts that constitute this crime prevent the investigation and prosecution authorities from reaching the proceeds of the predicate crimes and from conducting an effective investigation and prosecution, thus making it difficult to uncover the predicate crimes and their perpetrators hidden with this crime. Therefore, by introducing money laundering acts a crime, it is aimed to ensure that justice system functions".[43]

Consequently, the victim of this crime is the public.[44] This approach to criminalization of money laundering after 2005, in both case- law and doctrine in civil law jurisdiction like Türkiye, differs substantially from the view of the FATF. Because, in Türkiye, money laundering as a type of crime type is not an end in itself, but it serves a similar purpose as the crimes of destroying, concealing and transforming evidence of the committed crime, or the crime of purchasing or accepting property acquired through the commission of crime, perjury or harbouring an outlaw.[45] These types of crime are all considered at first sight as crimes that mislead or prevent the functioning of the justice system. As for committing the crime of money laundering within a criminal organization, it is considered as an aggravated circumstance that requires more punishment than the crime of money laundering (Art. 282-4).

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42 This new legislation was marked as progress by the EU Turkey Progress Report in 2004 and 2005 (Toktaş and Selimoğlu (n 18) 144-145). Also see Kerim Çakır, *Suçtan Kaynaklanan Malvarlığı Değerlerini Aklama Suçu* (Adalet, Ankara 2016) 228.

43 Yargıtay Ceza Genel Kurulu [The Assembly of Criminal Chambers of the Court of Cassation], Date: 16.10.2018, E. 2015/172, K. 2018/435, <https://www.lexpera.com.tr/ictihat/yargitay/ceza-genel-kurulu-e-2015-172-k-2018-435-t-16-10-2018> accessed 3 May 2021. Also see İzzet Özgenç and Fatih Yurtlu, 'Suçtan Kaynaklanan Malvarlığı Değerlerini Aklama Suçları Bakımından Teori ve Uygulamada Ortaya Çıkabilecek Sorunlara İlişkin Bir Değerlendirme', at 7 <https://api.hacibayram.edu.tr/files/1/5.turkkorecezahukukugunleri/Özgenç,%20Yurtlu%20Suçtan%20Kaynaklanan%20Malvarlığı%20Değerlerini%20Aklama%20Suçları%20Bakımından%20Teori%20ve%20Uygulamada%20Ortaya%20Çıkabilecek%20Sorunlara%20İlişkin%20bir%20Değerlendirme.pdf> accessed 3 May 2021.

44 Özgenç (n 9) 170; Osman Yaşar, Hasan Tahsin Gökcan and Mustafa Artuç, *Yorumlu-Uygulamalı Türk Ceza Kanunu, 6th Volume* (2nd edn, Adalet, Ankara 2014) 8358.

45 Dursun (n 6) 100.

In 2009, the crime definition was modified by the Code no. 5918 after the FATF's evaluation, as such, some elements of crime were subject to change. In the first version of the Art. 282 in 2005 the punishment was lower than it is today, as it was punished by imprisonment from two years up to five years and a fine up to twenty thousand days. Furthermore, the threshold for predicate offences were higher, stipulated as crimes that requires a minimum sentence of one year imprisonment. As such, the definition of crime is frequently criticized (we will further discuss in the following parts) by the FATF and has been subject to such amendments at various times, *ratione temporis* and, respectively, the legality principle remains as a main issue in case law for the application to the crime of money laundering in Türkiye.[46]

3. The Acts of Money Laundering under Turkish Law

Two main questions arise as to: *what makes money dirty?* Dirty money simply refers to the money obtained through the commission of crime which is termed as a predicate offence. Indeed, the FATF defines money laundering as "the processing of these criminal proceeds to disguise their illegal origin".[47] At the initial legislative attempt in Türkiye, the Code of 1996 indicated a crime catalogue[48] that was criticized among scholars.[49] For example, crimes against the State, which includes organized crime, crimes listed in tax law or the crimes arising from organ and tissue transplantation law. However, today, no crime catalogue listing predicate offences exists in the definition of money laundering under Turkish law. Rather, in order to avoid the casuistic approach of the former regulation (Code 4208)[50], a *minimum threshold approach*[51] is adopted. After the FATF's evaluation, in 2009, the threshold for predicate offences was amended as crimes requiring a minimum six months of imprisonment. Therefore, every type of crime which may have been committed in Türkiye or abroad, such as a crime of burglary, results in so-called *dirty money.*[52] Nevertheless, one scholar[53] argues that stipulating a threshold is not the right method. Instead, whether the proceeds are obtained through the commission of crime is the decisive element.[54] Therefore, at the initial draft of the Penal

46 Yaşar, Gökcan and Artuç (n 44) 8356.
47 FATF, What is Money laundering?, <https://www.fatf-gafi.org/en/pages/frequently-asked-questions.html#tabs-36503a8663-item-6ff811783c-tab> accessed 25 September 2023.
48 See Dülger (n 1) 416; İzci (n 6) 377; Özgenç (n 9) 142.
49 Kocasakal (n 7) 345 ff.; Coşkun (n 5) 261; Değirmenci (n 4) 467; Özgenç (n 9) 143 and also 153; Dülger (n 1) 418 and 432.
50 Dülger (n 1) 435-436.
51 FATF (n 10) 167.
52 Özgenç (n 9) 158.
53 *Ibid.* 153 and 156.
54 *Ibid.*

Code in 2004, no threshold was required. However, after the objection by the competent administrative authorities on money laundering, a threshold was added.[55] As for practice, it is observed that money laundering as a result of drug trafficking, fuel smuggling, human trafficking and migrant smuggling, occur more frequently.[56] The perpetrator of predicate offence and laundering money can be different or the same person.[57] However, the predicate offence is to be determined by a court judgment. In other words, there must be a court determination on that predicate offence, in order to reach decisions on the crime of money laundering.[58] That is, in order to answer the question whether the perpetrator is convicted of a predicate offence or not.[59]

In a case from 2011[60], it was noted that the bank account movements of the defendants were very high and remarkable, and this amount could not have been obtained through the trading capacity of the company owned by them. This high amount of money was taken from their account on 3 April 2002. Besides, the defendants were arrested with drugs on the border between Romania and Hungary. The defendants were convicted of money laundering.[61] This judgment was harshly criticized because it was based on presumption that a predicate offence was committed, rather than a judgment.[62] That is to say, the Court decided on the act of money laundering without seeking for existence of a judgment regarding drug trafficking. This is an issue because the predicate offence serves a substantial (objective) element of crime of money laundering, and the predicated offence has to be previously proven by the court in order to later assess the acts of money laundering.

The Turkish Penal Code in 2005 covers both self-laundering and third-party laundering. For self-laundering, Art. 282-1 reads;

> "Anyone who transfers abroad the proceeds of any predicate offence that requires a minimum of six-month imprisonment, subjects these proceeds to various *actions*[63] for the purpose of concealing their illegitimate origin or making them seem

55 *Ibid.* 156-157.
56 FATF (n 10) 56 and 57.
57 Ünver (n 13) 453; Yaşar, Gökcan and Artuç (n 44) 8357; Çakır (n 42) 281.
58 Özgenç (n 9) 161.
59 *Ibid.* 164.
60 Yargıtay 7. Ceza Dairesi [The Seventh Criminal Chambers of the Court of Cassation], Date: 22.11.2011, E. 2008/18019, K. 2011/24972, retrieved from Özbek (n 12) 172.
61 *Ibid.*
62 Özbek (n 12) 173.
63 In Turkish original version, the word *"action"* is referred as *"işlem"* which is a broad term and includes "all activities, operations and procedures" (Türkşen, Mısırlıoğlu and Yükseltürk (n 1) 282). This word, *"işlem"*, in crime definition is criticized as being not in line with legality principle by scholars. See Özbek (n 12) 176-177; Ünver (n 13) 458.

> to be obtained through a legitimate way shall be sentenced to imprisonment from three years to seven years and a fine up to twenty thousand days".

Pursuant to Art. 282-1, the crime of money (self-) laundering consists of two main alternative acts. These are (1) transferring the proceeds abroad or (2) subject these proceeds to various actions for the purpose of concealing their illegitimate source or making them seem to have been obtained through a legitimate way. Apart from the act of transferring sums abroad, all acts to laundering the proceeds is to be conducted for a specific purpose, concealing their illegitimate origin. To the FATF, requiring a specific intent for the acts of concealing or disguising the proceeds, shows that Turkish law is not totally, but broadly in compliance with *Vienna* and *Palermo Conventions*.[64] In other words, requiring a specific intention hamper combatting money laundering according to the FATF's view.[65] As a matter of fact, Art. 3 of the Vienna Convention (1988) also mentions "the purpose" as follows:

> "The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph a) of this paragraph, or from an act of participation in such offence or offences, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions".[66]

In the Turkish Penal Code, the act of subjecting the proceeds of predicate offence to various actions without any purpose of concealing their illegitimate origin or making them seem to have been obtained through a legitimate way, does not hold a sufficient degree of unjust character that would justify the intervention of criminal law. That is to say, without such a specific intent, the perpetrator does not direct her/his act to laundering, even if in the end, the acts of the perpetrator lead to concealing the proceeds. Furthermore, the legal interest that must be protected from this crime is the functioning of judiciary. Laundering the proceeds of crime, prevents judicial authorities from knowing that a crime is committed and the subsequent prosecution. If the perpetrator does not act with any intention such a prevention, as a rule, an inference can be drawn that this person does not perform any act violating the legal interest, the

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64 FATF (n 10) 165 and 167. The same critics in 2023 Follow- Up Report. See FATF (n 11) 21.

65 FATF (n 10) 167.

66 The UN, The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, 3, <https://www.unodc.org/pdf/convention_1988_en.pdf> accessed 25 September 2023.

functioning of judiciary, which refers to ensuring that justice system functions.[67] However, where the way the perpetrator acts result in such prevention is self-evident, such as transferring them abroad, may be considered in determining this specific intention.

What's more, this crime definition does not require harm (outcome), acting is already is sufficient for the crime of money laundering to occur. Therefore, this crime is considered an abstract crime of danger 68 referring to crimes wherein the judge does not investigate whether or not money is laundered by the act.

As for third-party money laundering, it includes a subjective legal component wherein the perpetrator knew the proceeds were obtained through an illegitimate way. Therefore, purchasing the proceeds of any crime without knowing these proceeds' illicit origin, e.g., when the person does not know this illicit origin due to recklessness, does not constitute the crime of money laundering. As such, Art. 282-2 states;

> "Anyone who does not participate to the commission of a crime, but purchases, accepts, possesses or uses the proceeds arising from commission of that crime by knowing that such proceeds were obtained through an illegitimate way shall be sentenced to imprisonment from two years to five years".

Third-party laundering was introduced in Art. 3-1-(c) of the Vienna Convention and Art. 6-1-(b)-(i) of the Palermo Convention. In doing so, the acts, "possess" and "use" of the proceeds arising from commission of that crime, were included in crime of money laundering[69]. Third-party laundering coincides with the crime, titled 'purchasing or accepting property acquired through the commission of crime', Art. 165 of the Penal Code. Third- party money laundering stands as special crime in comparison with crime of 'purchasing or accepting property acquired through the commission of crime', because third-party laundering is committed only by knowing that such proceeds were obtained through an illegitimate way. [70] Therefore, the crime of money laundering supersedes the crime of purchasing or accepting property acquired through the commission of crime.[71]

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67 Özbek (n 12) 177; Dülger (n 1) 453.

68 Yaşar, Gökcan and Artuç (n 44) 8355; Özbek (n 12) 176; Ünver (n 13) 470; Çakır (n 42) 279. In Turkish criminal law, crimes are also classified into two main group as *crime of harm* and *crimes of danger* which is either abstract or concrete and does not require the occurrence of harm as a legal element of crime. For this terminology and explanation see Emilio S. Binavince, 'Crimes of Danger' (1968-1969) 15 Wayne L. Rev. 683.

69 The explanatory memorandum of crime of money laundering (Art. 282) of the Turkish Penal Code.

70 Özbek (n 12) 178.

71 *Ibid.*

There are two aggregated circumstances that require more punishment for crime of money laundering. If this crime were to be committed by a public official or any professional in the course of performing her or his duty, the punishment shall be increased by half. (Art. 282-3). This refers to professional money laundering cases. Further, if this crime were committed within the activities of a criminal organization, the punishment shall be doubled. (Art. 282-4). In this case, in addition to the crime of money laundering, the perpetrator is punished due to criminal organization (Art. 220) depending on forming, being member or aider without being member[72]. This does not violate the prohibition against double jeopardy.[73]

The offender remorse which enables the perpetrator to be free of punishment under certain conditions is recognized by the lawmaker. As such, Art. 282-6 states that "if the person ensures the competent authorities to seizure of the proceeds or facilitate its seizure by disclosing the place where the assets are located prior to the prosecution is initiated on the account of this crime, shall not punished for the crime in this Article".

As for the Palermo Convention, it already dealt with the issue in such a broad sense in Art. 7, titled *measures to combat money-laundering,* requires States to *institute a comprehensive domestic regulatory and supervisory regime.*[74] This provision is adopted already from the Palermo Convention.[75] Therefore, the FATF's assessment that money laundering crime definition in Turkish law is *broadly in line with the Vienna and Palermo Conventions* shows a lack of strong reasoning.

4. Sanction for Natural Persons

The FATF critiques that sanction of money laundering is relatively low.[76] As pointed earlier, this is an *abstract crime*, that is to say, this crime definition does not require harm (*outcome),* acting is already sufficient to consider the crime of money laundering to have occurred. Therefore, a judge does not investigate whether or not the money is laundered as a consequence of this act. Nevertheless, the basic form of crime (self-laundering) requires imprisonment from three years to seven years and fine up to *two thousand days*[77]. If laundering is conducted within a criminal organization, the punishment is to be doubled

72 *Ibid.* 179.

73 Ünver (n 13) 467.

74 The UN, United Nations Convention against Transnational Organized Crime and the Protocols Thereto (n 27) 9-10.

75 Özgenç (n 9) 167-168.

76 FATF (n 10) 165.

77 Fine as one of the two sanctions in criminal law is applied based on daily basis scale which refers to day fine system. As such, *"The amount of fine for one day, which lies on the scale from twenty to one hundred Turkish Liras, is appraised by taking into account the economic and other personal conditions of the person"* (Art. 52, the Turkish Penal Code).

by the court. That means, the maximum penalty could be up to fourteen years of imprisonment. The sanctioning of money laundering is obviously high in comparison with other crimes against *the functioning of judiciary.* Furthermore, forming a criminal organization (Art. 220-1, the very basic form of crime) requires imprisonment between four years to eight years.

5. Sanctioning Legal Persons

Türkiye is a civil law jurisdiction, and unlike in the common law approach, it considers legal entities as artificial or fictitious person created through the law, in order to meet the needs of society. They lack independent will for a responsible act in the field of criminal law.[78] In other words, as opposed to human beings, legal entities cannot have their own will that lie at the core of the conception of punishment. Because of this lack of will, which is one of obligatory components of the criminal activity, the crime can only be committed by a natural person.[79] In the Turkish criminal law, therefore, it is admitted by the current statutes that legal entities cannot commit a crime, thus, be subject to punishment. To illustrate this, if a corporation is involved in human or drug trafficking cases as an autonomous party of some relationships with others, and it gains profits from these sorts of criminal activities, the available punishment will be inflicted on those who decide to take part in these criminal activities, mostly members of board of that company.

Punishing legal entities for criminal activity is not even a matter of discussion in Turkish criminal law seeing that the current statute, Art. 20 of the Penal Code, states explicitly that punishment shall not be inflicted on legal entities, but security measures may apply. Thereby, certain security measures, e.g., *"revocation of the license"* or *"confiscation of properties",* are applicable to legal entities under Art. 60 of the Penal Code, if the crimes are intentionally committed within its name or in favour of it.[80] However, legal entities, especially corporations, operate internationally, and get involved in crimes which have transnational dimensions such as human or drug smuggling or trafficking, environmental, financial or cybercrimes, etc. In addition, in order to inflict measures on legal entities for a certain crime, the definition of crime must include a provision that require measures to be taken. As a matter of fact, with the crime of money laundering, Art. 282-5 states that "legal entities are subject to the special measures[81] on account of commission of this crime".

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78 Kayıhan İçel, Füsun Sokullu-Akıncı, İzzet Özgenç, Adem Sözüer, Fatih Selami Mahmutoğlu and Yener Ünver, *İçel Suç Teorisi* (2nd Book, 3rd edn, Beta, İstanbul 2004) 57. See also Nur Centel, 'Ceza Hukukunda Tüzel Kişilerin Sorumluluğu -Şirketler Hakkında Yaptırım Uygulanması-' (2016) 65 (4) Ankara Üniversitesi Hukuk Fakültesi Dergisi 3313.

79 See Berrin Akbulut, 'Criminal Law Responsibility of Legal Entities in Turkey' (2017) 6 (1) Perspectives of Business Law Journal 154.

80 See Centel (n 78) 3317; Akbulut (n 79) 155-156.

81 For these special measures see Akbulut (n 79) 156-158.

That legal entities have no criminal liability as natural persons in Turkish law causes some problems and conflicts among jurisdictions at a global level. The crime of money laundering is one of the matters that leads to that conflict. The FATF views sanctions in Turkish law for legal person as limited[82] and accordingly states:

> 'When a legal person is involved in the commission of a ML offence, it is subject to specific security measures: TCL[83], Art. 282 (5), such as the cancelation of its license and confiscation measures. No criminal penalties shall be imposed on legal persons TCL, Art. 20 (2), as implementation of criminal measures against legal persons is contrary to the fundamental principles of the criminal justice system in Türkiye, according to authorities. In addition to security measures, legal persons that are misused for the commission of an ML offence are also subject to administrative fines, which range from EUR 1.500 – EUR 325.000. These administrative fines are not considered as dissuasive'.[84]

It should be noted that FATF does not make any difference as judicial or administrative fine for legal person on the account of crime money laundering. Rather it highlights that "sanctions for legal persons are not sufficiently effective, proportionate and dissuasive".[85] However, it argues that sanctioning legal persons in Turkish law is necessarily based on the prosecution or conviction of a natural person obstructs this dissuasiveness.[86]

One of the fundamental principles of the criminal justice system in Türkiye is the principle of individual criminal responsibility. Whereas the FATF critiques the current sanction in Art. 282, even the existing sanction for legal entities in Art. 282-5 is already criticized among Turkish scholars who argue that the provision breaches the individual criminal responsibility and is to be abolished.[87] Further, in imposing punishment on legal entities, the aims of the punishment such as having the effect of deterrent, retribution and prevention become meaningless.

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82 FATF (n 10) 165; FATF (n 11) 21.

83 FATF's abbreviation for the Turkish Criminal Law which this chapter uses it as the Turkish Penal Code.

84 FATF (n 10) 167.

85 *Ibid.* 19.

86 *Ibid.*.Cf. Akbulut (n 79) 154-155.

87 Ünver (n 13) 452; Sacit Yılmaz, 'Suçtan Kaynaklanan Malvarlığı Değerlerini Aklama Suçu' (2011) 2 Ankara Barosu Dergisi 70, 94. See also Dülger (n 1) 409.

In response to criticisms due to criminal responsibility of legal entities Türkiye faces in the international arena with respect to international conventions regarding the fight against corruption[88], Türkiye introduced a middle ground in the year of 2009 after the previous EU Türkiye Report and the FATF reports. Accordingly, the Code on Administrative Crimes 5326 in Art. 43/A enables the law to impose administrative fines on legal entities, if a given crime is committed by a competent person and in favour of a legal entity. A catalogue of crimes that covers mostly crimes arising from Türkiye's responsibility from international conventions, whereby money laundering is included in the list.[89] In this case, a legal entity may incur an administrative fine — ranging from ten thousand Turkish Liras to fifty million Turkish Liras. Article 43/A thus circumvents the Penal Code's provisions on legal entities' criminal responsibility. Therefore, legal entities may be subject to administrative sanctions (not a criminal law one) but based on the criminal act as defined in the Penal Code.

Concluding Thoughts

Money laundering appears to be one of the main financial resources of criminal organizations. As the FATF emphasizes that Türkiye, located at an inter-continental junction, faces significant money laundering and terrorist financing risks and criminal organizations seek to exploit domestic and cross-border vulnerabilities, given Türkiye's geographic location.[90] However, in the struggle of the State, *under rule of law*, against money laundering or the financing of terrorism, respectively, cannot be operated at all costs. In that regard, such State needs to maintain fundamental principles such as legality, human dignity, and the principle of individual criminal responsibility.

The FATF's recommendations and critiques that are directed towards practical aspects of Turkish application of money laundering — *inter alia*, the establishment of a national strategy for investigating and prosecuting money laundering and, respectively, dealing with complex money laundering cases such as prioritizing professional and third-party money launderers[91] — are useful and fit the purpose of tackling cross-border organized crime. However, as for the FATF's recommendations and critiques of the definition of the crime, this may not be the case.

