BAKU STATE UNIVERSITY

LAW REVIEW

Volume 4 **February 2018** **Issue 1**

Founder: Baku State University Law School

ISSN: 2415-5555
Publisher: Baku State University Law School
Student Academic Society | www.bsulawss.org
Website: www.lr.bsulawss.org
Email: lawreview@bsulawss.org

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MÜNDƏRİCAT

*Clancey S. Henderson**

TAKING OFF THE GLOVES: TERRORISTS AS *HOSTIS HUMANI GENERIS*[1]

Abstract

Terrorists are self-admitted enemies to all peoples and States and are at war with the world. They do not confine themselves to operating within the same limiting spheres of humanitarian and human rights law, to which States subject themselves. They are unconcerned with the stability of the international community and ignore the foundation of State-to-State relations. Because terrorists are independent and unconstrained actors on the global stage, a special response is needed to wage an effective conflict against them. This response is accomplished by recognizing terrorists as hostis humani generis, an enemy to mankind. The classification of terrorists as hostis humani generis is justified because terrorists, as unique non-state actors, cause all States to suffer from their universally condemned actions, and only through a coordinated response can the international community overcome the terrorists' egregious conduct. By designating terrorists as hostis humani generis, a State reinforces the use of force as a legitimate means to address this special class. A collaborative effort by States to persecute terrorists wherever they are found will reduce safe havens and diminish their ability to deal violence to the world, thereby preventing the terrorists from engaging in future human rights abuses.

Annotasiya

Terroristlər insanlığın və dövlətlərin bariz düşməni olub, bütün dünya ilə müharibə edirlər. Onlar öz fəaliyyətlərini dövlətlərin müdafiəsini özləri üçün məcburi hesab etdikləri insan hüquqları və humanitar hüququn müvafiq sahələri ilə məhdudlaşdırmırlar. Terroristlər beynəlxalq cəmiyyətin stabilliyinə laqeyd yanaşır və dövlətlərarası münasibətlərin əsaslarını gözardı edirlər. Beynəlxalq arenada müstəqil və sərbəst aktor olmaqları səbəbilə onlarla mübarizə aparmaq üçün xüsusi cavab tədbirləri zəruridir. Bu cavab tədbirlərinə terroristlərin hostis humani generis, bəşəriyyətin düşməni kimi tanınması yolu ilə nail olunur. Terroristlərin hostis humani generis kimi tanınmağının səbəbi bütün dövlətlərin onların beynəlxalq səviyyədə qınanan hərəkətlərindən əziyyət çəkməsidir. Yalnız razılaşdırılmış cavab tədbirləri vasitəsilə beynəlxalq cəmiyyət terroristlərin təhlükəli hərəkətlərinə cavab verə bilər. Terroristləri hostis humani generis qismində müəyyən edərək, dövlətlər güc tətbiqini bu xüsusi sinfə qanuni təsir vasitəsi kimi əsaslandırır. Dövlətlərin terroristləri olduqları yerdə cəzalandırmaqda birgə səyləri təhlükəsizlik sığınacaqlarını

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[1] *Hostis humani generis* is a Latin phrase meaning "enemy of mankind" and is used as a legal term of art. It was traditionally used to describe the unique legal status of pirates in admiralty law. It "is neither a [d]efinition, [n]or as much a [d]escription of a [p]irat [sic], but a [r]hetorical [i]nvective to shew the [o]diousness of that [c]rime." Matthew Tindall, *The Law of Nations* 25–26 (1694).

azaldıb, onların dünyaya zərər yetirmək qabiliyyətini azaldacaq, nəticə etibarilə gələcəkdə terroristlər tərəfindən insan hüquqlarının pozulmasının qarşısını alacaqdır.

CONTENS

Introduction

Since the early twentieth century the United States has practiced total fire suppression, a concept under which the government seeks to quickly extinguish every forest fire. Unfortunately, this practice has proven detrimental.[2] The suppression of fires inadvertently causes forests to remain cluttered with the debris which was previously consumed by naturally occurring fires. The debris now accumulates until a tipping point is reached and the fires, feeding on the plentiful fuel load, quickly spread to become intense and uncontrollable.