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88 This was pointed out in the explanatory memorandum of this Art. Türkiye Büyük Millet Meclisi [The Grand National Assembly of Turkey], 'Türk Ceza Kanunu ile Bazı Kanunlarda Değişiklik Yapılmasına Dair Kanun Tasarısı ile Avrupa Birliği Uyum ve Adalet Komisyonları Raporları (1/670)', 5 <https://www.tbmm.gov.tr/sirasayi/donem23/yil01/ss353.pdf> accessed 25 September 2023. See also Centel (n 78) 3321.

89 See Centel (n 78) 3321.

90 FATF (n 10) 5.

91 *Ibid.* 45.

It is not difficult to draw an inference that the definition of the crime of money laundering in the Turkish Penal Code has been in harmony with the *Vienna* and *Palermo Conventions*. Indeed, money laundering as a particular type of crime in Turkish law was first introduced and later amended by international conventions and institutions. The legislative framework of money laundering as a type of crime meets the requirements of these Conventions to some extent. However, the FATF does not consider the differences between civil law approaches and the ones in common law. This crime necessitates international cooperation and harmonized applications. Thereby, contradictions and disagreements between civil law and common law approaches come into question naturally. The long-established understanding and application of the core principles of criminal law in Türkiye may not be easily matched with the international expectations. Therefore, one hundred percent compliance outcome from the FATF's report will not be the case in a short term.

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STATE RESPONSIBILITY FOR TARGETED KILLINGS BY DRONES: AN ANALYSIS THROUGH THE LENS OF IHL PRINCIPLES*

İnsansız Hava Araçları Tarafından Gerçekleştirilen Hedef Alarak Öldürmelerde Devlet Sorumluluğu: Uluslararası İnsancıl Hukuk İlkeleri Merceğinden Bir Analiz

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ABSTRACT

This study analyses whether targeted killing by drones is inherently consistent with International Humanitarian Law (IHL) principles. Despite its commonly held negative perception, this study contends that targeted killing can align with IHL. This is due to the targeted killing method of drone strikes offering the unique advantage of being in accordance with IHL principles compared to other forms of attacks. However, the use of autonomous drones poses a significant risk to IHL and is likely to violate international obligations. This study discusses that autonomous drones may be unable to analyze data accurately and extract valuable insights. This could cause them to face difficulties in maintaining the necessary balance between civilian harm and anticipated military advantage. As a result, it is argued that autonomous drones are unable to adhere to the IHL principles, particularly the principle of proportionality. The study examines the attribution issue of autonomous drones and proposes that they should be regarded as agents of the State, making their actions attributable to the State.

Keywords: targeted killing, State responsibility, international humanitarian law, drone, IHL principles

ÖZET

Bu çalışma, insansız hava araçlarıyla gerçekleştirilen hedef alarak öldürmenin özü itibarıyla Uluslararası İnsancıl Hukuk (UİH) ilkeleriyle tutarlı olup olmadığını incelemektedir. Yaygın olarak kabul edilen olumsuz algıya rağmen bu çalışma, hedef alarak öldürmenin UİH ile uyumlu olabileceğini ileri sürmektedir. Bunun nedeni, hedef alarak öldürmenin, diğer saldırı türlerine kıyasla UİH ilkelerine uygun olabilme hususunda benzersiz avantajlar sunmasıdır.

* There is no requirement of Ethics Committee Approval for this study.
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Ancak otonom insansız hava araçlarının kullanımı UİH açısından önemli bir risk teşkil etmekte ve uluslararası yükümlülükleri ihlal etme riski barındırmaktadır. Bu çalışma, otonom insansız hava araçlarının verileri doğru bir şekilde analiz edemeyebileceğini ele almaktadır. Bu da sivillerin zarar görmesi ile elde edilmesi beklenen askeri avantaj arasında gerekli dengeyi sağlamada zorluklarla karşılaşmalarına neden olabilecektir. Sonuç olarak otonom insansız hava araçlarının UİH ilkelerine, özellikle de orantılılık ilkesine uymadığı ileri sürülmektedir. Çalışma, otonom insansız hava araçlarının eylemlerinin devlete atfedilebilirliği konusunu incelemekte ve bunların Devletin ajanları olarak görülmesi gerekliliği sebebiyle eylemlerinin Devlete atfedilebilir olduğunu önermektedir.

Anahtar Kelimeler: hedef alarak öldürme, Devlet sorumluluğu, uluslararası insancıl hukuk, insansız hava aracı, UİH ilkeleri

INTRODUCTION

This study aims to clarify whether the concept of targeted killing is inherently compatible with International Humanitarian Law (IHL) principles. From the perspective of IHL, targeted killing tools, e.g., drones, are often viewed skeptically. This perception is not unfounded. An examination shows that drone attacks in Afghanistan were ten times more likely to cause civilian casualties than other air strikes.[1] Similarly, the drone attacks in Yemen, Pakistan, and Syria have caused excessive civilian casualties. The use of drones and their efficiency in the Nagorno-Karabakh conflict and the Russia-Ukraine war showed that drones will likely become more prevalent on the battlefield in the coming years. Despite this critical innovation in armed conflicts, the legal regime of drones and targeted killings has not yet been adequately studied.

The concept of targeted killing began to draw attention, especially with the targeted killing of Iranian General Qasem Suleimani by the United States. Now, in both international and non-international armed conflicts, the method of targeted killing is frequently used. This study argues that the concept of targeted killing can be compatible with IHL principles, despite the generally accepted negative perception. The targeted killing method has potential benefits that other types of attacks do not offer. However, a targeted killing operation incompatible with IHL will result in a breach of international law, bringing about State responsibility, provided that it is attributable to the State.

This study suggests that autonomous drones pose a significant threat to IHL, and their utilization will most likely result in a breach of international obligations. This study argues that autonomous drones lack the ability to turn

[1] 'A/HRC/44/38: Use of Armed Drones for Targeted Killings - Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (OHCHR) 7 <https://www.ohchr.org/en/documents/thematic-reports/ahrc4438-use-armed-drones-targeted-killings-report-special-rapporteur> accessed 20 July 2023.

data or information into knowledge or insight, which is needed for striking balance in the principle of proportionality, therefore, not possibly upholding the principle of distinction and the principle of proportionality. Bearing in mind that drone operations frequently result in civilian casualties, this study suggests that autonomous drones cannot operate in accordance with IHL principles, especially the principle of proportionality. This study also discusses the attribution issue of autonomous drones and suggests that they should be considered a State agent and, thus, their acts should be attributable to the State.

This study is structured in three main chapters. Chapter 1 analyzes the main concepts. It shows why drones have become a popular tool in armed conflicts and the reasons that make the method of targeted killing a favorable option for the participants in an armed conflict. Chapter 2 explores the compatibility of the concept of targeted killing with IHL principles, namely the principle of distinction, the principle of proportionality, and the principle of precautions. It concludes that the concept of targeted killing is not inherently incompatible with IHL principles. Chapter 3 discusses the autonomy issue with drones and delves into whether autonomous drones may comply with IHL principles, especially when conducting targeted killing operations.

A. Killing Remotely: Mapping the Concepts

"Being a robot means never having to tell the Judge you're sorry." [2]

1. Drones

Over the past twenty years, using drones in armed conflicts has significantly impacted military engagements in different regions. This can be seen in various examples, such as in operations conducted by the United States of America (USA)[3] related to the *"global war on terror*"[4], in Bush and especially in the Obama Administration[5], and in Israel's regular targeted killing operations.[6]

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2 Jay Logan Rogers, 'Legal Judgment Day for the Rise of the Machines: A National Approach to Regulating Fully Autonomous Weapons' (2014) 56 Arizona Law Review 1257, 1257.

3 Targeted killings have been initiated primarily during the presidency of George W. Bush and have notably escalated during the tenure of Barack Obama. see: Aaron M Drake, 'Current U.S. Air Force Drone Operations and Their Conduct in Compliance with International Humanitarian Law - An Overview' [2011] Denver Journal of International Law & Policy 632.

4 see further on the concept Russell Hogg, 'Law, Death and Denial in the "Global War on Terror"' in Simon Bronitt, Miriam Gani, and Saskia Hufnagel (eds), *Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force* (Bloomsbury Publishing 2012).

5 Robert P Barnidge, 'A Qualified Defense of American Drone Attacks in Northwest Pakistan under International Humanitarian Law' (2012) 30 Boston University International Law Journal 409, 411; see further Trevor McCrisken, 'Obama's Drone War' (2013) 55 Survival 97.

6 Barnidge (n 5) 415; Gabriella Blum and Philip Heymann, 'Law and Policy of Targeted Killing' [2010] Harvard National Security Journal 145, 147 also to see the practice of

There are also relatively recent and current examples of the utilization of drones, for instance, the Nagorno-Karabakh conflict between Azerbaijan and Armenia that continued for almost two months in 2020[7] and the ongoing Russia-Ukraine war after Russia's invasion started in February 2022.[8] Drones significantly disrupted Armenia's logistical support and transportation to supply bases and played a crucial role in Ukraine's initial resistance during the conflict.

The use of drones in armed conflicts has steadily increased over the past two decades[9], with over 50 States currently possessing them and others actively seeking to acquire them.[10] Although the USA and Israel's use of drones has greatly influenced and led to how armed conflicts are carried out,[11] other countries, such as Turkey, Russia, Iran, and the United Kingdom, also possess drone technology that is effectively used in various regions during armed conflicts.[12] Additionally, the number of countries producing drones has expanded.[13]

To properly analyze the compliance of the concept of targeted killing carried out by drones with the IHL principles, it is crucial to identify the specific types[14] of drones used in these operations and why States choose to employ them.[15] In general, drones can be defined as effective aircraft with payload capacity, with or without lethal nature, that do not require a human operator to operate

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targeted killing of USA and Israel, 149-154.

7 see further 'Drones in the Nagorno-Karabakh War: Analyzing the Data' (*Military Strategy Magazine*) <https://www.militarystrategymagazine.com/article/drones-in-the-nagorno-karabakh-war-analyzing-the-data/> accessed 9 July 2023.

8 see 'The War in Ukraine Shows the Game-Changing Effect of Drones Depends on the Game' <https://www.tandfonline.com/doi/epdf/10.1080/00963402.2023.2178180?needAccess=true&role=button> accessed 9 July 2023.

9 'A/HRC/44/38: Use of Armed Drones for Targeted Killings - Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (n 1) 3–4.

10 Eric Tardif, 'A Particularly Dynamic Field of International Law: Recent Developments in the Laws of Armed Conflict' 5 <https://www.academia.edu/10007409/A_Particularly_Dynamic_Field_of_International_Law_Recent_Developments_in_the_Laws_of_Armed_Conflict> accessed 15 July 2023; Markus Wagner, 'Unmanned Aerial Vehicles' (*Oxford Public International Law*) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e2133?prd=OPIL> accessed 15 July 2023 para 3.

11 'Mapping US Drone and Islamic Militant Attacks in Pakistan' *BBC News* (22 July 2010) <//www.bbc.co.uk/news/world-south-asia-10648909> accessed 15 July 2023.

12 Tardif (n 10) 5; Waseem Ahmad Qureshi, 'The Legality and Conduct of Drone Attacks' (2017) 7 Notre Dame Journal of International & Comparative Law 91, 92.

13 'World of Drones' (*New America*) <http://newamerica.org/international-security/reports/world-drones/> accessed 16 July 2023.

14 Wagner (n 10) para 11; see for the different type of drones Barnidge (n 5) 414.

15 In this study, I will refer -from now on, unless indicated otherwise- armed unmanned aerial vehicles that are equipped with weaponry explicitly to "drones".

the vehicle and can fly autonomously or be remotely[16] controlled.[17] Drones are increasingly utilized in modern armed conflicts for their tactical advantages in providing a strategic edge and deploying lethal force without risking personnel safety.[18] This is of enormous importance to the State, as people who use armed aircraft are crucial to the military strength of a State.[19] Furthermore, drones can potentially eliminate targets that would otherwise be invulnerable to attack.[20]

Drones can reach hard-to-access locations, including those ground troops cannot, and hover for long periods while being operated from a distance.[21] They can work nonstop without human limitations, making them useful for tasks like assisting pilots with flight schedules.[22] In addition, they provide a more affordable option than manned ones. To illustrate, an F-16 aircraft has a price tag of around $50 million, while a Predator drone is priced at roughly one-tenth of that amount.[23] Future drones will likely increase in functionality, shrink in size, and decrease in price, making them more accessible to a broader audience.[24] However, even now, drones are precise, and when intended, they might be less harmful weapon options, and also they can be redirected mid-flight to avoid user error or misuse.[25] The significance of this matter is closely tied to the adherence to the distinction, proportionality, and precautions principles.[26]

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16 to see how it is operated remotely Derek Gregory, 'From a View to a Kill: Drones and Late Modern War' (2011) 28 Theory, Culture & Society 188.

17 "Unmanned Aerial Vehicles: Background and Issues for Congress" (Report for American Congress, 21 December 2005) <http://www.congressionalresearch.com/RL31872/document.php?study=Unmanned+Aerial+> accessed 2 June 2023. see further Wagner (n 10) para 1.

18 Christof Heyns and others, 'The International Law Framework Regulating the Use of Armed Drones' (2016) 65 International and Comparative Law Quarterly 791, 792; see further Tardif (n 10) 2–3.

19 Wagner (n 10) para 22.

20 Allen Buchanan and Robert O Keohane, 'Toward a Drone Accountability Regime' (2015) 29 Ethics & International Affairs 15, 18.

21 see further 'A/HRC/44/38: Use of Armed Drones for Targeted Killings - Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (n 1) 5; David Akerson, 'Applying Jus In Bello Proportionality to Drone Warfare' (2015) 16 Oregon Review of International Law 173, 183–184; Mary Ellen O'Connell, 'Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009' in Simon Bronitt, Miriam Gani, and Saskia Hufnagel (eds), Shooting to Kill: Socio-Legal Perspectives on the Use of Lethal Force (Bloomsbury Publishing 2012) 268; see further on drone advantages Barnidge (n 5) 413.

22 O'Connell (n 21) 267; see further advantages Michael W Lewis, 'Drones and the Boundaries of the Battlefield' (2012) 47 Texas International Law Journal 293, 296–298.

23 Tardif (n 10) 5.

24 Heyns and others (n 18) 793.

25 Buchanan and Keohane (n 20) 18.

26 The principles of distinction, proportionality and precautions will be examined in the second chapter of the study.

Although drones have advantages in theory[27], the over-reliance on drones for military force is a significant concern due to the potential for favoritism and excessive use, especially with decreasing costs.[28] The increase in the number of drones in use and military strikes suggests that operational drones will continue to rise.[29] As drone strikes become more prevalent around the world[30], there is growing debate over whether they comply with IHL and, hence, create State responsibility.

It is worth noting that international law does not explicitly prohibit using drones, unlike certain weapons such as anti-personnel mines[31], laser-blinding weapons[32], or chemical weapons[33].[34] However, whether a particular weapon system is legal under IHL depends on its use, with specific considerations for adhering to IHL requirements.[35] Examining the potential compliance of drone attacks with IHL principles related to targeted killing methods and some real practices may shed light on whether the practice is in accordance with the theory.[36] Prior to an attack, taking precautionary measures and adhering to the principles of distinction and proportionality is essential.[37] If a drone strike does not adhere to the principles of IHL, it gives rise to State responsibility due to violating international obligations.[38]

2. Targeted Killing

In 2002, a one-ton bomb was employed in a targeted killing operation in Gaza. The objective was to eliminate Salah Shehadeh, a prominent Hamas leader. The bomb caused extensive damage to Shehadeh's apartment and 8 nearby buildings. As a result, 14 Palestinians, including 8 children, lost their lives, and over 150 others were injured.[39] A lot of drone operations are classified

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27 see further 'A/HRC/44/38: Use of Armed Drones for Targeted Killings - Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (n 1) 5–6.

28 Buchanan and Keohane (n 20) 22.

29 Wagner (n 10) para 3.

30 'Mapping US Drone and Islamic Militant Attacks in Pakistan' (n 11).

31 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997.

32 Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention on Certain Conventional Weapons), 13 October 1995.

33 Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Paris 13 January 1993.

34 Geert-Jan Alexander Knoops, 'Drones at Trial: State and Individual (Criminal) Liabilities for Drone Attacks' (2014) 14 International Criminal Law Review 42, 46.

35 See Article 36 of the AP-I.

36 This, in theory, has the potential to aid in preventing States from violating the norms of IHL, which I will delve into further in the next chapter.

37 Knoops (n 34) 59; Wagner (n 10) para 19-20.

38 See Articles 1 and 2 of Responsibility of States for Internationally Wrongful Acts.

39 Lisa Hajjar, 'Lawfare and Armed Conflict: Comparing Israeli and US Targeted Killing

as targeted killings, like the previous incident. This raises international concerns about the concept of targeted killing and its adherence to the fundamental principles of IHL. To comprehend the IHL aspect of targeted killing, it is crucial to understand its definition clearly.

There is no clear definition of targeted killing in international law. This prompts causing controversy and a lack of consensus on what this concept entails.[40] However, looking at the existing literature to understand this complex issue is useful.[41] According to Solis, targeted killing refers to the deliberate killing of a particular civilian or unlawful combatant who cannot be captured and is actively involved in hostilities during an international or non-international armed conflict.[42] This definition of targeted killings falls short of explaining the concept as a whole since it is frequently used to kill combatants in armed conflicts[43], as seen in the ongoing Russia-Ukraine conflict.[44]

Melzer's definition[45] of targeted killing refers to the intentional and premeditated use of lethal force to individually kill selected persons not under the attacker's physical custody.[46] The components of this definition should be further elaborated. Lethal force is the intentional use of any coercive action that could result in the death of a human being, regardless of the weapon or techniques used.[47] But targeted killing is commonly linked to the use of drones and has been extensively studied in relation to them.[48] The primary objective is killing the targeted individual, regardless of any underlying causes or motivations, ensuring that the intention is deliberate and not impulsive or motivated by emotion rather than accident, negligence, or recklessness.[49]

Policies and Challenges Against Them' [2013] Issam Fares Institute for Public Policy and International Affairs - Research Report 12.

40 see further Georg Nolte, 'Targeted Killing' (*Oxford Public International Law*) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e415> accessed 15 August 2023 para 1.

41 See also UN Doc. A/HRC/14/24/Add.6, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, para. 7-10. See further for a definition putting the "execution without trial" to the center of the definition: Wagner (n 10) para. 22.

42 Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press 2010) 538–541.

43 see Nolte (n 40) para 3.

44 see 'The War in Ukraine Shows the Game-Changing Effect of Drones Depends on the Game' (n 8).

45 see further Nils Melzer, 'Targeted Killings in Operational Law Perspective' in Terry D Gill and Dieter Fleck (eds), *The handbook of the international law of military operations* (second edition, Oxford University Press 2015) 307–308.

46 Nils Melzer, *Targeted Killing in International Law* (Oxford University Press 2008) 3.

47 ibid.

48 UN Doc. A/HRC/14/24/Add.6, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, para. 79-86.

49 Blum and Heymann (n 6) 147.

Targeted killings are aimed at particular individuals. This aspect distinguishes them from other operations that target groups or random individuals.50 Thus, killing acts resulting from intentional attacks on the enemy, without targeting any specific individual, fall outside the concept of targeted killing. This approach is a key characteristic of targeted killings, which seems, in theory, to align with the fundamental principles of IHL, namely the principle of distinction, the principle of proportionality, and the principle of precautions. Because it selects the legitimate target beforehand and plans accordingly. Identifying a specific target minimizes the risk of mistakenly killing someone other than the targeted person or persons and thereby potentially upholds the principle of distinction. Additionally, directing an attack toward a specific person is helpful to strike a balance between the value of the target and the potential effects of the collateral damage. In any case, targeted killings should be conducted with caution to minimize harm to civilians and ensure that the potential harm is proportionate to the anticipated military benefits.

In conclusion, the term "targeted killing" refers to using lethal force with the intent, forethought, and plan to kill specific people who are not in the physical custody of those making the killing.[51] It is an example of targeted killing when a State believes that a person or persons pose a significant threat due to their activities and chooses to kill them, even if they are not currently involved in hostile actions.[52] The term "targeted killing" is a neutral and objective description of a technique that avoids biases or strong language and does not assume legality according to international law.53 It also does not place unnecessary limitations on the methods or motives involved in the act of intentionally causing someone's death.54 To maintain consistency and explain its relation with IHL principles as well as State responsibility, this study uses the term "targeted killing" as a neutral expression.

3. State Responsibility

Without responsibility, international law lacks effectiveness and becomes merely symbolic, similar to a *brutum fulmen,* which is a harmless thunderbolt.[55]

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50 ibid 147–148; see Nolte (n 40) para 4.

51 see further Melzer (n 45) 307–308.

52 This study will analyze targeted killings by States using drones, focusing on their compliance with IHL and hence State responsibility but findings may also apply to non-State actors if held to the same standards. Melzer (n 46) 5.

53 Roland Otto, *Targeted Killings and International Law: With Special Regard to Human Rights and International Humanitarian Law*, vol 230 (Springer Berlin Heidelberg 2012) 9; Nolte (n 40) para 1.

54 Melzer (n 46) 8.

55 Aaron Xavier Fellmeth and Maurice Horwitz, *Guide to Latin in International Law* (Oxford University Press 2009) 47; as cited in Thompson Chengeta, 'Accountability Gap:

Ratner suggests that international law has a two-fold purpose: setting out guidelines for governments, non-state actors, and their representatives to follow and outlining consequences for those who fail to comply with these standards.[56] Responsibility mechanisms are crucial for ensuring the effectiveness of IHL principles, including those considered part of jus cogens. Without such mechanisms, their impact would be greatly diminished.[57] The examination of the concept of targeted killing by drones, a relatively recent and extensively employed concept, is necessary to determine the probable consequences of noncompliance with IHL.

The International Law Commission's study on State Responsibility[58] (ARSIWA) provides that, "*every internationally wrongful act of a State entails the international responsibility of that State."*[59] Thus, international law requires two elements to establish responsibility for an act: first, the act must be attributed to the State, and second, the act must breach an international obligation of the State.[60] What ultimately determines State responsibility is the action or lack thereof that they take[61], regardless of whether they intended to cause harm or not. This means that the law of State responsibility is built upon objective liability rather than subjective factors.[62]

State responsibility may be incurred if it is known that a targeted killing operation by drones carries a danger that the operation would violate any of the three IHL principles mentioned above[63]. To fully explore the issue of State responsibility regarding drone-based targeted killings, we must examine the problems of breach and attribution that can arise from such operations.

Autonomous Weapon Systems and Modes of Responsibility in International Law' (2016) 45 Denver Journal of International Law and Policy 1, 5–6.

56 Steven R Ratner, Jason Abrams and James Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Third Edition, Third Edition, Oxford University Press 2009) 3; as cited in Chengeta (n 55) 6.

57 Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press 2009) 292–293; as cited in Chengeta (n 55) 6.

58 United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (United Nations) <https://www.un-ilibrary.org/international-law-and-justice/materials-on-the-responsibility-of-states-for-internationally-wrongful-acts_1b3062be-en> accessed 20 July 2023.

59 Art. 1 of Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).

60 ibid Art. 2.

61 İbid, *"There is an internationally wrongful act of a State when conduct consisting of an* ***action*** *or* ***omission****..."*

62 Wolff Heintschel von Heinegg, Robert Frau and Tassilo Singer (eds), *Dehumanization of Warfare: Legal Implications of New Weapon Technologies* (Springer International Publishing 2018) 195 <http://link.springer.com/10.1007/978-3-319-67266-3> accessed 21 March 2023.

63 Knoops (n 34) 80.

However, in both practice and the relevant literature, there is a lack of information and discussion regarding the attribution of drone-based targeted killing operations; this is due to the fact that these operations are conducted by States like any other military operation.[64] Therefore, only the "breach of an international obligation" element will be examined in relation to the IHL principles.

B. Calibrating Lenses: The Compliance of Targeted Killings by Drones with the Relevant IHL Principles

"*There can be no justice in war if there are not, ultimately, responsible men and women.*"[65]

In 2009, the USA targeted a Taliban leader, Mehsud, while he was receiving medical treatment on the house's roof. The drone-based targeted attack killed Mehsud, his wife, parents-in-law, seven bodyguards, and one lieutenant.[66] The strike killed 12 for one intended target, and the US attempted up to 16 drone strikes to kill Mehsud.[67] Examples like this raise questions about targeted killing operations, mainly because of the death of civilians, and require an examination based on IHL,[68] because IHL is the legal framework that assigns responsibility for actions in armed conflicts.

IHL differentiates between international and non-international armed conflicts.[69] While international armed conflicts occur between States, non-international armed conflicts are between States and organized armed groups, or between multiples of these groups.[70] The rules applicable to international armed conflicts are the four Geneva Conventions[71] and the Additional Protocol

64 The specific attribution problem arises in case drones operate autonomously, and this will be discussed shortly in Chapter 4.

65 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th ed, Basic Books 2006) 288; as cited in Rebecca Crootof, 'War Torts: Accountability for Autonomous Weapons' (2016) 164 University of Pennsylvania Law Review 1347, 1349.

66 see further O'Connell (n 21) 273; also Barnidge (n 5) 440–441.

67 Jane Mayer, 'The Predator War' [2009] *The New Yorker* <https://www.newyorker.com/magazine/2009/10/26/the-predator-war> accessed 5 August 2023.

68 see for discussion on that incident Akerson (n 21) 175–178.

69 'How Is the Term "Armed Conflict" Defined in International Humanitarian Law? - ICRC' (14:00:28.0) <https://www.icrc.org/en/doc/resources/documents/article/other/armed-conflict-article-170308.htm> accessed 19 July 2023 International Committee of the Red Cross (ICRC) Opinion Paper, March 2008.

70 ibid.

71 see for the texts of Conventions: 'The Geneva Conventions of 1949 and Their Additional Protocols - ICRC' (00:00:00.0) <https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm> accessed 19 July 2023.

I[72], and to non-international armed conflicts, they are Common Article 3 of the Geneva Conventions and the Additional Protocol II[73]. This study will examine the targeted killing operations' compliance with IHL principles in both dimensions. So which rules will be relevant?

According to IHL, the fundamental principles in international and non-international armed conflicts are basically the same.[74] Since they reflect the customary international law,[75] they are applied to either of the armed conflicts.[76] The principles at issue here are the principles of distinction, proportionality, and precaution, constituting the guidelines that must be adhered to.[77] These principles are included in Additional Protocol I to the Geneva Convention (AP-I) and are also recognized in customary international law.[78] Some may suggest that they only apply in international armed conflicts since they are in AP-I. But their nature of customary international law and acknowledgment of their fundamentalness for IHL rejects that and makes it clear that they are in use in any armed conflicts. In its 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice (ICJ) stated that the principle of distinction and the principle of proportionality are the cardinal principles of IHL, and it did not consider the classification of the armed conflict in question.[79]

Regulations regarding targeting during armed conflict do not rely on the weapon or method used.[80] Modern weapons like drones and targeted killing methods are legal as long as they adhere to IHL. Therefore, when conducting drone-based targeted killing operations in armed conflicts, States must comply with IHL principles: the principle of distinction, the principle of proportionality,

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72 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.' <https://ihl-databases.icrc.org/en/ihl-treaties/, https://ihl-databases.icrc.org/en/ihl-treaties/api-1977> accessed 19 July 2023.

73 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.' <https://ihl-databases.icrc.org/en/ihl-treaties/, https://ihl-databases.icrc.org/en/ihl-treaties/apii-1977> accessed 19 July 2023.

74 Knoops (n 34) 59.

75 see Jean-Marie Henckaerts and others (eds), *Customary International Humanitarian Law* (Cambridge University Press 2005).

76 Akerson (n 21) 190.

77 O'Connell (n 21) 285.

78 Gabriel Sweney, 'Saving Lives: The Principle of Distinction and the Realities of Modern War' 39 734. Michael N. Schmitt, 'The Principle of Discrimination in 21 Century *Warfare' Yale Hum. Rts. & Dev. LJ 2* (1999): 143.

79 'Legality of the Threat or Use of Nuclear Weapons' <https://www.icj-cij.org/case/95> accessed 16 July 2023 para 78; as cited in Barnidge (n 5) 433.

80 Knoops (n 34) 59.

and the principle of precaution.[81]

1. The Principle of Distinction

Drone and other airstrikes by the USA since the 9/11 attacks have resulted in the deaths of at least 22,000 civilians, with estimates suggesting the actual number of civilian casualties may be as high as 48,000.[82] To ensure the safety and protection of the civilian population, it is essential for all parties involved in armed conflicts to distinguish between civilians and combatants, as well as between civilian objects and military objectives.[83] Thus, all parties should only engage in operations against military objectives. The principle of distinction is outlined in AP-I[84], and as mentioned before, it is recognized in customary international law.[85] It is also Rule 1 and 7 of the International Committee of the Red Cross' (ICRC) customary IHL.[86] This is why it should be upheld both in international and non-international armed conflicts, like the other fundamental principles.

Distinguishing between combatants and non-combatants in the past was straightforward due to the presence of uniforms on combatants and their absence on non-combatants.[87] The "*global war on terror*"[88] has posed challenges due to terrorists not wearing traditional uniforms and often hiding among civilians.[89] Hence, distinguishing between civilians and terrorists has become a challenging issue that raises concerns. When it comes to addressing such issues, some States view the utilization of drone strikes for targeted killings as a feasible solution. Because it is believed that targeted killing enables a State to identify and lawfully eliminate a specific target in accordance with IHL.[90] This

81 ibid.

82 Peter Beaumont, 'US Airstrikes Killed at Least 22,000 Civilians since 9/11, Analysis Finds' *The Guardian* (7 September 2021) <https://www.theguardian.com/global-development/2021/sep/07/us-airstrikes-killed-at-least-22000-civilians-since-911-analysis-finds> accessed 18 July 2023; to see the casualty in Pakistan between 2004-2014 Heyns and others (n 18) 793. For an updated numbers, see: 'Drone Wars: The Full Data' (*The Bureau of Investigative Journalism (en-GB)*, 28 October 2017) <https://www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data> accessed 18 July 2023.

83 Article 48 of the AP-I.

84 Articles 58, 51 and 52.

85 see 'Principle of Distinction | How Does Law Protect in War? - Online Casebook' <https://casebook.icrc.org/law/principle-distinction> accessed 16 July 2023.

86 'The Principle of Distinction between Civilians and Combatants' <https://ihl-databases.icrc.org/en/customary-ihl/v1/rule1#> accessed 16 July 2023.

87 Vivek Sehrawat, 'Legal Status of Drones under LOAC and International Law War in the 21st Century and Collected Works' (2017) 5 Penn State Journal of Law and International Affairs 164, 185–186.

88 see further on the concept Hogg (n 4).

89 O'Connell (n 21) 287.

90 see further ibid 273.

method, in theory, has the potential to improve precision in targeting while minimizing unintended harm.[91] Hence, in theory, it seems that using drones for targeted killings is one of the most efficient choices for States to comply with IHL principles during armed conflicts.[92] However, ensuring this principle is effectively implemented in practice is crucial to avoid any possible breaches of the IHL.

The principle of distinction is of utmost importance in IHL; therefore, violations of this principle are considered "grave breaches" of the Protocol.[93] This indicates that this principle is at the core of the IHL. Nevertheless, States have frequently disregarded this principle by employing heavy weaponry to target irregular forces in densely populated regions, leading to the unfortunate loss of numerous innocent civilian lives.[94] On the other hand, due to technological advancements enabling more precise targeting, States are utilizing weapons designed for engaging conventional military adversaries to reduce unintentional harm to non-combatants and adhere to the principle of distinction.[95]

To be in accordance with the principle of distinction, every effort must be made by States to prevent lethal harm to bystanders.[96] Although the number of civilians killed by drones is not insignificant, it is claimed that recent research reveals that targeted killings by drones have violated the principle of distinction significantly less than other forms of attacks intended against terrorists.[97] Because during the targeted killing operation, operators can utilize the "pattern of life" method to track and target individuals with data gathered from surveillance cameras.[98] This is why targeted killing operations, rather than any other drone strikes, are the ones that play a significant role in the issue of differentiation.[99]

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91 Although there may be a slight decrease in the number of casualties in specific attacks, there has been a notable overall rise in the frequency of strikes. This could be attributed to the potential drawbacks of using drones, which should be considered alongside their benefits. see further ibid.

92 Unfortunately, the practice does not seem to be in accordance with theory, where in some instances, there are even more civilian deaths than the intended number of targets. see Azmat Khan, 'Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes' *The New York Times* (18 December 2021) <https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html> accessed 16 July 2023.

93 Article 85 of Protocol I to the Geneva Convention.

94 Sehrawat (n 87) 187.

95 Ryan J Vogel, 'Drone Warfare and the Law of Armed Conflict' [2010] Denver Journal of International Law & Policy 116–124.

96 Buchanan and Keohane (n 20) 19.

97 ibid.

98 Sehrawat (n 87) 188.

99 ibid.

In AP-I, Article 51(4) stresses the significance of differentiation by forbidding indiscriminate attacks. According to this article, indiscriminate attacks come in three types: those that don't have a specific military target[100], those that use weapons or methods that can't be aimed at a particular military objective[101], and those that use weapons or methods whose effects can't be controlled in accordance with the Protocol[102]. In any of these scenarios, the attacks may cause harm to both military targets and non-combatants or civilian objects without distinction. In theory, targeted killing by drones appears as a solution to this article. It may be helpful to evaluate these three categories in relation to the subject of targeted killing.

First, upon pure theoretical examination, it appears that targeted killing is not an indiscriminate attack and does not violate Article 51 or the principle of distinction. This is because targeted killing is aimed at a specific military target, which is the core of the method. Here, the act of intentional and premeditated killing of a specific person is being considered, but there is a possibility of making a mistaken choice. If the target is a civilian and killed during the operation, it would be a breach of the principle of distinction. Suppose the individual in question is a combatant but not the intended target, and the wrong person is killed in a targeted killing operation. In that case, it may be deemed unsuccessful, but it does not violate the principle of distinction since combatants can be targeted. Still, assuming that there is collateral damage, and the no-intended-wrongly-killed target is nothing but a regular combatant, which is not a high-value target as anticipated, then there is a great chance that every fundamental humanitarian principle is violated. In any scenario, targeted killing can be viewed as a viable solution for addressing the problem of not having a clear military objective. This is because there is a process involved in planning, selecting, and identifying the target. Of course, if a State chooses a target that cannot be targeted and then executes it, this is a direct breach of the principle of distinction. However, suppose the theory of targeted killing is followed. In that case, it appears to be a method that allows a State to carefully organize and choose its military targets, lowering the chance of attacking individuals who should not be targeted.

Second, since targeted killings are operated by drones in this context, and they use conventional weapons during the operation, it cannot be said that it is a means or method that cannot be directed at a specific military object. It is not a method that causes unclear collateral damage (which, in practice, it does pretty often but not because of the method itself, because of States not adhering to the principle of proportionality), and drones are not equipped with prohibited weapons such as laser blinding weapons or chemical weapons. But

100 Article 51(4)(a) of AP-I.
101 Article 51(4)(b) of AP-I.
102 Article 51(4)(c) of AP-I.

it must be emphasized that the concept of targeted killing is not limited to a particular method or weapon. This means that, in every case and occasion, whether the targeted killing operation is carried out with a legitimate weapon and method should be examined case by case.

The last component, which can be called "effect control", is related more to the principle of proportionality. Targeted killing operations by drones are highly significant due to the fact that drones are unmanned aerial vehicles that are operated remotely. If the drone operator loses control or if the drone malfunctions, such as being unable to accurately identify faces or dropping a missile in an unintended location, it could become an uncontrollable method. A new weapon deployed in a drone, whose effect is unknown and utilized in targeted killing, would also contradict the concept of effect control. This brings us to the weapons that have an indiscriminate nature.

The AP-I prohibits using weapons that can indiscriminately harm both military targets and civilians or civilian objects.[103] Therefore, how to use new weapons without causing harm to non-combatants plays a crucial role in adhering to the principle of distinction. Using drones equipped with precision-guided weapons has changed how states engage in armed conflicts, allowing for more precise targeting and avoiding the need to bomb places where civilians may be at risk. These drones are equipped with cutting-edge imaging technologies that enable operators to view intricate details, including individual faces, from remote locations.[104] As a result, they are capable of differentiating more effectively between civilians and combatants, making them a valuable tool in military operations.

Although drones can differentiate between targets accurately, not all drone operations adhere to the principle of distinction. Targeting unidentified individuals based on conduct[105], characteristics, or connections with others, known as signature strikes[106], is considered against established targeting rules and violates the principle of distinction.[107] This indicates that drone attacks do not de facto help States adhere to IHL principles; the method is also essential. This is where targeted killing plays a significant role since it suggests a solution for indiscriminate attacks, as evaluated above.

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103 See Article 35 of AP-I on the basic rules and Article 36 of AP-I on the new weapons.

104 Sehrawat (n 87) 177.

105 Qureshi (n 12) 102–103.

106 see 'A/HRC/44/38: Use of Armed Drones for Targeted Killings - Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (n 1) 6; see further Mark Klamberg, 'International Law in the Age of Asymmetrical Warfare, Virtual Cockpits and Autonomous Robots' in Jonas Ebbesson and others (eds), *International Law and Changing Perceptions of Security* (Brill | Nijhoff 2014) 164–165 <https://brill.com/view/book/edcoll/9789004274587/B9789004274587-s011.xml> accessed 12 March 2023.

107 Wagner (n 10) para 17; see also Akerson (n 21) 197.

It is said that they can differentiate because of their sensors and technology, but what if they malfunction or cannot identify the target? In cases where the high-tech cameras on a drone do not accurately identify whether a specific person is a valid target, according to the ICRC Interpretative Guidance on Direct Participation in Hostilities, individuals are assumed to be civilians by default in this scenario.[108] When there is uncertainty about whether a particular civilian action can be considered direct involvement in hostilities, it should be assumed that the default principle of protecting civilians applies, especially when there is uncertainty about someone's affiliation with an organized armed group.[109] In our case, the operation should be canceled if the target identification cannot be concluded during the targeted killing operation. Because this shortcoming would affect both the principle of distinction since it may be unclear whether the target is legitimate, and also the principle of proportionality because the assessment of the balance between the possible collateral damage and the military advantage cannot be done due to the unknown identity of the target, which will be examined below.

2. The Principle of Proportionality

General MacArthur chose a ground attack over an airstrike to avoid civilian casualties in Manila during World War II, but despite his efforts, over 100,000 civilians still lost their lives due to the conflict, while around 17,000 soldiers also perished.[110] As seen, failure to adhere to the principle of proportionality can lead to significant casualties, highlighting its importance.[111] The principle of proportionality dictates that military attacks should not result in excessive civilian deaths or property damage[112] beyond what is required to achieve the anticipated military objective.[113] The aim of this principle is to minimize unintentional casualties during armed conflicts. It is founded on the notion that there are limits to the methods and tools that can be employed to attack the enemy,[114] which means that the parties involved in an armed conflict don't have complete freedom in deciding their warfare methods or weapons, and it is prohibited to employ weapons and methods of warfare designed to inflict

108 ICRC Guidance on DPH, 75–76. see further O'Connell (n 21) 287–288.

109 ibid.

110 William J. Fenrick, 'The Rule of Proportionality and Protocol in Conventional Warfare' (1982) 98 Mil L Rev 91

111 The violation of this principle will also be a grave breach, as it is in the principle of distinction. Article 85(3)(b) of the AP-I. see also on this matter Akerson (n 21) 188.

112 Also, in the *Nuclear Weapons Advisory Opinion*, the International Court of Justice (ICJ) not only considered the harm caused to civilians but also took into account environmental factors when assessing proportionality. *Nuclear Weapons Advisory Opinion,* para. 30.

113 Article 51(5)(b) of Protocol I.

114 Sehrawat (n 87) 178.

unnecessary harm or suffering.[115] Thus, in order to comply with the principle of proportionality, States are required to refrain from conducting attacks that would result in excessive civilian casualties. But the balance between military benefits and civilian casualties is delicate and difficult to assess. Therefore, it is necessary to examine these two elements and evaluate their connection with drone-based targeted killing operations.

In this principle, the focus is on the unintended damage caused to innocent bystanders, which is casualties, instead of considering the harm caused to targeted individuals.[116] The killing of fifty civilians in response to the death of one combatant is a textbook example of a clear violation of the principle of proportionality in IHL.[117] But the nature of the victims, such as children, elderly individuals, or those in a residential setting, has an impact even in cases with fewer unintended casualties, which indicates that proportionality encompasses more than just numerical factors.[118] Not just the victims, the target's identity also plays a role in assessing proportionality. For instance, the same collateral damage[119] may be assessed as proportionate in a case where the target has a high value militarily and disproportionate in a case where the target has a low value.[120] Therefore, the proportionality of collateral damage in targeted killing also depends on the military significance of the target, with a greater acceptance of collateral damage for high-value targets than low-value targets, determined by factors like rank and current tactical position.[121]

When evaluating the expected military benefit, Andresen suggests taking into account three factors: the importance of the target, the probability of success, and the rarity of the opportunity.[122] An attacker should consider these three variables during the planning stage of a drone-based targeted killing operation.[123] The importance of the target is evident since the specific person is selected beforehand. With the advantages of drones mentioned earlier, assessing the probability of success before or during the operation and the rarity of opportunity is easier. With that in mind, these operations may offer

115 Article 35 of the AP-I.

116 See Articles 45, 44, and 51 of the AP-I for a list of the various categories of people who are legitimate targets under international humanitarian law.

117 O'Connell (n 21) 288.

118 ibid.

119 The term "incidental" in Article 51(5)(b) of Protocol I pertains to unintended harm inflicted on non-military targets, which is called "collateral damage". Sehrawat (n 87) 178; see also Akerson (n 21) 186.

120 Akerson (n 21) 197–199.

121 Vogel (n 95) 127.

122 Joshua Andresen, 'Challenging the Perplexity over Jus in Bello Proportionality' 7 European Journal of Legal Studies 31–32.