Although the practice of total fire suppression permits fewer fires, it also results in occasional unmanageable fires which have become increasingly

[2] "Over 60 years of total fire suppression policy led to more intense fires that are more dangerous and difficult to extinguish." Stefanie Haeffele, *Burned Up: Government Wildfire Policy Has Actually Made Fires Worse* (Dec. 5, 2016), https://www.usnews.com/opinion/economic-intelligence/articles/2016-12-05/wildfire-policy-has-made-fires-worse. *See also* Irfan, *infra* note 2 (observing that fire prevention practices "paradoxically increase fire risk"); U.S. DEPT. OF AGRIC., FOREST SERV., CONTROLLED BURNING https://www.fs.usda.gov/detail/dbnf/home/?cid=stelprdb5281464 (last visited Nov. 20, 2017) ("The absence of these low intensity fires has increased the risk of large fire events and has negatively impacted the health of our forests.").

devastating and deadly.[3] In response, practices are employed to limit the naturally occurring fuel loads, such as prescribed burns, the purposeful burning of consumable debris under controlled circumstances.[4] Although the practice risks starting or exacerbating a fire event,[5] it has been successfully employed to help contain fires and save lives.[6]

While not the subject of this article, the firefighting practices mentioned above provide an interesting parallel to the principles of international law which will be discussed. Comparable to the practice of total fire suppression is the international community's restraint on the use of force which inadvertently fosters conditions fueling conflict.[7] But, similar to the practice of prescribed burns, international law can be applied in a manner than alleviates these conditions. In light of this imagery, this article will discuss how the international community's effort to suppress the use of force has allowed the "debris" to accumulate and how a deliberate, measured application of the use of force, akin to a controlled burn, can mitigate unmanageable conflicts in the long run. Ultimately, the question this article answers is: how can a state adapt the existing international legal framework to justify the use of force against an international terrorist threat in its nascent stage, in order to preclude the exacerbation of a full-scale war?

The solution discussed below is not a silver bullet; it is appropriate only for certain circumstances. Specifically, this article addresses how the application

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[3] Umair Irfan, *California's Wildfires Aren't "Natural" — Humans Made Them Worse at Every Step*, VOX MEDIA (Oct 16, 2017), https://www.vox.com/energy-and-environment/2017/10/12/16458242/risk-wildfires-worse-climate-change-california-san-francisco-los-angeles.

[4] Also referred to as planned, controlled, fuel-reduction, or hazard-reduction burning. *See* Prescribed Fire, https://www.fs.fed.us/fire/management/rx.html (last visited on Nov. 09, 2017); David Bowman, *Explainer: Back Burning and Fuel Reduction*, CONVERSATION (Aug. 7, 2014), https://theconversation.com/explainer-back-burning-and-fuel-reduction-20605.

[5] Bowman, *supra* note 4.

[6] Paulo M. Fernandez et al., *A Review of Prescribed Burning Effectiveness in Fire Hazard Reduction*, 12 Int'l J. of Wildland Fire 117, 117–18 (2003), https://www.fs.fed.us/rm/pubs/rmrs_gtr292/2003_fernandes.pdf ("[T]his fuel management tool facilitates fire suppression efforts by reducing the intensity, size and damage of wildfires.").

[7] "The United Nations, created to end wars, now prolongs and enlarges them." Richard Miniter, *Why Is The U.N. In The War-Making Business?*, FORBES (Apr. 22, 2011), https://www.forbes.com/2011/04/18/united-nations-libya.html#4458edab427b. *See* Walter Enders, *Domestic Versus Transnational Terrorism: Data, Decomposition, and Dynamics*, 48 J. PEACE RES. 319, 319 (May 2011) ("A key finding is that shocks to domestic terrorism result in persistent effects on transnational terrorism; however, the reverse is not true. This finding suggests that domestic terrorism can spill over to transnational terrorism, so that prime-target countries cannot ignore domestic terrorism abroad and may need to assist in curbing this homegrown terrorism.").

of existing laws can permit a state (hereafter the "victim state")[8] to use force in self-defense against a transnational terrorist organization[9] operating from another state (hereafter the "territorial state"),[10] which has not consented to a use of force within its territory and which is unwilling or unable to address the terrorist threat to the victim state. This discussion is necessary because the "'war on terrorism' is being conducted---by both states and non-states---in a relative vacuum of international law."[11] In order to overcome the contention among states concerning the use of force against terrorists, this article seeks to fill that vacuum with existing law in novel ways.

Part I addresses the existing legal standards and how anti-interventionist sentiment has deterred national security prerogatives, allowing conditions conducive to conflict to accrue. *Part II* discusses expanding the designation of *hostis humani generis* to apply to terrorists in a manner beyond the traditional criminal framework, providing states with legal justification for the use of force. *Part III* addresses how normative principles can serve as limits to the justification for the use of force and prevent abuse by a state.[12] This article concludes with the assertion that designating terrorists as *hostis humani generis* grants states the authority to use force and that such action will limit the scope of conflicts, minimize the infringement of state sovereignty, and enable effective military action against terrorism.

I. The International Legal Framework

This Part first addresses anti-interventionist sentiments among the international community and the changes to such sentiments in recent years, particularly regarding the use of force against terrorists. It will then briefly address the circumstances under which a use of force is currently permitted under international law. Particular attention is directed to the doctrine of self-defense which becomes the basis for justifying the use of force against terrorists.

[8] This term is used to designate the state under threat of an armed attack by the terrorist organization in question.

[9] For the working definition used by this article *see infra* note 94 and accompanying text.

[10] This term is used to designate the state from whose territory the terrorist threat originates.

[11] *See, e.g.*, Stanley Fish, *Don't Blame Relativism*, 12 RESPONSIVE COMMUNITY 27, 30 (2002).

[12] Scholars have described three ways that international law can affect policy decisions as: a constraint on actions, a basis of justification action, and organizational structures, procedures, and forums. ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW 17 (1974). This article undertakes a discussion of justification in order to mitigate interference by the international community in a state's security prerogatives.

A. Anti-interventionist Sentiments and Recent Changes

In the post-World War II era, the international community embraced restrictive analysis, "an approach seeking to limit the availability of military force to the largest possible extent," as part of the *jus contra bellum* doctrine.[13] Subsequent interpretations of use of force and *jus ad bellum* principles caused the international community to view the use of anti-terrorist force with skepticism.[14] Despite challenges to this perception and a degree of change in recent decades, many states still adhere to a restrictive view.[15]

There is a danger in inaction when action is warranted. The discomfiture concerning the use of force discourages military action and enables criminals in committing atrocities.[16] This truth is not exclusive to addressing terrorist threats, but is evident in many circumstances. Examples include the international community's delayed response to conflicts in Rwanda and the subsequent genocide of an estimated one million Tutsis, and more recently a reluctance[17] to intervene in the Syrian war which has seen almost half a million deaths and over five million refugees.[18] By seeking to chill the use of force among states, the international community has inadvertently exacerbated the consequences of conflict.[19]

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[13] Christian J. Tams, *Use of Force against Terrorists*, 20 EUR. J. INT'L L. 359, 363 (2009).

[14] *Id.* at 364; *See* Gregory E. Maggs, *The Campaign to Restrict the Right to Respond to Terrorist Attacks in Self-Defense Under Article 51 of the U.N. Charter and What the United States Can Do About It*, 4 REGENT J. INT'L L. 149 (2006); Patrick Goodenough, *Stellar Cast of Critics Slams U.N. As Anti-American, Anti-Israel*, CNS NEWS (Sept. 23, 2011) https://www.cnsnews.com/news/article/stellar-cast-critics-slams-un-anti-american-anti-israel; Rachel Alexander, *Anti-Americanism Increasing at the United Nations*, TOWNHALL (May 07, 2013), https://townhall.com/columnists/rachelalexander/2013/05/07/antiamericanism-increasing-at-the-united-nations-n1590060.