123 ibid.

minimal civilian casualties. Assessing proportionality will always be a sensitive matter that requires good faith and a case-by-case approach, as a single set of objective criteria is unlikely to lead to satisfactory conclusions consistently.[124] However, without any objective criteria to rely on, this assessment will always be subjective and delicate in nature.[125]

The proportionality principle determines the legitimacy of attacks that primarily affect civilians rather than combatants and is not required if a target is solely military and does not involve civilians.[126] If attacking authorized targets is believed to result in collateral damage, the predicted military advantage must be sufficient to warrant the risk.[127] However, considering the principle of proportionality, it is not required if there is no chance of collateral damage occurring.[128] Suppose a military base is geographically far from any nearby civilian communities; in this case, the attacking party would not have to worry about the proportionality of their attack, as it would only affect legitimate targets.[129] But in any case, during a drone operation, the probability of the existence of civilians should be constantly checked to avoid causing any unintended casualties. Controlling and minimizing collateral damage to civilians and their property is emphasized by the principle of proportionality, despite the acknowledgment of potential civilian casualties and unintentional harm.[130] Using drones can minimize collateral damage, and offer commanders improved accuracy when deciding when to take action. This entails considering various factors, including the target's legitimacy, the attack's timing, or the type of weapon employed.[131] Therefore, the focus is on more than what can be targeted but rather on the methods used to attack legitimate targets.[132]

Imagine that an attacker is unable to foresee the potential harm that a drone strike might cause. In that case, it should be halted or postponed until there is a reasonable level of certainty.[133] If the attacker adequately planned and carried out an attack on a legitimate target, the attacker would not be held accountable, even if the attack caused excessive harm for an unknown reason.[134]

124 Melzer (n 45) 323; Vogel (n 95) 127; Akerson (n 21) 185.
125 Drake (n 3) 643–644.
126 Sehrawat (n 87) 189.
127 see further on military advantage Akerson (n 21) 193.
128 Yunus Gül, 'Drone Attacks and the Principle of Proportionality in the Law of Armed Conflict' (2021) 0 Annales de la Faculté de Droit d'Istanbul 119, 130.
129 ibid.
130 Sehrawat (n 87) 188–189.
131 ibid 189.
132 Françoise J. Hampson, 'The Principle of Proportionality in the Law of Armed Conflict' in S Perrigo and J Whitman (eds), The Geneva Conventions Under Assault (Pluto Press 2010) 46. as cited in Gül (n 128) 128.
133 See Article 57(2)(b) of the AP-I.
134 Gül (n 128) 137.

However, it is essential to clarify that collateral damage should not be interpreted as a legal mechanism that justifies the intentional killing of civilians considered enemies.[135] Thus, a State cannot ignore the proportionality principle when conducting a targeted killing operation to kill a legitimate target.

Even if the target is of high value, the situation must be evaluated regardless of the value of the target, and the necessary balance between the possible collateral damage and the anticipated military benefit should be upheld during the entire process of the targeted killing operation. But a new concept in operational practice, the principle of combatant immunity, prioritizes the lives of soldiers over foreign civilians in modern warfare, as discussed in Gregoire Chamayou's book on the philosophical implications of drones.[136] This scenario occurs particularly in cases involving drone-based targeted killing operations since they are being operated remotely. Regardless of the situation, parties should prioritize the equal value of enemy civilians' lives as they do for their own civilians and military personnel, due to their inherent human dignity.[137]

Targeted killing in Israel's practice results in an average of six unintended casualties for every two intended targets.[138] While this proportion may be deemed acceptable in exceptional situations, it could lead to an imbalance in a long-term military strategy focusing solely on eliminating key enemy figures without effectively resolving the conflict.[139] This issue is also of concern to UN agencies investigating drone strikes' proportionality and human rights implications. The UN Special Rapporteur on Counter-Terrorism and Human Rights analyzed 37 drone strikes causing harm to civilians, emphasizing the legal obligation of states to publicly explain the circumstances and justify lethal force use while holding individuals accountable for their actions.[140]

Targeted killings are not inherently disproportionate, but they should be carried out to advance military efforts against the opposing party and ultimately end the conflict. Strategies that minimize conflict intensity but result in significant civilian casualties contradict the fundamental principle of proportionality in armed conflicts.[141]

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135 Andresen (n 122) 34.

136 see Grégoire Chamayou, *A Theory of the Drone* (The New Press 2015) 127; as cited in Ezio Di Nucci and Filippo Santoni de Sio (eds), *Drones and Responsibility: Legal, Philosophical, and Sociotechnical Perspectives on Remotely Controlled Weapons* (1st edn, Routledge 2016) 50–51 <https://www.taylorfrancis.com/books/9781317147794> accessed 22 February 2023.

137 Andresen (n 122) 34.

138 Melzer (n 45) 323–324.

139 ibid.

140 UN Doc. A/HRC/25/59, para. 36. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson.

141 Melzer (n 45) 324.

3. The Principle of Precautions

The US operation in Afghanistan in 2010 resulted in civilian casualties due to inaccurate and incomplete reports by the Predator crew located in Nevada, who neglected the visibility of civilians and children to the ground commander.[142] The incident resulted in a missile strike from a nearby attack helicopter, causing the deaths of Afghan civilians due to the crew's failure to acknowledge or pass on intelligence reports.[143] This example highlights the importance of care in adhering to IHL principles, which brings us to the principle of precautions. It is necessary to examine the rules of the principle of precautions and evaluate the compliance of targeted killings with this principle within the context of this study.

The principle of precautions can be traced back to Article 27 of the Hague Convention IV.[144] After that, several documents have included the prohibition of launching attacks against civilians and the obligation to minimize harm to them.[145] The initial binding regulation of the principle of precautions can be found in the AP-I.[146] According to Article 57(1), *"In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects."* Drone-based targeted killings have become a preferred option for States to take the necessary precautions to eliminate a specific, legitimate target while minimizing civilian casualties. As seen in Article 57(1), States must exercise constant care to protect civilians and civilian objects during military operations. The term "constant care" means there are no exceptions to seeking to protect the civilian population, civilians, and objects.[147] Hence, it is essential for all military members involved in the planning, ordering, or execution of the targeted killing operation to consistently prioritize the well-being of civilians and strive to minimize any negative impact on them.[148]

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142 Dexter Filkins, 'Operators of Drones Are Faulted in Afghan Deaths' *The New York Times* (29 May 2010) <https://www.nytimes.com/2010/05/30/world/asia/30drone.html> accessed 16 July 2023; as cited in Drake (n 3) 658.

143 Filkins (n 142); as cited in Drake (n 3) 658.

144 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

145 as cited in Yunus Gül, 'The Application of the Principle of Precautions to Cyber Operations' [2023] SSRN Electronic Journal 8.

146 ibid It requires both attacking and defending parties to take precautions to protect civilians and civilian objects during armed conflicts.

147 Program On Hpcr At Harvard University, *HPCR Manual on International Law Applicable to Air and Missile Warfare: Prepared for Publication by Program on HPCR at Harvard University* (Cambridge University Press 2013) 141–142 <http://ebooks.cambridge.org/ref/id/CBO9781139525275> accessed 6 August 2023.

148 Drake (n 3) 644; Sehrawat (n 87) 191.

According to Article 57(2)(a) of the AP-I, parties to armed conflicts are required to take "feasible" measures to reduce the impact of an attack on civilians and civilian objects. They are practical and achievable measures that take into account the circumstances of an attack, including factors that may impact the success of military operations.[149] This means that parties involved in a conflict are not required to take flawless precautions; they must take realistically feasible precautions given the prevailing circumstances.[150] Therefore, the feasibility determination should be based on the specific context. In each scenario, there are distinct elements that require careful consideration, and States should take appropriate measures by considering the situation's specific characteristics.[151]

The feasibility of precautionary measures in practice depends on factors like intelligence availability, control over the targeted area, weapon choice, urgency of the operation, and potential security risks for the military forces or civilians.[152] When comparing a State with air superiority, satellite surveillance, and advanced weaponry to a low-tech force with limited intelligence and basic weapons, the former is expected to do more; however, it's important to remember that the concept of "feasibility" cannot be used to justify breaking the fundamental principles of IHL.[153] States are still under the responsibility of planning or deciding on an attack and must exert their utmost effort to select means and methods of attack that will prevent or at least decrease harm to civilians and damage to civilian objects.

The purpose of this is to prohibit the targeting of non-military objectives due to misinformation and the deliberate targeting of military objectives to gain a slight military advantage at the expense of causing significant harm to civilians and civilian objects. If it becomes clear that the objective is not military or if the attack is likely to cause excessive harm to civilians or civilian objects, it should be canceled or suspended.[154] This rule is significantly easier to adhere to in our context. During drone-based targeted killings, the drone surveillance mechanisms allow new inputs to be detected, such as unexpected civilians near the target. This information is immediately available to the operator, who can assess the situation accordingly. Even if there is no initial indication that civilians would be harmed during an operation, circumstances may change during the operation, resulting in the operation being canceled or suspended.

149 Gül (n 145) 13.
150 ibid.
151 see generally on the elements required consideration Akerson (n 21).
152 Melzer (n 45) 320–321.
153 ibid.
154 Article 57(2)(b) of the AP-I. The first provision applies during the planning phase, while the second provision applies during the execution phase.

As seen, drone technology can address precautionary dilemmas by providing time for planning and prevention, including precautionary measures in strategy development, and facilitating targeted killings.[155] Extensive surveillance may be performed for varying durations before a drone attack, ranging from hours to days or weeks, representing reasonable safety measures that can reduce collateral damage even though they cannot guarantee a complete avoidance of civilian casualties.[156] This is why targeted killing operations necessitate careful planning and organization, relying heavily on intelligence and strict adherence to established procedures, leaving little room for improvisation.[157] Even minor incidents can result in failure, incorrect targeting, or unintended harm. The *"heat of battle*" is not a valid excuse for neglecting precautionary measures in an operation's planning and decision-making stages; therefore, it is crucial to interpret the obligation to take all possible precautions very strictly and literally when it comes to targeted killing operations.[158]

As per Article 57(2)(c) of the AP-I, there is a requirement to provide effective warning of attacks that could impact the civilian population, unless it is not possible due to the circumstances.[159] Therefore, it is recommended that commanders notify the enemy before launching an attack.[160] This ensures the safety of non-combatants, particularly elderly people and children, who can be evacuated from the area before the bombardment begins. However, not informing the enemy in this manner might not violate IHL because surprise can be essential in some cases.[161] When conducting targeted killings, the element of surprise is crucial. This is because if the target is alerted to the attack, they will surely flee. As such, it is essential for States to evaluate the situation in targeted killing operations carefully, thoroughly plan the operation in advance, and continually monitor any nearby civilians during the operation. This indicates that taking precautionary measures is highly crucial to targeted killing operations.

Accordingly, targeting decisions for pre-selected individuals are usually not made during immediate combat situations. Instead, these individuals are often monitored for a period of days or weeks before the operation of targeted killing

155 Sehrawat (n 87) 191.
156 ibid 191–192.
157 Melzer (n 45) 322.
158 ibid; Melzer (n 46) 366.
159 Article 57(2)(c) of the AP-I.
160 It also should be emphasized that drones are not able to propose surrender before employing lethal force. Lewis (n 22) 300.
161 The origin of this rule can be traced back to the Lieber Code, which stated that commanders should, when possible, notify the enemy of their intention to bombard a place. Instructions for the Government of Armies of the United States in the Field, 24 April 1863, prepared by Professor Francis Lieber, University of Columbia ('Lieber Code') Article 19.

is executed.[162] Drones can improve the information-gathering abilities of commanders during targeted killing operations since they have the capability to remain in the air for extended periods and are equipped with advanced sensors.[163] But these operations have both advantages and disadvantages.[164] On the one hand, it allows for better precautionary measures. On the other hand, it disconnects the operator from the adversary, making targeting easier and increasing the likelihood of abuse. Furthermore, operators may need help processing large amounts of data, especially when the data appears contradictory. This challenge becomes even more complex when a single group of operators supervises multiple drones.[165]

According to the least danger rule in Article 57(3) of the AP-I, if multiple military objectives could provide a similar military advantage, the objective chosen should be the one that poses the least risk to civilian lives and objects.[166] Thus, if multiple options can provide a similar advantage, the one that poses the most negligible threat to civilians and their belongings should be selected for attack. This rule can be applied if a commander has multiple options, hence, this principle is commonly referred to as "the lesser of two evils" in international law.[167] In this sense, targeted killing operations may be considered the lesser of two evils most of the time. Keeping in mind that the targets are primarily high-value, specific people, using drones with the method of targeted killing that have surveillance and reconnaissance systems and therefore gather intelligence before and during the operation makes the operation suitable to make the evil less harmful. However, the States engaged in a targeted killing operation must still make every effort to safeguard civilians and civilian objects.[168]

To prevent harm to civilians during targeted killing operations on legitimate targets, it is crucial to take proactive measures rather than simply avoiding the intention to harm them. This includes ensuring that civilians are away from the target and avoiding conducting the targeted killing operation in densely populated areas. These operations must adhere to specific guidelines, such as restricting them to certain hours to minimize civilian casualties and launching them from particular angles.[169] Also, it is essential that every individual who takes part in the targeted killing operations have clear ethical guidelines.

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162 Melzer (n 45) 322.
163 Vogel (n 95) 123.
164 Wagner (n 10) para 16.
165 Ibid.
166 According to the least danger rule in Article 57(3) of the AP-I.
167 see further Gül (n 145) 34–35.
168 See Article 58 of the AP-I.
169 Sehrawat (n 87) 191.

Determining the compliance of targeted killing with IHL may allow for some margin of error as long as the evaluation was made in good faith by those planning, deciding, and executing the operation based on the conditions at the time.[170] The standard of precaution should not be excessively burdensome for authorities but should instead be based on what can reasonably be achieved in the given circumstances.[171] Nevertheless, in IHL, the prevailing criterion is consistently based on reasonableness.[172] States must exercise caution and make every effort to prevent and reduce harm to civilians and civilian objects when planning and carrying out targeted killing operations. Those responsible for targeted killings must ensure that the individuals targeted are legitimate military targets, that IHL permits attacks against them, and take all possible precautions to minimize harm to civilians and avoid excessive harm. In addition, during a targeted killing operation, those in charge must make every effort to stop or pause the operation if it becomes clear that the person being targeted is not a valid military target or the attack is likely to cause excessive harm to others. Hence, targeted killings should be halted or stopped if a person is wrongly identified as a legitimate military target or the harm caused will be significant.[173] Nevertheless, targeted killing by drones is prohibited when other combat techniques with similar chances of success but less collateral damage are viable options.

According to Philip Alston, the former UN Special Rapporteur on extrajudicial, summary, or arbitrary executions, there has been a tendency to broaden the scope of permissible targets and conditions where the IHL applies, as highlighted in the UN's 2010 report.[174] Furthermore, it is stated in the report that the involved States frequently neglect to clarify the legal basis for their policies, reveal the measures in place to ensure the legality and accuracy of targeted killings, and establish mechanisms for holding individuals accountable for any violations.[175] The lack of transparency is also concerning, as they have not revealed the identities of those killed, the reasons behind the killings, or the resulting consequences.[176]

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170 Melzer (n 45) 321–322.

171 ibid 316.

172 Michael Schmitt, 'Autonomous Weapon Systems and International Humanitarian Law: A Reply to the Critics' (2013) 4 Harvard National Security Journal 1, 21.

173 Melzer (n 45) 320–321.

174 UN Doc. A/HRC/14/24/Add.6, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, paras 1-3.

175 ibid, para 93.

176 ibid; as cited in Di Nucci and de Sio (n 136) 48.

C. Auto-Calibrating Lenses: The Issue of Autonomy in Targeted Killings by Drones

"A sword is never a killer; it is a tool in the killer's hands."[177]

Seneca

In 1988, the United States warship USS Vincennes engaged in an incident where it fired upon an Iranian Airlines plane in the Persian Gulf, resulting in the tragic loss of lives of 290 passengers, including 66 children.[178] The attack was initiated after Aegis, a computer program, identified the aircraft as an F-14 belonging to the Iranian Air Force. The military personnel on board complied with the advice without questioning or investigating.[179] As humans become increasingly reliant on machines, there is growing concern over the use of autonomous weapons. These weapons have the potential to drastically change how countries view warfare and have raised questions about their compliance with IHL. This chapter will evaluate the potential compatibility of autonomous drones used for targeted killings with the principles of IHL and, hence, state responsibility.

1. The Issue of Autonomy in Drones

According to one of the most frequently used definitions, an autonomous weapon system (AWS) is "*A weapon system that, once activated, can select and engage targets without further intervention by an operator.*"[180] When examining the definitions by many others, it appears that the fundamental aspect of autonomous weapons, or autonomous drones in our context, is the ability to independently detect, select, and engage with a specific individual or object without any form of human intervention.[181] After a human operator

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177 Letters to Lucilius, 1st c., as cited in Schmitt (n 172) 1 which also refers to earlier version of; Michael C Thomsett and Jean Freestone Thomsett, *War and Conflict Quotations: A Worldwide Dictionary of Pronouncements from Military Leaders, Politicians, Philosophers, Writers and Others* (McFarland 2015).

178 Chantal Grut, 'The Challenge of Autonomous Lethal Robotics to International Humanitarian Law' (2013) 18 Journal of Conflict and Security Law 5, 14–15.

179 ibid.

180 Department of Defense, United States of America, DoD Directive 3000.09, "Autonomy in Weapon Systems", January 25 2023, 21.

181 'Views of the ICRC on Autonomous Weapon Systems' <https://www.icrc.org/en/document/views-icrc-autonomous-weapon-system> accessed 11 August 2023; Bonnie Docherty, 'Losing Humanity' [2012] Human Rights Watch <https://www.hrw.org/report/2012/11/19/losing-humanity/case-against-killer-robots> accessed 11 July 2023; see further Marco Sassòli, 'Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to Be Clarified' (2014) 90 International law studies 308, 308–309; Robert Sparrow, 'Robots and Respect: Assessing the Case Against Autonomous Weapon Systems' (2016) 30 Ethics & International Affairs 93, 94–95; Schmitt (n 172) 4.

launches or turns on the weapon system for the first time, it is the weapon system itself that aims at the target by using its sensors, computer code, software, and weapons, which a person would typically do.[182] Therefore, AWS contributes to a significant detachment of humans from the battlefield, and it is clear that it will completely change how States engage in armed conflicts.[183] The integration of autonomy in military operations has been referred to as the third significant transformation in military strategy, following the advancements of gunpowder and nuclear weapons.[184] It is certainly true that robots are increasingly taking over roles that were once occupied by humans on the battlefield.

The classification of various types of AWS is based on the extent of machine autonomy and the level of human supervision or oversight.[185] The primary distinction between automatic and autonomous weapons is the degree to which they can be predicted.[186] The ability of AWS to comply with the principles of IHL hinges on this distinction.[187] The above-mentioned definition of autonomy will be used in this study, while the notion of automation will be out of the scope.

The international community has expressed concern for over a decade regarding the development of autonomous systems that can be remotely controlled or have increased autonomy in targeting or killing humans.[188] However, their potential to conquer the battlefield with their advantages pushed States to develop these types of weapons. AWS possesses benefits such as extended range, prolonged operation duration, enhanced accuracy, quicker response, and invulnerability.[189] Autonomous weapons can use force

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182 Neil Davison, 'A Legal Perspective: Autonomous Weapon Systems under International Humanitarian Law' in United Nations, *UNODA Occasional Papers No. 30, November 2017* (UN 2018) 6 <https://www.un-ilibrary.org/content/books/9789213628942c005> accessed 16 February 2023.

183 Jeffrey S Thurnher, 'Examining Autonomous Weapon Systems from a Law of Armed Conflict Perspective' in Hitoshi Nasu and Robert McLaughlin (eds), *New Technologies and the Law of Armed Conflict* (TMC Asser Press 2014) 225 <https://doi.org/10.1007/978-90-6704-933-7_13> accessed 22 February 2023; Grut (n 178) 5.

184 Magdalena Pacholska, 'Military Artificial Intelligence and the Principle of Distinction: A State Responsibility Perspective' (2023) 56 Israel Law Review 3, 4.

185 Dr Berenice Boutin, 'Legal Questions Related to the Use of Autonomous Weapon Systems' 2.

186 James Foy, 'Autonomous Weapons Systems: Taking the Human out of International Humanitarian Law' (2014) 23 Dalhousie Journal of Legal Studies 47, 49.

187 ibid.

188 Chengeta (n 55) 1.

189 see further Kenneth Anderson and Matthew C Waxman, 'Debating Autonomous Weapon Systems, Their Ethics, and Their Regulation Under International Law' (28 February 2017) 1100–1103 <https://papers.ssrn.com/abstract=2978359> accessed 22 February 2023; see further Kelly Cass, 'Autonomous Weapons and Accountability: Seeking Solutions in the Law of War Law of War' (2014) 48 Loyola of Los Angeles Law Review 1017, 1027–1030; Foy (n 186) 52–53.

with precision and personal focus, potentially canceling attacks based on eyeball scans or unique biometric signals.[190] It is argued that the advancement of AWS will lead to more humane outcomes, and decrease casualties among military personnel during armed conflicts, while reducing the probability of collateral damage.[191] Moreover, AWS may have a higher capacity to adhere to IHL principles because of their exceptional abilities, potentially reducing unfortunate errors during military operations.[192] This requires an examination of an autonomous drone's targeted killing operation related to the relative principles of IHL. But the same reasons may lead the thinkers to different outcomes. For instance, while proponents of AWS contend that the absence of human emotions, such as fear and anger, reduces the likelihood of AWS engaging in war crimes, opponents argue that the absence of human empathy in robots increases the probability of them acting without regard for human life.[193] Some people criticize AWS because they believe that a robot may face challenges distinguishing between an armed combatant and a teenager carrying a toy gun.[194] This is why nonprofit organization Human Rights Watch and other critics have argued that AWS may face difficulties in maintaining consistent adherence to the principles of distinction and proportionality.[195] On the other hand, according to Schmitt, it can be argued that prohibiting AWS would place civilians and civilian property at greater risk of incidental harm, and AWS can achieve military objectives with less collateral damage than human-controlled systems.[196] This is because autonomous systems could be armed with non-lethal weapons, have a more precise sensor suite, and make better decisions in dangerous situations.[197]

Like any other weapon, an autonomous drone's legality depends on its unique characteristics and its capacity to use in all circumstances in accordance with IHL principles.[198] IHL places limitations on the use of weapons, including autonomous ones, in specific situations.[199] These limitations guarantee that weapons are used specifically against soldiers and military targets, do not entail excessive harm to non-combatants or civilian property, and safeguard

190 Michael A Newton, 'Back to the Future: Reflections on the Advent of Autonomous Weapons System International Regulation of Emerging Military Technologies' (2015) 47 Case Western Reserve Journal of International Law 5, 18.
191 Rogers (n 2) 1259–1261.
192 ibid.
193 Docherty (n 181) 37–38.
194 see futher ibid 31–32.
195 ibid 3.
196 Schmitt (n 172) 25.
197 ibid.
198 Davison (n 182) 9.
199 Schmitt (n 172) 35.

humanitarian values when conducting operations during armed conflicts.[200] It is important to review the legality of targeted killings by drones since there are currently no fully autonomous drones capable of carrying out such actions.

According to Article 36 of the AP-I [201], States are obligated to conduct legality reviews of newly developed weapons. This is essential to ensuring that a state's armed forces can engage in hostilities while still upholding their international obligations.[202] Article 36 requires clarification, and there is a lack of state practice, making it unclear how the obligation applies to AWS.[203] Before utilizing new weapons, States should check to see if they are subject to any treaties that prohibit their use or existence. Additionally, it is crucial to determine whether they comply with the IHL's tenets and violate customary international law.[204] Although there is no agreement on banning or controlling the utilization of autonomous drones, or AWS in general, States have to abide by the principles of IHL when carrying out actions during armed conflicts.[205]

Modern international law generally forbids the use of weapons due to their indiscriminate nature and the potential to cause excessive harm and unnecessary suffering.[206] Since it is still not clear whether an autonomous drone can discriminate against lawful targets, its ban is recommended by some legal experts.[207] An immediate and comprehensive ban on AWS is the easiest way to address the concerns. However, technical developments are inevitable due to market and political forces aiming to exploit their benefits.[208] This is why establishing a legal regime is desired. Firstly, a multilateral convention, for example, would be effective in regulating the use of autonomous drones in armed conflicts.[209] Secondly, a general regulation on AWS would also apply to autonomous drones. But it may be too soon for States to reach a final consensus at this stage. Still, a potential solution could be a framework convention that

200 ibid.

201 see further for a comprehensive study related to Aritcle 36 and AWS Klaudia Klonowska, 'Article 36: Review of AI Decision-Support Systems and Other Emerging Technologies of Warfare' (17 March 2021) <https://papers.ssrn.com/abstract=3823881> accessed 20 March 2023.

202 Davison (n 182) 9.

203 Grut (n 178) 10.

204 Cass (n 189) 26.

205 This will be examined in this Chapter.

206 Yannick Zerbe, 'Autonomous Weapons Systems and International Law: Aspects of International Humanitarian Law, Individual Accountability and State Responsibility' (2019) 29 Swiss Review of International and European Law 581, 584–585.

207 Docherty (n 181) 46.

208 Gregory P Noone and Diana C Noone, 'The Debate over Autonomous Weapons Systems International Regulation of Emerging Military Technologies' (2015) 47 Case Western Reserve Journal of International Law 25, 12.

209 Foy (n 186) 70.

involves all stakeholders and allows for the creation of a multilateral convention over time to appropriately regulate autonomous drones.[210]

Effective procurement testing and certification mechanisms are essential to ensure legality; these mechanisms might help verify compliance with Article 36 and other relevant regulations.[211] In the context of autonomous drones, it is possible to create interpretative guidance that provides further explanation of the obligations. In this context, it is necessary to have non-legal technical standards, verification tools, and certification mechanisms to effectively implement international law and regulation.[212] Drones are becoming increasingly prevalent in both international and non-international armed conflicts. As a result, this study foresees that autonomous weapons systems will first be extensively tested on drones. This highlights the urgent need for regulations on autonomous drones, even if States only agree on a non-binding agreement.

2. The Effects of Autonomy in Targeted Killings Regarding State Responsibility

Human Rights Watch highlights concerns over responsibility regarding the actions carried out by AWS.[213] The inquiry poses a highly rational query: "*In the event that the act of killing is carried out by a fully autonomous weapon, the question that arises is: who should be held accountable?*"[214] Scholars emphasize individual responsibility for IHL violations from AWS, with commanding officers and manufacturers being the primary focus. Despite the examination of the responsibility of different actors regarding the responsibility gap for autonomous drones, State responsibility remains underexamined.[215] As main purchasers and users, States have an obligation to ensure compliance and compensate victims when AWS breaches IHL.[216]

The State responsibility generated from AWS also took place in UN Documents. In the Report of the 2022 session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Systems, it is stated that "*every internationally wrongful act of a State, including those potentially involving weapons systems based on emerging technologies in the area of LAWS entails international responsibility of that State, in accordance with international law. In addition, States must comply with international*

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210 ibid.
211 Boutin (n 185) 6.
212 ibid 10.
213 Schmitt (n 172) 33.
214 Docherty (n 181) 42; as cited in Schmitt (n 172) 33.
215 Crootof (n 65) 1365; see as an example Marcus Schulzke, 'Autonomous Weapons and Distributed Responsibility' (2013) 26 Philosophy & Technology 203.
216 see Article 91 of the AP-I, see further Cass (n 189) 37–38.

humanitarian law…"[217]

The possible use of AWS raises concerns about legal responsibility in situations where violations of IHL occur. The ambiguity of responsibility arises due to the autonomous nature of weapon systems, or, in other words, the potential ability of autonomous drones to act completely independently.[218] State responsibility encompasses various forms of responsibility, including corporate responsibility during the design[219] and sale of AWS and individual and command responsibility when the weapon is deployed in battle or law enforcement scenarios.[220] Moreover, States can be held accountable for employing untested or insufficiently reviewed systems prior to their implementation.[221] This implies that prior to the use of autonomous drones, a comprehensive review is needed. When holding an international law subject legally responsible for the actions of autonomous drones, State responsibility is the fundamental for assessing other forms of international responsibility.[222] The theory of State responsibility is firmly established in international law, hence, it is more pragmatic to hold States responsbile for the violations of IHL caused by their AWS,[223] in order not to have any *brutum fulmen*. It can be said that this is also an inevitable result of being the primary subject of international law.

The deployment of autonomous drones and other autonomous unmanned systems has the potential to affect State responsibility by employing nonattributable methods, hence posing challenges.[224] The issue of responsibility attribution is important because it is a fundamental requirement for holding someone accountable for the deaths of civilians during armed conflict.[225] In the autonomous drones' case, the method of attribution becomes important since they act on their own. It is suggested that the use of autonomous drones in warfare is considered unethical[226] due to the difficulty in assigning responsibility for their actions, and this increases the risk of potential casualties.[227]

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217 UN Doc CCW/GGE.1/2022/CRP.1/Rev.1, Report of the 2022 session of the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Systems (29 July 2022), para 19. as cited in Pacholska (n 184) 6.

218 Davison (n 182) 16.

219 see Tim McFarland and Tim McCormack, 'Mind the Gap: Can Developers of Autonomous Weapons Systems Be Liable for War Crimes?' (2014) 90 Mind the Gap.

220 Chengeta (n 55) 5.

221 Davison (n 182) 16.

222 Chengeta (n 55) 5.

223 Zerbe (n 206) 583.

224 Chengeta (n 55) 50.

225 Robert Sparrow, 'Killer Robots' (2007) 24 Journal of Applied Philosophy 62, 67.

226 see further Robert Sparrow, 'Building a Better WarBot: Ethical Issues in the Design of Unmanned Systems for Military Applications' (2009) 15 Science and Engineering Ethics 169.

227 Sparrow, 'Killer Robots' (n 225) 75.

According to the ARSIWA, a State can be held responsible for its actions if it violates its obligations.[228] Since individuals carry out a State's actions under international law, attribution rules are used to determine which types of actions by subjects can be attributed to the state. In our context, the main issue is whether a State can be held responsible in accordance with the attribution rules in ARSIWA for the actions of a drone, which has complete autonomy.[229]

As Pacholska suggests, AWS can be evaluated as an agent of States. [230] The definition of "agent" in the ICJ's *Reparations for Injuries* case refers to a human agent[231] in mind, but nothing in it would prevent its application to non-human persons or objects, such as autonomous drones. Accordingly, "organs or agents" could be interpreted as a reference to "organs" in Article 4 of ARSIWA, allowing for the attribution of wrongdoing induced by autonomous drones.[232] Despite some forms of responsibility being overlooked, it is important to attribute all types of responsibility to the State. Thus, it is necessary to interpret the Convention in this way to properly evaluate State responsibility. This study suggests that such an interpretation is required to uphold the IHL's object and purpose.[233] As it is clear now that autonomous drones' acts can be attributed to States, the second element of State responsibility should be examined, namely the breach of an international obligation. In our current situation, similar to the previous chapter, we will be examining compliance with the core obligation of adhering to the fundamental principles of IHL.

3. Autonomous Drones and IHL Principles

As mentioned, the utilization of autonomous drones, or AWS in general, is not subject to regulation in treaties; nonetheless, their deployment must adhere to the principles and guidelines outlined within the framework of IHL. After all, the responsibility for developing, deploying, and utilizing weapons rests with the State, and States must comply with IHL.[234] Analyzing autonomous drones' compliance with IHL relies on their technical performance, predictability, and reliability, which are assessed during their development. Various operational parameters are determined during the activation stage, including task assignment, target type, environment, mobility, and time frame. [235] These parameters are essential for ensuring that any weapon system complies with IHL regulations.

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228 See Arts 1-2 of ARSIWA.
229 Boutin (n 185) 7–8.
230 Pacholska (n 184) 20–21.
231 ICJ, Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion [1949] ICJ Rep 174, 177. as cited in ibid 20.
232 ibid 20–21.
233 see 'Vienna Convention on the Law of Treaties (1969)' Article 31.
234 Davison (n 182) 7.
235 ibid 13.

Compliance with IHL depends on the predictability of weapon systems in their intended circumstances.[236] Ensuring a solid level of confidence in the technical capabilities, surroundings, and interactions of autonomous drones is essential to prevent possible breaches of IHL.[237] But beyond these technical issues, the compatibility of autonomous drones with the basic principles of IHL should be examined based on targeted killing operations.

Applying existing legal frameworks to autonomous drones is challenging, particularly in ensuring that military forces adhere to the fundamental principles of distinction and proportionality, although these challenges might diminish as technology improves.[238] The shift towards autonomy on the battlefield depends on whether technology can deliver sophisticated autonomous systems that comply with IHL in armed conflicts.[239] It is important to assess whether autonomous drones can adhere to the fundamental principles of IHL, as they are likely to be deployed on future battlefields.

a. A Weapon or a Toy Stick?: Autonomy and Distinction

Identifying targets correctly on a battlefield is a difficult task. Research has shown that around 70% of civilian casualties caused by US forces occurred due to incorrect identification.[240] Autonomous drones' ability to differentiate between legitimate and non-legitimate military targets remains debated, especially in asymmetric conflicts.[241] Regardless of the advancements in facial recognition technology, it would be ineffective in armed conflicts if an autonomous drone could not differentiate whether a target was legitimate.[242] The issue of upholding the principle of distinction is especially difficult due to the challenge of designing a machine that can accurately differentiate between combatants and non-combatants. Some scholars argue that this task is particularly complex because insurgents often disguise themselves as civilians.[243] And when an autonomous drone cannot accurately determine whether a person or object is a legitimate target, it is required to consider them as civilians,[244] as mentioned earlier.

236 ibid 15.
237 ibid.
238 Jack M Beard, 'Autonomous Weapons and Human Responsibilities' (2013) 45 Georgetown Journal of International Law 617, 48.
239 Thurnher (n 183) 226–227.
240 Benjamin Kastan, 'Autonomous Weapons Systems: A Coming Legal "Singularity"?' (2013) 2013 University of Illinois Journal of Law, Technology & Policy 45, 60.
241 see further Docherty (n 181) 30.
242 Cass (n 189) 20.
243 see Beard (n 238) 58.
244 Schmitt (n 172) 19.

The principle of distinction relies on human judgment, as algorithmic intelligence lacks the ability to determine contextual information or intentions.[245] Also, the definition of lawful targets is problematic due to the dynamic lines between civilians and combatants or civilians and military objects. It is stated that autonomous drones might identify suspected targets or persons of interest but cannot satisfactorily define the legally protected group of civilians by predetermined criteria.[246] Autonomous drones may face challenges in adhering to IHL in urban environments and densely populated areas, where it can be difficult to identify those involved in armed conflicts. Also, autonomous drones may lack the necessary skills to recognize emotions and identify vulnerable individuals.[247] Thus, the issue is not the insufficiency of technology sensors but the challenge of converting IHL into a computer-readable format.[248] It still needs to be clarified whether an autonomous drone can identify legitimate targets beyond their specific characteristics. But if converting IHL into a computer-readable format becomes successful, autonomous drones can easily comply with the principle of distinction. Because having and assessing all the data and instances related to IHL and the principle of distinction is impossible for a human, an autonomous weapon may be in a better position to evaluate the situation for the best humane outcome.

To effectively distinguish between combatants and noncombatants, it is insufficient to rely solely on the ability to identify whether an individual or object is in possession of a weapon.[249] An autonomous drone must be able to differentiate between non-combatants and combatants carrying AK-47s and walking sticks, but this is not enough.[250] Also, it is possible for civilians to have weapons without participating in hostilities. Therefore, it is not clear whether an autonomous drone can identify a hors de combat, a surrenderer, or a child with a toy gun. Despite so many possible obstacles to the potential compliance of autonomous drones with IHL, a targeted killing operation might be relatively more straightforward. Assuming autonomous drones have a targeted killing list in a database, they can conduct the operation without human intervention. And since the target is specific, there would not be any problems identifying whether the target is legitimate. Because all the autonomous drone needs to do is confirm that the intended target matches the person in the database. Of course, the database of the list of targets is prepared by humans, and it should

245 Klonowska (n 201) 18.
246 ibid.
247 Denise Garcia, 'Killer Robots: Why the US Should Lead the Ban' (2015) 6 Global Policy 57, 59.
248 Sassòli (n 181) 327.
249 Sparrow, 'Robots and Respect' (n 181) 98.
250 Kastan (n 240) 60.

encompass only legitimate targets. Otherwise, the outcome will be a violation of IHL altogether.

Here the main problem lies with other people's identities around the target. If an autonomous drone does not possess the knowledge of how many of its targets were legitimate targets, this targeted killing operation should be considered an indiscriminate attack, hence, violating both the principle of distinction and the principle of proportionality. The level of certainty regarding autonomous drones' ability to accurately distinguish remains uncertain. As seen, programming robots to make complex judgments related to IHL poses significant challenges.[251] That is why it is debated that autonomous drones must be programmed with acceptable levels of doubt into the systems, as failure to do so may result in an indiscriminate attack.[252]

Using drones for targeted killing has been proposed as a strategy to decrease civilian casualties.[253] It is argued that an autonomous drone equipped with precise weaponry may better discriminate between valid and invalid targets compared to human soldiers using conventional weapons.[254] Currently, no autonomous drone is able to assess situations and distinguish between valid targets, irrespective of their initial appearance. Furthermore, it seems impossible to convert the rules of IHL into a software system, as they consist of many ambiguous, undefined terms and regulations that only humans can interpret. Introducing a regulation for converting IHL into artificial intelligence could be a valuable solution for addressing this problem.

b. Psychology of a Robot: Autonomy and Proportionality

An attack targeting a lawful target must adhere to the principle of proportionality.[255] This principle, which is a complex and often misunderstood aspect of IHL[256], prohibits attacks that may cause excessive civilian loss, injury, or damage.[257] Proportionality judgment involves estimating civilian casualties and anticipating military advantage. These determinations require case-by-case analysis due to their contextual nature.[258] Assessing military advantage in modern battlespaces is more challenging for autonomous drones, as proportionality tests require more than quantitative data balancing, despite their potential ability to assess civilian harm in target areas.[259] It has been suggested

251 Sparrow, 'Robots and Respect' (n 181) 98.
252 Schmitt (n 172) 18.
253 Zerbe (n 206) 586.
254 ibid.
255 See Articles 51(5)(b) and 57(2)(iii) of the AP-I.
256 Akerson (n 21) 175.
257 Schmitt (n 172) 18.
258 ibid 19–20.
259 ibid.

that autonomous drones may actually be able to use force more proportionately than human soldiers due to the fact that computerized weapons can accurately calculate the effects of a blast and any potential collateral damage.[260] On the contrary, according to Human Rights Watch, autonomous weapons cannot reflect the psychological processes necessary for proportionality assessment.[261] Whether these claims are true is yet to be seen, as there is no sufficient empirical data regarding autonomous drone attacks.

In order to determine the likelihood of harm, autonomous drones must be able to identify and count civilian and potential military targets. This entails monitoring unarmed individuals, including children, and preventing attacks on military targets that may cause substantial civilian casualties.[262] Determining acceptable civilian casualties in an attack depends on factors such as military advantage, alternative methods, consequences of not attacking, and weapons used. While assessing excessive destruction, considers target characteristics, intended benefit, and less harmful methods.[263] Understanding these factors requires deep knowledge of global affairs, including human behavior and politics.[264] Therefore, the principle of proportionality requires interpretation ability and insight, rather than pure data and information. It is still unclear whether an autonomous drone can accurately evaluate these factors.

As it is seen, assessing collateral damage and military advantage involves considering various factors. However, accurately predicting outcomes is difficult due to the intricate programming and unforeseen code interactions involved in the deployment of autonomous drones in open and unstructured environments.[265] Integrating ground principles, values, and control requirements into autonomous drones is certainly rewarding, but quantifying context-based principles like proportionality is more difficult than it seems at first.[266] In theory, autonomous drones' algorithms can be programmed with collateral damage thresholds for specific targets, which can be adjusted by human operators. But this will be challenging since determining the appropriate threshold is subjective and requires judgment from military commanders.[267] Applying the proportionality principle to avoid excessive civilian casualties involves

260 Armin Krishnan, *Killer Robots: Legality and Ethicality of Autonomous Weapons* (Ashgate 2010) 92.

261 Docherty (n 181) 33; as cited in Schmitt (n 172) 20.

262 Sparrow, 'Robots and Respect' (n 181) 98.

263 ibid 99.

264 ibid.

265 Foy (n 186) 61.

266 Berenice Boutin and Taylor Woodcock, 'Aspects of Realizing (Meaningful) Human Control: A Legal Perspective' (11 May 2022) 17 <https://papers.ssrn.com/abstract=4109202> accessed 20 March 2023.

267 Schmitt (n 172) 20–21.

subjective and complex decisions that are difficult to resolve using formulas, algorithms, or artificial intelligence systems.[268] This suggests that autonomous drones might struggle with assessing the proportionality of the attack, as they cannot accurately evaluate the anticipated military advantage without constant updates on military operations and plans. A solution might be the agreement of the States on clear criteria and formulas for assessing proportionality and its influencing parameters.[269] However, reducing it to its basic components could potentially lead to a regression in safeguarding civilians and IHL rules in general.

As previously discussed regarding the principle of distinction, the primary challenge lies in transferring crucial information to autonomous weapons software. Additionally, the issue with the principle of proportionality in this context is the extensive evaluation that is required. It is doubtful that autonomous drones, as well as other autonomous weapons, have the ability to turn data or information into knowledge or insight. It is unlikely that the rules of IHL can be translated into computer language, making it difficult to assess whether the principle of proportionality has been followed. This means that an autonomous drone lacking proportional calculation could potentially violate IHL, resulting in an increased risk of civilian casualties.[270] The principle of proportionality, which concerns collateral damage, applies to the use of autonomous drones in targeted killing operations just as it does to any other method. Therefore, there is no significant discussion specifically related to targeted killing, and the issues discussed in the previous chapter regarding the principle of proportionality are also applicable here. Since targeted killing operations are about the value of the target, the proportionality principle plays an even more significant role than any other method. Because not just the bystanders' identity but also the identity of the target plays an important role when balancing the two elements of the proportionality principle. This is why targeted killing operations are one of the worst-case scenarios to occur for an autonomous drone since they require an even more delicate assessment unless autonomous drones solve all the problems we discussed above.