[15] See Tams, *supra* note 13, at 374.

[16] *See* Prime Minister of India Modi's Comments at the Heart of Asia Summit on Dec 04, 2016 indicating that "silence and inaction against terrorism only embolden terrorists and their masters."

[17] Jo Cox et al., *The Cost of Doing Nothing: The Price Of Inaction in the Face of Mass Atrocities*, POLICY EXCHANGE (2017), https://policyexchange.org.uk/wp-content/uploads/2017/01/Intervention-01-17_v8.pdf; *see also* Kyle Almond, *Why the World isn't Intervening in Syria?*, CNN (Feb. 23, 2012), http://www.cnn.com/2012/02/23/world/syria-intervention/index.html (answering its own question as to why there hasn't been any intervention in the Syrian conflict with the poignant response: There is no international consensus.).

[18] *Syrian Civil War Fast Facts*, CNN (Oct. 17, 2017) http://www.cnn.com/2013/08/27/world/meast/syria-civil-war-fast-facts/index.html; HUMAN RIGHTS WATCH, https://www.hrw.org/world-report/2017/country-chapters/syria (last visited Oct. 30, 2017).

[19] *See* Miniter, *supra* note 7; Richard Norton-Taylor, *Global Armed Conflicts Becoming More Deadly, Major Study Finds*, GUARDIAN (May 20, 2015), ("International Institute for Strategic Studies says despite fewer wars number of deaths has trebled since 2008 due to an 'inexorable intensification of violence.'") https://www.theguardian.com/world/2015/may/20/armed-

The exacerbation of conflicts calls into question the wisdom of anti-interventionism.[20] As a result, "the legal rules governing the use of force have been re-adjusted" [21] in recent decades to "permit forcible responses against terrorism under more lenient conditions."[22] Although these changes are a step in the right direction, additional adjustments are still needed.[23] This article proposes an adjustment to anti-terrorism strategies to weave together the traditionally separate approaches of criminal prosecution and military targeting.[24] This discussion is necessary because antiquated conceptualizations are insufficient to address modern non-state threats which are capable of bringing to bear financial and human resources comparable to that of a state.[25] The concept of terrorists as permissible targets, absent a military operation, is predicated upon a liberal construal of the doctrine of self-defense and the existing legal framework of *hostis humani generis.*

B. Use of Force in Self-Defense

The United Nations Charter placed significant restraints on a Member State's ability to resort to the use of force.[26] However, the Charter also incorporated exceptions to the prohibition against force,[27] including: the use of force under the direction of the Security Council and the rights of individual and collective self-defense.[28] The Security Council has abstained from or been slow to authorize the use of force against terrorists.[29]

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conflict-deaths-increase-syria-iraq-afghanistan-yemen; *but cf.* Trends in Armed Conflict, 1946–2014, 01 Conflict Trends 1 (2016), (optimistically observing "long-term trends nevertheless driving the waning of war are still at work") http://file.prio.no/publication_files/prio/Gates,%20Nyg%C3%A5rd,%20Strand,%20Urdal%20-%20Trends%20in%20Armed%20Conflict,%20Conflict%20Trends%201-2016.pdf

[20] *See generally* Tams, *supra* note 13, at 373–75.

[21] Tams, *supra* note 13, at 361.

[22] *Id.*

[23] *Id.* at 394–97.

[24] *Id.* at 396.

[25] *Infra* notes 4104–4105 and accompanying text.

[26] U.N. Charter art. 2, ¶ 4.

[27] *See* Michael Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL'Y 539, 549 (2002) ("Article 51 is grounded upon premises that neither accurately describe nor realistically prescribe state behavior.").

[28] *See* U.N. Charter art. 2, ¶ 4, art. 42, 43, 51.

[29] *See* Tams, *supra* note 13, at 359.