In sum, defining the principle of proportionality in computer-based terms is difficult due to the lack of a specific formula. Precisely determining the boundaries that must be respected is another difficult aspect. Including the prohibition in software coding presents difficulties as it is unclear how an autonomous drone can accurately distinguish between civilian, military, and

268 Beard (n 238) 49.

269 Sassòli (n 181) 331–332.

270 Daniel N Hammond, 'Autonomous Weapons and the Problem of State Accountability Comments' (2014) 15 Chicago Journal of International Law 652, 674.

dual-use items and assess the situation within the targeted killing operation.[271] Considering the current level of technological developments, it is uncertain whether an autonomous drone can effectively make these determinations.[272]

c. Anticipating the Future: Autonomy and Precautions

To ensure that a target is a legitimate military objective, all available sensors must be used to enhance target identification accuracy. When operating in a military context, it is advisable not to rely solely on autonomous drones. Instead, it is recommended to use other unmanned aerial systems to locate enemy forces before deploying an autonomous drone. This approach helps to minimize the risk of mistakenly identifying civilians as combatants.[273] Therefore, autonomous drones can obtain all the information from all devices and evaluate them to operate better. This would be particularly useful for targeted killing operations since it requires intensive planning.

Using an autonomous weapon may not be feasible in high-risk areas, e.g., urban areas.[274] This is due to technical or operational factors and the lack of enhanced identification capabilities.[275] The decision to avoid using these systems could be made to prevent potential civilian casualties or to prioritize military objectives.[276] Autonomous drones offer an advantage as precautions evolve through experience, allowing belligerents to learn from past failures and anticipate future incidents.[277] This indicates that there should be a comprehensive testing process before actually deploying an autonomous drone in armed conflicts, therefore, they can develop over time until reaching perfection.

CONCLUSION

> *"To date, attacks and targeted killings using drones have not been the object of robust international debate and review. The Security Council is missing in action; the international community, willingly or not, stands largely silent. That is not acceptable."*[278]

This study shows that the concept of targeted killing is not inherently incompatible with IHL principles, namely the principle of distinction, the

271 Grut (n 178) 13.
272 ibid.
273 Schmitt (n 172) 23.
274 Vogel (n 95) 124.
275 Schmitt (n 172) 23–24.
276 ibid.
277 Sassòli (n 181) 336.
278 'A/HRC/44/38: Use of Armed Drones for Targeted Killings - Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (n 1) 20 para 82.

principle of proportionality, and the principle of precautions. The features of the concept of targeted killing that other drone attack methods do not typically have can make the former compatible with IHL principles. Drones' advanced sensors, advanced visual technology, and the feature of pre-selecting the legitimate target help uphold the principle of distinction. Before targeted killing operations are conducted, there is a planning and scheduling process, which helps to select the place and the time. This process, in accordance with the principle of proportionality, helps to strike a better balance between the possible collateral damage and the military advantage expected by conducting the operation. Since it is a premeditated operation, it also helps adhere to the principle of precautions.

The drones are efficient, but it often leads to excessive civilian casualties. The international community is not fully aware of the methods of drone strikes in practice. While a signature strike will likely result in excessive civilian casualties, a targeted killing operation may not. However, the extent of public disclosure of targeted killings carried out by drones is constrained by the inherent secrecy surrounding these operations, which encompasses the inquiry into civilian casualties. Although targeted killing is generally viewed negatively in the international community due to its high civilian casualties, it is not inherently incompatible with IHL. On the contrary, it has some benefits to offer to States in order to adhere to IHL principles.

Moreover, in a more specific context, autonomous drones have alarming implications from the perspective of IHL. The features of autonomous drones appear incompatible with IHL principles and established international obligations. The primary constraint of autonomous drones in terms of their compatibility with IHL principles is their inability to convert raw data into informed decisions or insights, which is necessary for maintaining balance. As a result, the fundamental principles of IHL, namely the principle of distinction and the principle of proportionality, may not be maintained through autonomous drone operations. Additionally, the question of how to attribute the acts of autonomous drones to the State regarding responsibility has been discussed, leading to the suggestion that these autonomous drones should be considered agents of the State. Lastly, it should be noted that this study focused on one element of State responsibility: breach of an international obligation from the perspective of IHL principles. With technological development and States' interaction regarding drones and targeted killing operations, the other element, attribution, will also be problematic and require examination. Thus, this subject matter has potential for future academic studies.

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MAIN CHANGES INTRODUCED BY THE "RENTERS (REFORM) BILL" IN TERMS OF RESIDENTIAL TENANCY: IS IT AN EFFECTIVE PROTECTION FOR TENANTS?*

"Kiracılar (Reform) Tasarısı" ile Konut Kiracılığı Açısından Getirilen Temel Değişiklikler: Kiracılar İçin Etkili Bir Koruma mı?

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ABSTRACT

Rent is defined as a contract whereby a tenant occupies and gains a legal interest in property particularly for a specified period, in return for a legal benefit which is usually payment of the rent. In this context, residential tenancy is a significant part of rental law, as well. In England and Wales, residential tenancies are currently regulated under the Housing Act 1988. However, a new bill, which is named as "Renters (Reform) Bill", was introduced in the House of Commons on the date of 17 May 2023. This will be the biggest change in the field of rent law since the Housing Act 1988. For this reason, it might be meaningful to examine main changes introduced by the Bill. Within this framework, decent homes standard, restriction of assured tenancies and abolition of assured shorthold tenancies, abolition of "no fault" evictions, new termination grounds and notice periods for landlords, rent increases, request of the tenant to keep a pet, duties of landlords related to tenancy, dispute resolution by the ombudsman and enforcement, the database of local councils against landlords, and other changes effect residential tenancy are considered as fundamental changes in this paper.

Keywords: Rent Law, Renters (Reform) Bill, Residential Tenancy, Landlord, Tenant.

ÖZET

Kira, kiracının, genellikle kira bedelinin ödenmesi olan hukuki bir menfaat karşılığında, özellikle belirli bir süre için kira konusunun kullanımı ile hukuki menfaat elde ettiği bir sözleşme olarak tanımlanmaktadır. Bu bağlamda, konut kiracılığı da kira hukukunun önemli bir bölümünü oluşturmaktadır. İngiltere ve Galler'de konut kiracılığı şu anda yürürlükte olan 1988 Konut Kanunu kapsamında

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düzenlenmektedir. Ancak, 17 Mayıs 2023 tarihinde "Kiracılar (Reform) Tasarısı" olarak adlandırılan yeni bir yasa tasarısı Avam Kamarası'na sunulmuştur. Bu tasarı, 1988 Konut Kanunu'ndan bu yana kira hukuku alanında yapılan en büyük değişiklik olarak değerlendirilmektedir. Şu hâlde, yasa tasarısının getirdiği temel değişiklikleri incelemek anlamlı olacaktır. Bu kapsamda olmak üzere, makul konut standardı, garantili kiracılığın sınırlandırılması ve kısa süreli garantili kiracılığın kaldırılması, "kusursuz" tahliyelerin kaldırılması, kiraya veren için yeni fesih gerekçeleri ve ihbar süreleri, kira artışları, kiracının evcil hayvan bulundurma talebi, kiraya verenin kiraya ilişkin bazı yükümlülükleri, ombudsman tarafından uyuşmazlık çözümü ve icrası, yerel yönetimlerin kiraya verene ilişkin veri tabanları ve konut kiracılığını etkileyen diğer bazı hususlar bu çalışmada temel değişiklikler olarak ele alınmaktadır.

Anahtar Kelimeler: Kira hukuku, Kiracılar (Reform) Tasarısı, Konut kirası, Kiraya veren, Kiracı.

INTRODUCTION

Rent is a contract whereby a tenant occupies and gains a legal interest in property particularly for a specified period, in return for a legal benefit which is usually payment of the rent. Residential tenancy is a significant part of rental law and is an extensive aspect of it. In England and Wales, residential tenancies are currently regulated under the Housing Act 1988[1] (HA 1988) as amended 1996 and 2004 and various amendments on some other Acts. At the beginning of the 20th century, most people in England rented their homes; approximately ninety percent (90%) of all housing was privately rented. This situation changed dramatically because of the housing policy through the century and reached the lowest point only around nine percent (9%) of the population rented their homes in 1992. By the year of 2022, share of tenants among the total population increased to nineteen percent (19%) which means doubled if it is compared with thirty years ago[2]. This result indicates that private tenancy share is increasing steadily and predicted to reach twenty five percent (25%) of the total housing by the year of 2025.

The Housing Act 1988, which is the most comprehensive legislation related to topic, regulates the residential tenancy field currently[3]. A new bill, which is named as *"Renters (Reform) Bill",* was introduced in the House of Commons

1 The Official Home of UK Legislation, 'Housing Act 1988' <https://www.legislation.gov.uk/ukpga/1988/50/contents> accessed 7 September 2023.

2 Statista, 'Share of tenants among the total population of the United Kingdom (UK) from 1980 to 2022' <https://www.statista.com/statistics/544709/tenants-among-population-uk/> accessed 7 September 2023.

3 The Housing Act 1988 came into force on 15 January 1989. Therefore, tenancies granted on or after 15 January 1989 are governed by the Housing Act 1988. If the tenancy was granted before 15 January 1989, the tenant will be subject to the Rent Act 1977 and may benefit the considerable security of tenure and rent control of it.

on the date of 17 May 2023[4]. This will be the biggest change in the field of rent law since the HA 1988. Therefore, it might be meaningful to attempt to examine main provisions of the Bill and point out the fundamental changes in the field of residential tenancy. Within this framework, decent homes standard, restriction of assured tenancies and abolition of assured shorthold tenancies, abolition of "no fault" evictions, new termination grounds and notice periods for landlords, rent increases, request of the tenant to keep a pet, duties of landlords related to tenancy, dispute resolution by the ombudsman and enforcement, the database of local councils against landlords, and other changes effect residential tenancy are considered in this paper.

A. Decent Homes Standard Policy

The main purpose of the Renters (Reform) Bill is to ensure that private tenants have access to a safe and *"decent home"* and that landlords' ability to sustain the confidence to repossess their property if they have good reason to do so. This may be expressed as the main policy of the Bill, as well[5]. A decent home means a house which meets the current statutory minimum standard for housing, is in a reasonable state of repair, has reasonably modern facilities and services, and provides a reasonable degree of thermal comfort. These criterions include that a home must be free from serious health and safety hazards such as fall and fire risks and must not be in a disrepair condition. Any home within these requirements must contain adequate facilities and services such as kitchen, bathroom, WC, or external noise insulation, and have an efficient heating system to provide a warm and dry residential area[6].

According to the English Housing Survey 2021-2022, twenty three percent (23%) of privately rented properties – almost one quarter – do not meet the Decent Homes Standard7. The government published reform plans for the

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4 UK Parliament Parliamentary Bills, 'Renters (Reform) Bill' <https://bills.parliament.uk/bills/3462> accessed 7 September 2023.

5 House of Commons, *Renters (Reform) Bill Explanatory Notes* (Parliamentary 2023), 6.

6 Department for Communities and Local Government, *A Decent Home: Definition and Guidance for Implementation June 2006 - Update* (DCLG Publications 2006) 11-12; See. Department for Levelling up, Housing and Communities, 'A Decent Homes Standard in the Private Rented Sector: Closed Consultation' (2 September 2022) <https://www.gov.uk/government/consultations/a-decent-homes-standard-in-the-private-rented-sector-consultation/a-decent-homes-standard-in-the-private-rented-sector-consultation> accessed 7 September 2023.

7 Department for Levelling up, Housing and Communities, 'English Housing Survey 2021 to 2022: Housing Quality and Condition' (13 July 2023) 5 <https://www.gov.uk/government/statistics/english-housing-survey-2021-to-2022-housing-quality-and-condition/english-housing-survey-2021-to-2022-housing-quality-and-condition> accessed 7 September 2023. There are higher concentrations of homes that do not meet the Decent Homes Standard in certain parts of the UK with lower productivity such as Yorkshire and the Humber. See.

private rented sector in the White Paper "A Fairer Private Rented Sector" and declared to halve the number non-decent rented homes by the year of 2030 as an official mission[8]. The same policy target has taken place previously in "Levelling Up the United Kingdom" White Paper, as well[9]. Thus, the decent homes standard became influential in the legal policy that dominated the Bill.

B. Restriction of Assured Tenancies and Abolition of Assured Shorthold Tenancies

Tenancy agreements according to the HA 1988 can currently be either fixed-term or periodic. A fixed-term tenancy is a rent which runs for a fixed period, that having been made clear in the terms of the agreement. This fixed term can be for one month, one year, or 99 years for instance. On the other hand, a periodic tenancy is a rent that continues from period to period. These periods may be routinely one week, one month, or one year[10]. Periodic tenancies can't be determined by notice to quit, instead of that the landlord must prove one of the grounds for possession[11]. Clause 1 of the Renters (Reform) Bill inserts a new section 4A to the HA 1988 which comes before section 5. It proposes that all assured tenancies will be periodic in future and can no longer have fixed terms. In this case, any terms of an assured tenancy that try to create a fixed term will have no legal effect. Instead, tenancies will be considered as periodic (Clause 1 of the Bill - subsection 1-2). It is stated that this change will provide tenants more flexibility to terminate tenancies when they need to, including where landlords fail to fulfil their obligations, or properties are quite low quality[12].

The Bill includes a significant restriction on assured tenancies. An assured tenancy is a tenancy where a dwelling-house[13] is let as a separate dwelling and is occupied as the tenant's only or principal home. The tenant must be an

House of Commons (n 5) 8.

8 Department for Levelling up, Housing and Communities, 'A Fairer Private Rented Sector' (June 2022) 7, 24 <https://www.gov.uk/government/publications/a-fairer-private-rented-sector> accessed 7 September 2023.

9 Department for Levelling up, Housing and Communities, 'Levelling Up the United Kingdom' (2 February 2022) 121, 221 <https://www.gov.uk/government/publications/levelling-up-the-united-kingdom> accessed 7 September 2023.

10 Chris Bevan, *Land Law* (3rd ed Oxford Law Trove OUP 2022) 364. In a fixed term tenancy, right to possession terminates at the latest, on the expiry of the tenancy period. By contrast, a periodic tenancy runs on indefinitely, from week to week, month to month, quarter to quarter, or year to year until one of the parties does not want to continue the tenancy. See. Judith-Anne MacKenzie and Aruna Nair, *Textbook on Land Law* (17th ed OUP 2018) 182.

11 Emily Walsh, *A Guide to Landlord and Tenant Law* (1st ed Routledge 2018) 236.

12 House of Commons (n 5) 14.

13 According to HA 1988 s. 45 (1), a "dwelling-house" is defined as a house or part of a house.

individual and the tenancy may be held by an individual or by joint tenants[14] (HA 1988 s. 1). The periods of a periodic tenancy can currently be any length within the scope of HA 1988, but clause 1 of the Bill brings a limitation for the length of the period of an assured tenancy (subsection 3-7). Particularly, relevant periods will have to be either monthly or no more than twenty-eight (28) days long[15]. Purpose of this restriction is to avoid situations that tenants might be locked because of unnecessary long periods in future inside the tenancy[16]. On the other side, it might be tough to exercise this rule in practice due to the landlords' concerns. Because this provision may cause much more risk in point of obtaining rental fee steadily. Landlord candidates might feel unsecure in order to be in a *"buy to let"* transactions in this case, as well. Such a probable result may help disadvantageous groups to reach an appropriate accommodation easier.

Assured shorthold tenancies are a type of assured tenancy. They must meet with the requirements of HA 1988 s. 1 and besides, not be subject to any of the statutory exclusions. The essential difference between assured shorthold tenancies and assured tenancies is regarding security of tenure and in this sense assured shorthold tenants have very limited security of tenure[17]. In this (assured shorthold) tenancy, it is easier to remove the tenant at the end of the agreed period, thus a landlord has less concerns while renting the property[18]. In private renting, the assured shorthold tenancy is seen as the market standard for short-term tenancies of less than twenty-one (21) years since the 1980s[19]. Clause 2 (b) of the Bill removes provisions of the HA 1988 which establish assured shorthold tenancies, thereby such tenancies can't be formed anymore in the future[20]. This may be considered as a fundamental change really, that indicates the government's attitude to simplify tenancy structures by abolishing assured shorthold tenancies and replace the current legislation with a single system of periodic tenancies[21].

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14 Simon Garner and Alexandra Frith, *A Practical Approach to Landlord and Tenant* (8th ed OUP 2017) 228-231; Walsh (n 11) 228.

15 See. Renters (Reform) Bill, Clause 1, Subsection (3), (a)-(b).

16 House of Commons (n 5) 14.

17 See. Mark Davys, *Land Law, Palgrave Law Masters* (Palgrave Macmillan 2015) 57; Walsh (n 11) 237; Garner and Frith (n 14) 228.

18 Ben McFarlane, Nicholas Hopkins and Sarah Nield, *Land Law: Text, Cases and Materials* (5th ed Oxford Law Trove OUP 2021) 703; Garner and Frith (n 14) 228, 248.

19 Tim Reid and Megan Stewart, 'The Renters Reform Bill' (2023) 27 (2) Landlord & Tenant Review 48, 48; Andrew Arden and Martin Partington, 'Housing Law: Past and Present' in Susan Bright (eds), *Landlord and Tenant Law Past, Present and Future* (Bloomsbury Publishing 2006) 203.

20 Additionally, clause 2 (a) of the Bill removes section 6A of the HA 1988 which detailed the mechanism that social housing providers could use to demote their tenants to assured shorthold tenancies if they commit anti-social behaviour. See. House of Commons (n 5) 14-15.

21 Reid and Stewart (n 19) 48.

C. Abolition of "No Fault" Evictions

The Housing Act 1988 includes provisions related to assured shorthold tenancies (Ch. II). According to s. 21 (1) of the HA 1988, the landlord can recover the possession at the end of the fixed term of an assured shorthold tenancy without existing any fault of the tenant. The landlord must give tenant not less than two months' notice if he/she requires possession of the dwelling-house at the end of the term (s. 21 (1) (a)-(b) HA 1988). If the court is satisfied on these statutory elements, makes an order for eviction of the tenant[22]. Clause 2 of the Bill removes section 21 of the HA 1988 which is named "no fault" evictions along with the whole assured shorthold tenancy regime[23]. The Bill gives tenants a longer-term security and behavioural flexibility in this way. They can express their complaints more confidently to their landlords, for instance about the level of rent, or condition of their property without any concern for being evicted because of their requests related to the property[24].

D. New Termination Grounds and Notice Periods for Landlords

The grounds for possession that landlords must use to evict their tenants are currently stated in Schedule 2 of the HA 1988[25]. Section 7 of the HA 1988 sets out when a court must award possession. Regarding this, section 8 of the HA 1988 specifies the notice periods that landlords must give tenants before they can start court proceedings. Now, clause 3 of the Bill is providing to amend the grounds for possession in schedule 2 of the HA 1988, including in relation to notice periods and the courts making orders for possession[26]. For the purpose of redressing the balance for landlords, the Bill (schedule 1) brings new termination grounds for landlords: (1) intention to sell the property; or (2) intention to move into the property with or without their families. These rights may become exercisable after the first six months of the tenancy and upon two months' notice[27].

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22 Walsh (n 11) 242; Reid and Stewart (n 19) 49.

23 House of Commons (n 5) 15.

24 Reid and Stewart (n 19) 49.

25 These are: Ground 1–Recovery by owner-occupier or future occupier; Ground 2–Mortgages; Ground 3–Holiday lets; Ground 4–Student accommodation; Ground 5–Ministers of religion; Ground 6–Redevelopment; Ground 7–Death of a periodic tenant; Ground 7A–Anti-social and criminal behaviour; Ground 8–Serious rent arrears; Ground 9–Suitable alternative accommodation; Ground 10–Rent arrears; Ground 11–Persistent arrears of rent; Ground 12–Breach of obligation; Ground 13–Deterioration of the dwelling-house; Ground 14–Nuisance, annoyance or criminal activity; Ground 14A–Domestic violence; Ground 14AZ–Offences connected with riot; Ground 15–Deterioration of furniture; Ground 16–Employees; Ground 17–Grant induced by false statement.

26 House of Commons (n 5) 15.

27 Reid and Stewart (n 19) 49.

Landlords have right to serve notice to evict tenants who are in arrears amounting to two months' rent before the contractual term of the tenancy has expired, in the current status within the scope of section 8 of the HA 1988[28]. The Bill outlines a mandatory eviction process which applies where tenants have hit that limit three times within three years, regardless of the amount outstanding at the date of the hearing[29]. In addition to this, the notice period is being extended for rent arrears from two weeks to four weeks[30]. Serious anti-social or criminal behaviours such as murder, manslaughter, sexual offences, burglary, certain road traffic offences and certain drug related offences amongst others are regulated as a mandatory ground for possession of the landlord[31] (Ground 7A- Schedule 2 of the HA 1988). The Bill is reducing the notice period for serious anti-social or criminal behaviours, as well. In such circumstances, landlords will be able to make a claim for possession immediately with the amendment[32].

E. Rent Increases

A covenant to pay rent is not implied automatically into every lease, but the payment of rent is usual, and it is normally the intention of the parties that it should be paid[33]. Section 13 of the HA 1988 regulates the process which a landlord can issue notice to inform the tenant of a rent increase. Clause 5 of the Bill will amend section 13 of the HA 1988 and in this context, section 13 notice will be the only valid way that a private landlord can increase the rent. On the other hand, tenants will be able to have the possibility to challenge the rent increase under section 14 of the HA 1988, if they believe the increase to be above market rate[34]. Within these changes, rent increase will only be achievable by the service of a notice under section 13 and this will be possible annually upon two months' notice. In other words, rent may be increased once per year

28 Walsh (n 11) 250.

29 Reid and Stewart (n 19) 49.

30 House of Commons (n 5) 15.

31 Walsh (n 11) 248.

32 House of Commons (n 5) 15; Reid and Stewart (n 19) 49-50. Each possession ground has a minimum notice period. Clause 3 of the Bill states that under grounds 1, 1A, 1B, 2, 2ZA, 2ZB, 5, 5A, 5B, 5C, 5D, 6, 6A, 7 and 9, the notice period before the landlord may begin court proceedings is two months; under grounds 5E, 5F, 5G, 8, 8A, 10, 11 and 18, the notice period before the landlord may begin court proceedings is four weeks; under grounds 4, 7B, 12, 13, 14ZA, 14A, 15 and 17, the notice period before the landlord may begin court proceedings is two weeks (subsection 3).

33 MacKenzie and Nair (n 10) 245. The rent must be either certain or capable of being calculated with certainty at the date when payment becomes due. Although there is no necessity that rent should be expressed to be in money terms. It might be determined differently as a form of services in kind or chattels. See. Garner and Frith (n 14) 67.

34 House of Commons (n 5) 16-17.

and needs to be given to the tenant at least two months' notice of any change. Of course, it should be noted that the proposed rent will take effect unless the tenant applies to the Tribunal before the proposed rent increase date. These amendments also adopt an idea which reject rent controls being introduced to fix rent levels at the beginning of a tenancy[35].

F. Request of the Tenant to Keep a Pet

According to the English Private Landlord Survey 2021, forty-five percent (45%) of landlords are unwilling to rent their properties to tenants with pets[36]. Clause 7 of the Bill adds new provisions (section 16A, 16B, 16C) to the HA 1988 to strengthen tenants' rights to keep a pet in their home, which has previously been at the landlord's discretion. Section 16A, which regulates requesting consent to keep a pet, brings the rule that a tenant may keep a pet with the landlord's consent unless the landlord reasonably refuses. Section 16B states that the tenant's request must be made in writing and include a description of the pet (subsection 3). On the other side, section 16C aims to balance landlord concerns about damages given to the property. It gives right to landlord to require an insurance from the tenant to cover possible damages by a pet is purchased (subsection 1). Furthermore, clause 8 of the Bill amends section 1(4) of the Tenant Fees Act 2019 to permit landlords to demand from a tenant who keeps a pet to enter into a contract with an insurance company for pet damages[37]. The proposed consent regime between the landlord and the tenant to keep pets might be extended to other requests of the tenant such as redecorating the property, hanging pictures, or changing appliances. Thus, more satisfying right over the property particularly in terms of appearance, can be given to the tenant who wishes to have long-term interests. Such an idea is quite consistent with the policy of decent homes standard, as well.

G. Duties of Landlords Related to Tenancy

Clause 9 of the Bill inserts a new section (16D) which is named "Duty to give statement of terms and other information" into the HA 1988. This provision brings a duty on landlords to give the tenant a written statement of terms and information (subsection 2) on or before the first day of a tenancy (subsection 3). In this way, basic information about the tenancy and responsibilities of both

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35 Reid and Stewart (n 19) 50. The rent determination will be regarding to market value as it is now.

36 Department for Levelling up, Housing and Communities, 'English Private Landlord Survey 2021: Main report' (2022) 7 <https://www.gov.uk/government/statistics/english-private-landlord-survey-2021-main-report> accessed 21 September 2023.

37 House of Commons (n 5) 19-20; Reid and Stewart (n 19) 53. Relevantly see. Tenant Fees Act 2019 at <https://www.legislation.gov.uk/ukpga/2019/4/contents/enacted> accessed 25 September 2023.

parties are put into a written agreement to prevent and resolve the possible disputes easily. It may be considered as evidence if disputes between the parties go to court, as well[38]. Clause 10 of the Bill is another new provision that adds section 16E into the HA 1988 to prohibit some certain actions by a landlord or former landlord of an assured tenancy including misuse of possession grounds. According to this new section (16E), landlords will be prohibited from purporting to let the property for a fixed term and claiming to end the assured tenancy by service of a notice to quit (subsection 2). Additionally, subsection 3 and 4 of the section (16E), prohibit landlords from reletting the property within three months of obtaining possession on the ground for occupation or selling[39].

Clause 11 of the Bill brings new sections into the HA 1988 which are related to financial penalties and offences for the breach of the prohibitions in Clause 10 including the misuse of possession grounds and for not providing a written statement of terms as required by Clause 9. Under the title of financial penalties, section 16F regulates that a local housing authority will be able to impose a financial penalty up to £5,000 if satisfied beyond reasonable doubt that a landlord or former landlord has disobeyed the rules contained in clauses 9 or 10. As for offences, section 16G points out circumstances where a landlord or former landlord will be guilty of an offence and is liable for a fine or prosecution. According to section 16H, the local housing authority may impose a financial penalty as an alternative to prosecution under section 16G and the amount of this fine cannot be more than £30,000[40] (subsection 3).

H. Dispute Resolution by the Ombudsman and Enforcement

Under the current legislation, there is no ombudsman for private residential tenants to complain about their landlords[41]. Clause 24 of the Bill includes a plan to approve and designate a Privately Rented Sector Landlord Ombudsman Scheme as the one redress scheme and Clause 25 points out regulations regarding the conditions of it. Essentially, in subsection 2 (a) of the clause 25, it is mentioned that an appointment of an individual, approved by the Secretary of State, to be the principal executive in charge of investigating and determining complaints under a scheme. In other words, there is not any obvious literal reference to an *"Ombudsman"* or *"Head of Redress"* in the aforementioned

38 House of Commons (n 5) 20.

39 See Schedule 1 of the Bill for the mentioned grounds of possession; Ground 1 refers occupation by landlord or family and Ground 1A refers intention to sell the dwelling-house.

40 House of Commons (n 5) 21-22. These limits of financial penalties stated in sections 16F and 16H may be amended due to inflation by the Secretary of State regulations. See. Section 16I subsection 2 of the Bill.

41 Currently, social housing tenants have right to apply to an ombudsman and private residential tenants have a legal possibility to recourse against managing agents. See. para. 2-3 of the Schedule 2 in the Housing Act 1996; Reid and Stewart (n 19) 50.

provision, but the aim of these amendments is clearly providing an authorized scheme administrator to resolve disputes against landlords[42].

In that case, the Bill introduces a new, single, and government approved ombudsman model, covering all private landlords who rent out property, regardless of whether they use an agent or not in order to deal with tenant complaints about their landlords. The intention in proposing such a dispute resolution model is to resolve disputes swiftly without resorting to court proceedings and secondarily to provide a guide for identifying issues of the sector. Within the scope of clause 25 of the Bill (subsection 2 (i)), the ombudsman could require the landlord to issue an apology, provide an explanation, take remedial action, and pay compensation. It is proposed that the ombudsman will have the power to make a final decision which would be binding on the landlord if accepted by the tenant. Besides, it will be possible to enforce those decisions through the court if there is insufficient compliance with the ombudsman's decisions[43] (Clause 28).

I. The Database of Local Councils Against Landlords

There is already a database which local councils are required to record landlords who are issued with banning orders for committing an offence under the current legislation. According to Housing and Planning Act 2016[44] (Part 2: Chapter 3), "Database of Rogue Landlords and Property Agents" has a function that local housing authorities record landlords who are subjects of banning orders. Chapter 3 (Clauses 32–51) of the Bill will extend the Database under the name of "The Private Rented Sector Database" to include all offences committed by landlords, not just those which result in banning orders, and ensure they are publicly available. Pursuant to the current legislation, if a landlord is served with two or more civil penalty notices in a twelve (12) month period, they will be entered onto the Database. Chapter 3 of the Bill reduces the threshold to cover all civil penalties to give tenants more information within the context of the proposed Database. Besides, local councils will be allowed to require financial information from landlords to investigate their probable illegal business activities[45]. This new database is considered as the basis of the future Privately Rented Property Portal Service that includes wider information regarding privately rented properties[46].

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42 House of Commons (n 5) 33-34.

43 Reid and Stewart (n 19) 50; House of Commons (n 5) 38-39.

44 Home of UK Legislation, 'Housing and Planning Act 2016' <https://www.legislation.gov.uk/ukpga/2016/22/contents/> accessed 28 September 2023.

45 Reid and Stewart (n 19) 52; House of Commons (n 5) 40-41.

46 House of Commons (n 5) 41.

J. Other Changes Effect Residential Tenancy

Private landlords usually demand a deposit as security, against failure to keep the property in good condition. Clause 19 of the Bill requires landlords as a rule to have complied with the deposit protection necessities in order for a court to award possession47. However, there can often be a gap between the requirement to pay a deposit on a new house before the previous deposit has been returned while moving. Clause 19 and as a whole the Renters (Reform) Bill is not contained to introduce passporting for deposits. This is a significant criticism reason in the context of indifference to the solution of the situation, which causes a serious financial problem for tenants in practice[48].

Clause 21 of the Bill (subsection 1) changes Schedule 1 of the HA 1988 to add fixed-term tenancies of more than seven (7) years to the list of tenancies that are excluded from the assured tenancy system. In other words, tenancies of more than seven years will not be considered as assured tenancies when the Bill comes into force. Clause 22 of the Bill regulates penalties for unlawful eviction or harassment of occupier and in this direction adds new provisions to the Protection from Eviction Act 1977[49] to enable local housing authorities to issue financial penalties up to £30,000 for an offence under section 1 of the Act[50].

CONCLUSION

The Renters (Reform) Bill was introduced in the House of Commons on the date of 17 May 2023, and it will be the biggest statutory change in the field of rent law since the HA 1988. The Bill aims to provide a better deal for renters and, decent homes standard is felt at the background of the Bill for secure and decent homes within the scope of residential tenancy agreements. The Bill proposes that all assured tenancies will be periodic in future and can no longer have fixed terms. In this way, tenants are expected to have more flexibility to terminate their tenancy agreements when they need to. As a significant restriction on assured tenancies, length of the period of an assured tenancy will be either monthly or no more than twenty-eight (28) days. Thus, tenants might be able to be protected from the situations which they feel locked because of unnecessary long periods inside the tenancy. In terms of assured

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47 Except relating to serious crimes and anti-social behaviour based on Grounds 7A or 14 (Schedule 2) of the HA 1988.

48 Instead of passporting, the Government is suggesting the "Tenancy Deposit Protection Working Group" will monitor the commercial solutions already in place for bridging the gap through loan and insurance products and introduce legislation if needed. See. Reid and Stewart (n 19) 53.

49 The Official Home of UK Legislation, 'Protection from Eviction Act 1977' <https://www.legislation.gov.uk/ukpga/1977/43> accessed 28 September 2023.

50 House of Commons (n 5) 29-30.

shorthold tenancies, this type of tenancies will be abolished in line with the government's aim to simplify tenancy structures and bring a single system of periodic tenancies. By abolishing the whole assured shorthold tenancy regime, the Bill removes section 21 of the HA 1988 which is named "no fault" evictions, as well. This change might be the most advantageous gain for the protection of tenants functionally. Because it gives tenants a longer-term security and behavioural flexibility in this way.

The Bill will bring new termination grounds for landlords which are intention to sell the property, and intention to move into the property with or without their families. This provision might be considered as a balance factor for landlords' interests against changes in favor of tenants in the Bill. Rent increase may be the most significant point in practice as usual and according to the Bill, it will only be achievable by the service of a notice under section 13 of the HA 1988, and this will occur annually upon two months' notice. This is another gain for tenants within the framework of the Bill to prevent unpredictable rent increases. The Bill enables tenants to keep a pet in their homes within a new statutory protection. In response to the statutory request of the tenant to keep a pet in the property, landlords will be able to demand from the tenant to make a contract with an insurance company for pet damages. In addition to some other duties of landlords related to tenancy such as the duty to give a written statement of terms and other information, the Bill requires landlords to have complied with the deposit protection necessities.

The Bill introduces a new, single, and government approved ombudsman model, covering all private landlords who rent out property. It is expected that such a dispute resolution model might resolve some disputes swiftly without resorting to court proceedings. Furthermore, bringing a new database is included within the Bill which records all offences committed by landlords. This new database is considered as the basis of the future Privately Rented Property Portal Service that includes wider information regarding privately rented properties. When the Bill is considered in general, it is clear that the changes introduced are mainly aimed at protecting and improving the interests of tenants. On the other side, regulations to address some concerns of landlords are also included partly. It should be noted that there is no end to the positive changes regarding the protection of tenants who are on the economically weak side in the tenant-landlord relationship. As long as it is not ignored that landlords are also parties to the contract, and they also need legal protection. In that case, it can be said that the Bill is a significant progress in terms of protecting tenants. However, further development is always possible. For example, in this respect, Government's preparations to reform the regime for long leases of twenty-one (21) years or more might be considered later in another paper if it comes to light.

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EVALUATION OF BREAK FEE CLAUSES IN M&A CONTRACTS WITHIN THE FRAMEWORK OF UK LAW IN TERMS OF UNLAWFUL FINANCIAL ASSISTANCE*

Birleşme ve Devralma Sözleşmelerinde Yer Alan "Break Fee" Klozlarının Birleşik Krallık Hukuku Çerçevesinde Finansal Yardım Yasağı Yönünden Değerlendirilmesi

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ABSTRACT

The ban on financial assistance aims to prevent the usage of company resources for external interests and protect the shareholders and creditors of the company. The justification for this restriction is that a company's resources should be exclusively for the benefit of that company itself, not to facilitate the acquisition of its shares.

A break fee clause (or agreement) is a deal protection mechanism which requires a target company to pay a bidder a certain amount of fee if the target doesn't complete the proposed transaction. Break fees serve another purposes in addition to protecting the deal. In terms of the bidder, it enables the bidder to recover its costs arising from due diligence, legal fees, or applications to obtain regulatory approvals required for the transaction. On the other hand, from the target company's point of view, a break fee clause can be viewed as an opportunity for the target to refuse the completion of the deal at a known cost.

Break fee agreements could be characterized as "other financial assistance" under UK case law because they "*smooth the path towards the acquisition of the shares".* In this context, if a break fee agreement as "other financial assistance" reduces the net assets of the company to a material extent or the target company has no net assets, unlawful financial assistance occurs under the Companies Act 2006.

Keywords: Break Fee Agreements, Unlawful Financial Assistance, Deal Protection Mechanism

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

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ÖZET

Finansal yardım yasağının amacı, şirket kaynaklarının şirket dışı çıkarlar için kullanılmasını önlemek ve böylelikle hissedarları ve alacaklıları korumaktır. Bu yasak ile şirket kaynaklarının, şirket hisselerinin satın alımı için kullanılması engellenmek istenmiştir.

Break fee anlaşmaları, hedef şirketin, satın alma işlemi tamamlanmadığı takdirde alıcıya belirli bir ücret ödemesini gerektiren bir anlaşma koruma mekanizmasıdır. Bu anlaşmalar anlaşmayı koruma amacının yanı sıra başka amaçlara da hizmet etmektedir. Bu anlaşmalar alıcının; due diligence giderleri, avukatlık ücretleri veya gerekli regulasyonel onaylar için yapılan masrafları geri alabilmesini sağlamaktadır. Hedef şirket açısından ise; satım anlaşmasının tamamlanmasını bilinen bir maliyetle reddetme fırsatı olarak görülebilmektedir.

Öte yandan, break fee anlaşmaları "hisselerin satın alma yolunu kolaylaştırdığı" gerekçesiyle Birleşik Krallık Hukuku kapsamında finansal yardım türlerinden olan "diğer mali yardım" olarak nitelendirilmektedir. Bu bağlamda, "diğer mali yardım" niteliğindeki break fee anlaşmaları, şirketin net varlıklarını önemli ölçüde azaltmakta ise yahut hedef şirketinin net varlığı bulunmuyorsa, 2006 tarihli Birleşik Krallık Şirketler Kanunu gereğince hukuka aykırı şekilde bir finansal yardım gerçekleşmiş olacaktır.

Anahtar Kelimeler: Break Fee Anlaşmaları, Finansal Yardım Yasağı, Anlaşma Koruma Mekanizması

INTRODUCTION

The term "financial assistance" refers to a company providing financial assistance to a potential buyer for the purchase of its own shares and the shares of its parent company.[1] Financial assistance could be made by way of a gift, guarantee, security, or any other agreement[2] to be used to buy the target company's shares. Financial assistance is banned in many jurisdictions, such as the UK, Türkiye and Singapore, aiming to protect creditors and shareholders.[3]

Break fee clauses are provisions included in merger and acquisition (M&A) transactions that require the target company to pay the bidder a certain amount of fee if the target doesn't complete the deal.[4] These clauses are also called "target termination fee" or "break-up fee". Regardless of their name, their function is to protect the deal.

1 Alan Dignam and John Lowry, Company Law (11th edn, OUP Oxford 2020) 132; Maisie Ooi, 'The Financial Assistance Prohibition: Changing Legislative and Judicial Landscape' (2009) 2009 Sing J Legal Stud 135, 135.

2 For more type of financial assistance see s. 677 of the Company Act 2006.

3 Section 380 of Turkish Commercial Code and Section 76 of Companies Act 1967 of Singapore.

4 Micah S. Officer, 'Termination fees in mergers and acquisitions' (2003) 69 Journal of Financial Economics 431, 432.

This article addresses the fact that break fee clauses are commonly used in M&A transactions in many jurisdictions and aim to compensate the bidders' damages arising from the termination of the transaction. Since break fee clauses are prevalent contractual provisions in M&A transactions, various types of disputes may arise while enforcing them, such as the validity problem of these clauses. One of the major controversial issues regarding break fee clauses is whether they constitute unlawful financial assistance which is prohibited in many national laws and specifically in the UK Company Law we will address below. The main research question of this study is whether or not the inclusion of break fee clauses in M&A contracts breaches the prohibition of financial assistance, and if it does, under what conditions it does so.

This study proceeds as follows:

Section 2 examines the definition and purpose of the concept "unlawful financial assistance" and the rationale behind it. Section 3 deals with the comparison between unlawful financial assistance and capital maintenance doctrine. Section 4 examines types of unlawful financial assistance under the Companies Act 2006. Section 5 addresses the main research question of this study, which is whether break fee clauses constitute unlawful financial assistance under the Companies Act 2006. And finally, Section 6 concisely summarizes the conclusions reached.

A. The Concept of "Unlawful Financial Assistance"

The discussions on the prohibition of financial assistance in the UK date back to 1929. This prohibition was initially adopted through the enactment of the Companies Act 1929.[5] The prohibition of financial assistance is finally set out in the Companies Act 2006 between sections 677 and 683.

Section 678 of the Companies Act determines the essential elements of "unlawful financial assistance". Pursuant to this provision, it is unlawful financial assistance for a company to give financial assistance directly or indirectly to a natural person or legal entity seeking to acquire that company's shares or its parent company's shares before or at the same time as the acquisition takes place.

The prohibition of financial assistance by law aims to prevent the usage of company resources for interests not belonging to the company and to protect the shareholders and creditors of the company. The rationale behind this prohibition is that a company's resources should only be used for the benefit of the company, not to facilitate the acquisition of its shares.[6]

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5 See Chan Wai Meng & Sujata Balan, 'The Civil Consequences for Breach of the Prohibition against the Giving of Financial Assistance: The Malaysian Approach' (2008) 10 Austl J Asian L 77, 79ff.

6 ibid 80.