[29] Julian Borger & Bastien Inzaurralde, *Russian Vetoes are Putting UN Security Council's Legitimacy at Risk, Says US*, GUARDIAN (Sept. 23, 2015), https://www.theguardian.com/world/2015/sep/23/russian-vetoes-putting-un-security-council-legitimacy-at-risk-says-us; *see also id.* ("Syria is a stain on the conscience of the security council. I think it is the biggest failure in recent years, and it undoubtedly has consequences for the standing of the security council and indeed the United Nations as a whole." Quoting Matthew Rycroft, British Ambassador to the United Nations). It is also

Thus, states have resorted to the right of self-defense to justify[30] their use of force.[31]

To be justified as an act of self-defense, a use of force must satisfy the principles of *jus ad bellum*.[32] There is some variation as to the exact application of the criteria, but for the purposes of this article, *jus ad bellum* requires that the use of force must be both necessary and proportional to be justified.[33] This means to justify a state's decision to use force in self-defense, the action must be both necessary to defend the state and the use of force must be proportional to that objective.[34] This article is not concerned with measuring proportionality, nor the evaluation of the different types of force which may be used. That discussion is left for others to undertake. Rather, this article is concerned with the necessity of self-defense as a key component justifying the use of force at all. Under current views, necessity is satisfied when a state

worth noting that the United States has been prolific with their veto power in protecting Israel from scrutiny for action in Palestine.

[30] *See, e.g.*, Letter dated 23 September 2014, from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General, U.N. Doc S/2014/695 (2014); Letter dated October 7, 2001, from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. SCOR, 56th Sess. at 1, U.N. Doc. S/2001/946 (2001), http://www.un.int/usa/s-2001-946.htm ("In accordance with Article 51 of the Charter of the United Nations, I wish ... to report that the United States of America ... has initiated actions in the exercise of its inherent right of individual and collective self-defense following the armed attacks that were carried out against the United States.").

[31] Though there is some debate that the United Nations Charter governs only state-to-state relations and cannot justify the use of force in self-defense against terrorists, it is a minority position dismissed by two rational. First, states exercising the use of force against terrorists in other nations have found themselves to be acting pursuit to Article 51 which contains the right to self-defense. Secondly, the argument is negated by the fact that the doctrine of self-defense still exists in international customary law and did not cease to exist merely because it was written into a treaty. For a discussion on why Art. 51 includes non-state actors *see* Carsten Stahn, *Terrorist Acts as Armed Attack: The Right to Self-Defense, Article 51(1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35, 54 (2003). The challenge is offered because it seems contrary to the premise of the Charter which was to govern state-to-state relations. But, it remains consistent with the purposes and objectives of the document which, simply stated, are to preserve international peace and security. *See* U.N. Charter art. 1.

[32] *See* Statute of the International Court of Justice, art. 38 ¶ 1. Treaty law especially the U.N. Charter art. 2, ¶ 4 restraint on the use of force, is often invoked as an argument against using force. But, even when treaty law is used to justify the use of force, such as under U.N. Charter art. 51 allowing force in self-defense, the discussion inevitability turns to customary law to identify, define, and apply the relevant principles. This customary international law is the primary source of concern for the current discussion.

[33] Dapo Akande & Thomas Liefländer, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense*, 107 AM. J. OF INT'L L. 563, 563 (2013).

[34] "The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law." Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons, 1996 I. C. J. Rep. 245, ¶41 (July 8).

suffers an armed attack[35] or a state is exposed to an imminent threat.[36] Additionally, a few states hold the view that the certainty of a threat, regardless of its imminence, also establishes the necessity of using force.[37]

It is important to recognize that the three situations under which a state may seek to justify the use force in self-defense are of varying utility. First, no state can rightfully be expected to wait to be victimized before taking action.[38] So, the justification derived from suffering an armed attack is not ideal because it necessarily requires a state to sustain some harm. Next, the justification in response to an imminent threat is also not ideal. Imminence is difficult to define and determine.[39] Some states hold imminence to restrain responding with force until the need is "instant, overwhelming, leaving no choice of means, and no moment of deliberation."[40] This entails delaying the

[35] "[S]elf defence would warrant only measures which are proportional to the armed attack and necessary to respond to it" as "a rule well established in customary international law" Case concerning Military and Paramilitary Activities in and against Nicaragua [hereinafter "*Paramilitary Activities*"], 1986 I. C. J. Rep. 94, ¶176 (June 27).

[36] *See* Akande, *supra* note 33, at 563–66.

[37] This view is often referred to as the Bush Doctrine. It is not widely accepted as it is currently articulated. *See* Dietrich Murswiek, *The American Strategy of Preemptive War and International Law*, INST. PUB. L. 1 (Mar. 2003), https://ssrn.com/abstract=397601 or http://dx.doi.org/10.2139/ssrn.397601 ("By claiming a right to preemptive action, the U.S. government is pushing a change in public international law. If other States don't object a beginning practice of preemptive war, there could emerge a new rule of public international law that allows preemptive wars."); John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self Defense in Customary International Law*, 15 PACE INT'L L. REV. 283, 284 (2003) (discussing the historical development of the Bush Doctrine) (quoting Thomas Powers, *The Man Who Would Be President of Iraq,* N.Y. TIMES, Mar. 16, 2003, at Week in Review, 1, 7.); Dominika Svarc, *Redefining Imminence: The Use of Force against Threats and Armed Attacks in the Twenty-First Century*, 13 ILSA J. INT'L & COMP. L. 171, 183 (2006) ("If the ultimate goal of international law is to preserve State's right to effective self-defence, the standard of imminence may need to be read more broadly."); *see also* Adil Ahmad Haque, *Imminence and Self-Defense Against Non-State Actors: Australia Weighs In*, JUST SECURITY (May 30, 2017), https://www.justsecurity.org/41500/imminence-self-defense-non-state-actors-australia-weighs/ (observing that some consider Australia to have embraced the Bush Doctrine).

[38] *See Cf.* Mary E. O'Connell, *Lawful Self-Defense to Terrorism,* 63 U. PITT. L. REV. 889 (2002) (interpreting self-defense to require the occurrence of an attack or an attack underway).

[39] Debates still arise as to how imminent a threat must be before a state may act in self-defense. *See, e.g.*, Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 4 (1972) ("It was never the intention of the Charter to prohibit anticipatory self-defense and the traditional right certainly existed in relation to an 'imminent' attack."). *But see* IAN BROWNLIE,
INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 278 (1963) (stating that Article 51 prohibits anticipatory self-defense).

[40] This is commonly known as the Caroline Doctrine. *See* Webster, Daniel. *'Letter to Henry Stephen Fox'*, in THE PAPERS OF DANIEL WEBSTER: DIPLOMATIC PAPERS, 1841-1843 at 62 (1983).

use of force until the last opportunity for an aggressor to change its course has passed, and diminishes the victim state's ability to effectively defend itself.

This is particularly true in asymmetric conflicts where the foreseeability and imminence of an attack is more difficult to determine.[41] Attacks are predicted through the use of warnings and indicators in traditional conflicts.[42] These traditional measures of imminence are well established by intelligence agencies which have observed enemy operations, troops compositions, and doctrine,[43] allowing them to intuit precursory actions necessary for the deployment of military forces. However, terrorists do not have traditional military structures, nor do they pursue traditional military objectives.[44] Furthermore, terrorists often work in compartmentalized cells,[45] severely negating the utility and accuracy of indicators and warnings. However, preparations for an attack can be confirmed with reasonable certainty by other intelligence strategies, but their imminence is less predictable.[46]

The differences between traditional conflicts and attacks conducted by asymmetric actors highlight the utility of justifying the use of force when a threat is certain, as opposed to waiting to be victimized or gambling with predictions of imminency. Because using force in response to threats that are certain is the most advantageous for the purposes of self-defense, this article proposes that this approach be used. Although the necessity of acting in self-defense when a threat is certain is currently recognized by only a few states,

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[41] For more on the difficult posed by asymmetric challenges see Charles J. Dunlap, Jr., *Preliminary Observations: Asymmetrical Warfare and the Western Mindset*, *in* CHALLENGING AMERICA SYMMETRICALLY AND ASYMMETRICALLY: CAN AMERICA BE DEFEATED? 1-17 (Lloyd J. Matthews, ed., 1998).