This prohibition protects the creditors of a company by preventing the depletion of its sources. Shareholders are also protected by this prohibition against purchases they are not involved in or they do not accept by not letting the management or controlling shareholders utilize the sources of the company.[7] *Dignam and Lowry* exemplify the reasons for this prohibition in the context of exchange markets, saying that a listed company could give money to people to acquire its shares and thus affect its share price depending on increased demand, thereby creating an incorrect apperance of the true value of its shares. This exemplifies the abusive financial assistance provided by the company management to potential investors.[8]

Under the Companies Act 2006, the scope of the prohibition is limited to public companies and their subsidiaries (whether public or private), and this prohibition applies to financial assistance provided before or after the acquisition. The prohibition was removed in terms of private companies, except for those which are subsidiaries of a public company.[9]

B. The Relationship between Unlawful Financial Assistance and the Doctrine of Capital Maintenance

Prohibition of financial assistance is regarded as one of the consequences and concrete reflections of the doctrine of maintenance of capital.[10] The doctrine of maintenance of capital is based on the opinion that the capital of companies should be maintained but should not be reduced or distributed, since the capital constitutes security for the company's creditors.[11] In this respect, some rules that are considered to be underpinned by the capital maintenance doctrine have been provided in national laws, such as the purchase of its own shares by the company, unlawful financial assistance, and restriction of dividend payments meaning that they must only be made from distributable profits.[12]

However, while provisions regarding the prohibition of unlawful financial assistance are considered to be based on the doctrine of capital maintenance, it is also argued that the rationale behind the prohibition of financial assistance was not only the need to maintain capital but also the prevention of potential risks the company, the shareholders, and creditors may face, as well as abusive practices by acquirers and the management of the company. In other words,

7 Philip Marshall, 'Unlawful financial assistance: rising from the dead' (2017) October Butterworths Journal of International Banking and Financial Law 531, 531-532.

8 Dignam and Lowry (n 1) 132.

9 Marshall (n 7) 531.

10 Ann Ridley, *Key Facts Company Law* (4th edn, Taylor & Francis Group, 2011) 72.

11 ibid 70.

12 Md. Saidul Islam, 'The Doctrine of Capital Maintenance and its Statutory Developments: An Analysis' (2013) 4 The Northern University Journal of Law 47, 48.

the aim of this prohibition is wider than the maintenance of capital, protecting the shareholders and creditors from abusive behaviors of the company management, which uses its own assets to finance the purchase of its own shares. Therefore, even in some cases where the capital maintenance doctrine is not violated and the capital or assets of the company are not reduced, such as by giving loans[13], unlawful financial assistance may still take place.[14]

C. Types of Unlawful Financial Assistance Under the Companies Act 2006

Section 677 lays down the situations that constitute unlawful financial assistance in a way that is not "numerus clauses". Examples of unlawful financial assistance laid down in this section include assistance given by way of a gift, guarantee, security, or indemnity (other than an indemnity in respect of the indemnifier's own neglect or default), by way of release or waiver**,** by way of a loan or other agreement, by way of the novation of, or the assignment (in Scotland, assignation) of rights arising under, a loan or such other agreement, or any other financial assistance.[15] In this regard, unlawful financial assistance may occur if a company lends or gives money to someone to buy its shares or to pay back a bank loan taken out to buy its shares; releases a debtor from liability to the company to assist the debtor to buy its shares; guarantees or provides security for a bank loan for the purchase of its shares; or provides financial assistance by buying the acquirer's assets at an overvalued price to help the acquirer buy its shares.[16]

The Companies Act 2006 also sets out the situations where a company gives any kind of financial assistance to a potential acquirer and thereby reduces its net assets to a material extent, and any other financial assistance where the company has no net assets [Section 677 1(d)]. The title "any other financial assistance" is important in terms of the question of "whether break fee clauses constitute unlawful financial assistance", which is addressed below.

D. Does a Break Fee Clause Constitute Financial Assistance?

The issue of whether break fee clauses in M&A transactions breach the prohibition of financial assistance is controversial in UK Law. Discussions on this subject have arisen from a court decision made in 2012. However, there is no clarity or explicit provision for it. It seems like the courts may face and decide on another claim in this context in the future and may determine the criteria.

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13 In such cases, although funds leave the company, their loss is mirrored in the company's records by the debt that is therefore created, so they do not reduce the company's net assets. See Dignam and Lowry (n 1) 134.

14 Dignam and Lowry (n 1) 134.

15 ibid 135.

16 Ridley (n 10) 76.

In this respect, initially, it is necessary for reaching a conclusion to make an assessment of the legal nature of break fee clauses and the transactions and acts that cause unlawful financial assistance under the Companies Act 2006 and then determine whether break fee clauses fit into the unlawful financial assistance methods laid down in Section 677 and subsequently, the legal outcomes of the breach (if any) should be addressed.

1. The Concept of "Break Fee Clause"

Break fee clauses, which are also called "target termination fee" or "break-up fee," are provisions included in merger and acquisitions (M&A) transactions as a deal protection mechanism that require that the target company pays the bidder a certain amount of fee if the target does not complete the proposed transaction.[17] Break fees are essentially fixed payments paid by one party to another according to specified conditions.[18]

Break fee clauses include the payment amount, which is determined as either a percentage of the transaction's value or a specific amount of money, and a list of conditions that are the grounds of the payment.[19] The conditions that are the grounds for the payment of the break fee usually include, but are not limited to, the target company's breach of any warranties or covenants, for instance, not obtaining necessary regulatory approvals, rejection of the transaction by the board of shareholders, or acceptance of a third-party bid.[20]

Break fee clauses aim not only to protect the deal between the parties but also serve other purposes. In terms of the bidder, it enables the bidder to recover its costs and expenses arising from due diligence, legal fees, or applications to obtain regulatory approvals to make the transaction.[21] On the other hand, from the target company's point of view, a break fee clause might be regarded as an opportunity enabling the target company to reject completion of the deal at a known cost.[22]

2. Assessment of the Legal Nature of Break Fee Clauses Under Section 677 of the Companies Act 2006

When evaluating whether break fees constitute unlawful financial assistance, the acts and transactions that are laid down as unlawful financial assistance in

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17 Officer (n 4) 432.

18 Heath Price Tarbert, 'Merger Breakup Fees: A Critical Challenge to Anglo-American Corporate Law' (2003) 34 Law & Pol'y Int'l Bus 627, 638.

19 Tarbert (n 16) 639.

20 Tarbert (n 16) 639; Paul Andre, Samer Khalil and Michel Magnan, 'Termination Fees in Mergers and Acquisitions: Protecting Investors or Managers?' (2007) 34 3-4 Journal of Business Finance & Accounting 541, 542.

21 ibid 632, 641; Frank C. Butler and Peter Sauska, 'Mergers and Acquisitions: Termination Fees and Acquisition Deal Completion' (2014) 26 1 Journal of Managerial Issues 44, 45.

22 Tarbert (n 16) 641.

Section 677 of the Companies Act 2006 and whether break fee clauses fit into them should be reviewed. In this respect, it is very important to benefit from case law and its interpretation, which have dealt with break fees in terms of the prohibition of financial assistance, because there is vagueness on this subject.

In our opinion, since there is no ambiguity or disagreement about whether break fees are not "gifts" or "loans", in this subsection we try to answer the questions of whether break fees qualify as "indemnity" and also whether break fees are only "inducements" for the bidders or whether they can be considered under the umbrella of "other financial assistance" laid down in Section 677.

a. Assessment of the Legal Nature of Break Fee Clauses and Indemnities

Indemnification or providing indemnity can be defined as a method by which a legally responsible party (indemnitee) shifts a loss to another party (indemnifier).[23] In addition to their contractual version, indemnities can also be imposed by law, which is not addressed here.

Indemnities aim to provide one party to a contract, for instance, a buyer, with a contractual remedy for recovering post-closing damages arising from breach of the contract or any other reasons set out in the indemnification agreement between indemnitee and indemnifier. In other words, indemnities provide one party to the contract with protection against losses incurred, even against third party claims, depending on the scope of the indemnification agreement.[24]

Indemnification agreements' scope of protection may vary in terms of amount. In some cases, there is a maximum amount of damage, which is called "cap" indemnitee has right to recover from the indemnifier. On the other hand, in some other cases there might be some minimum limits or thresholds called as "basket" which means the amount of loss the indemnitee incurs must exceed the threshold so that the indemnitee is entitled to recovery.[25]

Within the framework of this explanation regarding indemnities, it can be easily said that break fee agreements are similar to indemnities. However, in our view, even though they both aim to serve the purpose of protection against losses and they both originate from agreements, they differ in some aspects.

Initially, break fees are a sum of compensation that is agreed upon by the parties. In the event of the dissolution of an M&A deal, the target pays the break fee regardless of the actual or potential loss to the bidder. Even if the bidder's loss exceeds the break fee, the target is not under obligation to

23 D. Hull Youngblood, Jr. and Peter N. Flocos, 'Drafting And Enforcing Complex Indemnification Provisions' (2010) August The Practical Lawyer 21,22.

24 ibid 22.

25 ibid 30-31.

compensate this exceeding amount.[26] Briefly stated, no matter how much the loss to the bidder is, the amount of the break fee that will be paid to the bidder can't go beyond the amount determined in the break fee agreement in advance of the termination of the M&A deal. However, indemnities must necessarily keep the indemnitees "harmless against loss", which means fully reimbursing the losses of the indemnitees.[27] Undoubtedly, in practice, indemnities are limited to certain amounts of reimbursement called "cap" and "basket". In other words, indemnities are legal instruments fully reimbursing the "covered loss" of indemnitees. Accordingly, indemnifiers are under obligation to fully reimburse the covered loss and the compensation varies depending on the loss the indemnitee incurs. To summarize, break fees and indemnities differ in terms of the full recoverability of the losses the indemnitee incurs, and therefore, in our view, it is not technically possible to define break fee clauses as indemnity which also constitute unlawful financial assistance in this sense.

On the other hand, even if break fees qualify as indemnity, they still do not constitute financial assistance because of the exception in Section 677/1-b(i).[28] Section 677 establishes that an assistance given by way of indemnity in respect of the indemnifier's own neglect or default does not constitute unlawful financial assistance. In this respect, even if it is open to discussion to bring forward the argument that break fees constitute unlawful financial assistance because they have same qualifications as indemnities, Section 677 clearly provides that indemnities given in respect of the indemnifier's own neglect or default (which means, in the case of a break fee agreement, giving the bidder an indemnity by the target against losses incurred by the bidder because of the termination of the M&A deal by not completing the transactions by the target) do not constitute unlawful financial assistance**.** Therefore, in our view, even if break fee clauses are technically regarded as indemnity, these clauses do not constitute unlawful assistance in the presence of Section 677/1-b(i).

Finally, in *Paros Plc v. Worldlink Group Plc* case, the Court made a legal assessment regarding whether break fees constitute unlawful financial assistance. The Court stated that the break fee clause in the transaction is an indemnity in respect of liabilities, and the related clause, which is expressed to be a "break fee", is also financial assistance**.** The Court expressed that *"On a proper construction, ..., it is also an indemnity in that it is payable only in respect of fees and costs actually incurred"* and added *"Even if that construction is incorrect ... the break fee is 'other financial assistance' and has a material effect on the net assets of Worldlink"*.[29] As can be seen that the Court

[26] Tarbert (n 16) 689.
[27] ibid 689.
[28] ibid 688.
[29] *Paros Plc v. Worldlink Group Plc* [2012] EWHC 394 (Comm) [68]-[69].

addressed the possibility of whether break fees are regarded as an indemnity and therefore constitute unlawful financial assistance, but ultimately based its decision on unlawful financial assistance on "other financial assistance" set out in Section 677 which is explained below.

b. "Other Financial Assistance" Smoothing the Path to the Acquisition of Shares

Assuming that break fees may not qualify as indemnity and therefore unlawful financial assistance, it is necessary to make an assessment about them in terms of whether they constitute "other financial assistance" and review their impacts on the company's net assets.

Under Section 677/1(d), unlawful financial assistance takes place if any "other financial assistance" given by a company;

a) reduces the net assets of the company to a material extent, or

b) the company has no net assets.

The provision of Section 677/2 defines the term "net assets" as the aggregate amount of the company's assets less the aggregate amount of its liabilities. However, the Act doesn't say anything about "materiality". In this respect, courts will make their own assessments of "materiality" case by case because the criterion "materiality" depends on the size and economic power of the related company. It is possible that an amount of assets may be material for some financially smaller or struggling companies, whereas the same amount of assets is immaterial for a financially strong company.[30] In *Chaston v SWP* case[31] the company had limited net assets, and the payments constituting "other financial assistance" amounted to 20 percent of its net assets and therefore found material by the Court. In our view, no matter how big and financially strong the company is, a reduction of net assets by 20 percent by means of break fees or any other financial assistance is obviously material and should be found unlawful.

On the other hand, it is justifiably argued that a percentage-based test for "materiality" of the reduction in net assets of the company in terms of the establishment of unlawful financial assistance may not be appropriate for certain industries. Even though the percentage of reduction in net assets of the company is below the threshold set by courts, where the related company is a long-standing entity and the sector is a capital-intensive, non-growth, low profit-margin sector, even the smallest percentage of reduction in net assets can be material for the company when compared to its annual revenue of the

30 Eilís Ferran, 'Corporate Transactions And Financial Assistance: Shifting Policy Perceptions But Static Law' (2004) 63(1) Cambridge Law Journal 225, 232.

31 *Chaston v. SWP Group plc* [2002] EWCA Civ 1999.

company.[32] Therefore, courts should review and evaluate each transaction one by one rather than using a standard approach.

To recap, as we mentioned above, to be able to identify an action, or transaction, or any other thing as unlawful financial assistance in the context of Section 677/1(d), two different conditions should be met. First, the action or transaction shall qualify as financial assistance and be included in the term "other financial assistance". Second, the net assets of the company shall be reduced to a material extent by the assistance, or the company shall have no net assets. As we already addressed the conditions regarding the impacts of financial assistance on the net assets of the company required for the establishment of unlawful financial assistance in the Section 677/1(d), now it needs to be dealt with the questions of "what actions and transactions constitute other financial assistance?" and particularly "do break fees constitute "other financial assistance" under Section 677/1(d) in the light of case law?"

In *Chaston v. SWP Group plc* case, the target company's subsidiary paid a portion of the bidder's due diligence costs, which include accountancy and advisory fees of nearly £20,000. The Court ruled that section 151 of the Companies Act 1985 (now corresponding to section 677) was violated because, as a matter of commercial reality, the fees paid by the target company's subsidiary smoothed the path to the acquisition of shares.[33] This decision is of importance because, although whether break fees violate Section 677 or whether break fees can be regarded as "other financial assistance" in terms of legal characteristics is not discussed here, the court made a decision that may quide other courts in similar cases. The Court determined a criterion regarding "other financial assistance" in this decision. According to the Court, to be able to identify an action or transaction or anything else as "other financial assistance", it needs to be established that the action or transaction smoothes the path to the acquisition of shares.

In *Paros Plc v. Worldlink Group Plc* case, the Court ruled that the break fee is "other financial assistance" and has a material effect on the net assets of Worldlink. According to the Court, "*it is financial assistance because it is a proposed financial payment which smooths the path towards the acquisition of the shares."* and the court justifies this opinion as follows: "*if Worldlink withdrew from the negotiations .., ParOS was certain to recover a minimum contribution towards its expenses. As such the fee was 'smoothing the path to the acquisition of the shares' because it enabled ParOS to incur up to £150,000 of expenditure in progressing the proposed acquisition secure (or virtually so)*

[32] Tarbert (n 16) 690.
[33] Ferran (n 32) 230.

that it would be reimbursed to that extent if the transaction failed."[34]

Also, the Court stated in response to considerations in *Barclays Bank plc v. British & Commonwealth Holdings plc* Award regarding whether break fees are only an inducement that "*the break fee was not a mere inducement to enter into the transaction (if relevant). I consider that it amounted to 'other financial assistance' and that it materially reduced the net assets of Worldlink, given that they were negative at the time*."[35] The Court addressed the materiality issue as well, stating that "*there is no authority on the meaning of material… . … Where, as here, the company has negative net assets, the reduction is plainly material."*[36]

Finally, it should be emphasized that it is clear that Section 677 applies to cases where a person (natural or legal) acquires or only proposes to acquire shares in the target company. Even if the transaction is not complete and fails, unlawful financial assistance remains because it is sufficient in the context of Section 677 only to propose the acquisition.[37] In this context, it is stated by Professor Ferran that "*principle that a company's money should not be spent in helping someone to buy shares has never spelt out in such precise terms as to exclude cases where no acquisition actually takes place*."[38]

3. Legal Sanctions Against Break Fee Clauses Qualifying As Unlawful Financial Assistance

Section 680 provides that breach of the prohibition of financial assistance is a criminal offense requiring a fine for the company and its officers. This is the consequence of the breach in terms of criminal law. The other consequences of this breach relate to civil law. Breach of this prohibition can make the transaction (break fees in our case) unlawful and also negatively affect the enforceability and validity of the underlying agreement.[39]

As regards the consequences of the breach, it can be said that the agreement on financial assistance can't be enforced since the agreement is unlawful. In this regard, we can say that the bidder can't enforce the break fee clause if it constitutes unlawful financial assistance.[40]

As to the M&A transaction, it can be stated that if the break fee agreement, which constitutes unlawful financial assistance, is included in the M&A agreement, the M&A agreement can only be enforceable if it can be severed

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34 *Paros Plc v. Worldlink Group Plc* (n 31) [69] – [72].
35 *Paros Plc v. Worldlink Group Plc* (n 31) [72].
36 *Paros Plc v. Worldlink Group Plc* (n 31) [70].
37 Ferran (n 32) 233.
38 Eilís Ferran, *Company Law and Corporate Finance* (Oxford University Press 1999) 207.
39 Dignam and Lowry (n 1) 141.
40 See also ibid 141.

from the break fee clauses.[41] Courts, in such cases, by examining the parties' intentions will decide whether break fees are an essential part of the M&A agreement, and if so, they will declare the whole agreement void and unenforcable; if not, they will decide to sever this clause from the M&A agreement and enforce the remainder of the agreement.[42]

Finally, in *Paros Plc v. Worldlink Group Plc* case, the Court applied the severability doctrine to the case. The Court established that "*... illegality renders a contract unenforceable rather than void, if by void is meant that the agreement was never made. It is clear that property can pass under an illegal contract, and in some circumstances a Court will enforce a contract which involves an element of illegality. ...*"

The Court also held that break fee clause can be severed from the contract, and the remaining part could be enforced, saying that *"... clause 5.1 providing for payment of a break fee was a contract to do something (viz.* the giving of financial assistance) prohibited by statute. *... it was invalid and unenforceable. Counsel were agreed that clause 5.1 could potentially be severed, and it may well be that the remaining lawful part of clause 5.1 (...) was unaffected."*[43]

CONCLUSION

The prohibition of financial assistance aims to prevent the usage of company resources for external interests and protect the shareholders and creditors of the company. The rationale behind this prohibition is that a company's resources should only be used for the benefit of that company, not to facilitate the acquisition of its shares.

Break fee is a deal protection mechanism that requires that the target company pays the bidder a certain amount of fee if the target doesn't complete the proposed transaction. Break fees aim not only to protect the deal between the parties but also serve other purposes. In terms of the bidder, it enables the bidder to recover its costs arising from due diligence, legal fees, or applications to obtain regulatory approvals to make the transaction. On the other hand, from the target company's point of view, a break fee clause can be regarded as an opportunity enabling the target to reject completion of the deal at a known cost.

The question of whether break fee clauses breach the prohibition of financial assistance is a controversial issue in UK law. Even though break fee clauses look very similar to indemnities, which constitute financial assistance under Section 677, they differ in some aspects. In the event of the dissolution of an

41 ibid 142.

42 Uri Benoliel, 'Contract Interpretation Revisited: The Case of Severability Clauses' (2019) 3 1 The Business & Finance Law Review 90, 94.

43 *Paros Plc v. Worldlink Group Plc* (n 31) [75], [80].

M&A deal, the target pays the break fee regardless of the actual or potential loss to the bidder. Even if the bidder's loss exceeds the break fee, the target isn't under obligation to compensate this exceeding amount. However, indemnifiers are under obligation to fully reimburse the covered loss, and the compensation varies depending on the loss the indemnitee incurs.

In addition, the other reason why break fees can not be regarded as indemnities is the exceptional provision laid down in Section 677. It clearly provides that indemnities given in respect of the indemnifier's own neglect or default do not constitute unlawful financial assistance**.**

It is also necessary to assess whether break fees constitute "other financial assistance". Under Section 677/1(d), unlawful financial assistance is committed, if any other financial assistance given by a company;

a) reduces the net assets of the company to a material extent by the giving of the assistance, or

b) the company has no net assets.

As to whether break fees constitute "other financial assistance" in the light of case law, there is only one example, which is Paros Plc v. Worldlink Group Plc case. In this case, the Court ruled that the break fee clause in the M&A deal is "other financial assistance" and has a material effect on the net assets of the company. According to the Court, "*it is financial assistance because it is a proposed financial payment which 'smooths the path towards the acquisition of the shares' ".* The Court also states that the fee was "smoothing the path to the acquisition of the shares" because it enabled the bidder to incur up to a certain amount of expenditure in progressing the proposed acquisition secure (or virtually so) that it would be reimbursed to that extent if the transaction failed.

To sum up, break fee agreements can be characterized as "other financial assistance" because they "*smooth the path towards the acquisition of the shares".* In this context, if a break fee agreement as "other financial assistance" reduces the net assets of the company to a material extent or the target company has no net assets, unlawful financial assistance occurs under the Companies Act 2006.

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