[42] Warnings and indicators comprise a "specialized intelligence effort for advanced strategic early warning" which "seeks to discern in advance any…intent to initiate hostilities." Thomas J. Patton, *Monitoring of War Indicators*, STUD. INTELLIGENCE 55 (Sept. 18, 1995).

[43] Order of Battle analysis is used to "to scrutinize all information pertaining to a military force to determine his capabilities, vulnerabilities, and probable course(s) of action." *Introduction to Order of Battle*, GLOBAL SECURITY (accessed Nov. 10, 2017), https://www.globalsecurity.org/military/library/policy/army/accp/is3001/lesson-1.htm. *See also* Patton, *supra* note 42, at 65–67 (noting order of battle as a factor in predicting an attack).

[44] Traditional military objectives are objects which "by their nature, location, purpose or use make an effective contribution to military action, and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage." *Military Objectives*, INT'L COMMITTEE OF THE RED CROSS (accessed on Nov. 09, 2017), https://casebook.icrc.org/glossary/military-objectives. There are, of course, outliers and exceptions to this observation. Some terrorist organizations follow models akin to traditional military structures, such as Hezbollah. However, the operations of these organizations remain distinct because they maintain additional capacities not common to traditional militaries. *See* Eitan Azani, *The Hybrid Terrorist Organization: Hezbollah as a Case Study*, 36 STUD. CONFLICT & TERRORISM 889 (2013).

[45] MARC SAGEMAN, UNDERSTANDING TERROR NETWORKS 166 (Univ. of Penn. Press 2011).

[46] *See, e.g.*, THOMAS FINGAR, REDUCING UNCERTAINTY: INTELLIGENCE ANALYSIS AND NATIONAL SECURITY 67–88 (Stanford Univ. Press 2011) (addressing estimative analysis).

under certain circumstances, more states may be willing to accept it as a legitimate justification.

Prior to the drafting of the U.N. Charter, western powers adopted the practice of declaring war in official acts prior to the outset of hostilities,[47] as codified in the Convention Relative to the Opening of Hostilities.[48] After a war was declared, a state did not need to suffer an attack, nor wait for an attack to become imminent, before it could use force against the declaring state. The declaration of war created the certainty of a threat forthcoming which justified a state in acting, even preemptively.[49] Therefore, in circumstances when a declaration of war is made, a state is justified in using force because the threat has become certain and the necessity of using force in self-defense is no longer questioned. This is the circumstance under which states find themselves in the War on Terror. States which are at war with terrorists[50] need not delay actions necessary for the preservation of their security and may preemptively act to prevent attacks which are certainly forthcoming, even if specific terrorist attacks cannot be deemed imminent.

[47] While this practice persists, "declarations of war have largely fallen into disuse since World War II" because "the establishment of the United Nations largely obviates the need for individual nations to declare war. Other than acts of immediate self-defense in conformance with the U.N. Charter it is the collective action of the Security Council, rather than the individual acts of states, that ordinarily authorizes 'the use of force to maintain or restore international peace and security.'" Charles J. Dunlap, Jr., *Why Declarations of War Matter*, HARV. NAT'L SECURITY J. (Aug. 30, 2016), http://harvardnsj.org/2016/08/why-declarations-of-war-matter/. For example, the United States has not officially declared war since World War II.

[48] Hague Convention (III) on the Opening of Hostilities, Oct. 18, 1907, 36 Stat. 2259, 205 C.T.S. 263, art. 1 ("The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a declaration of war, giving reasons, or of an ultimatum with conditional declaration of war."), http://avalon.law.yale.edu/20th_century/hague03.asp.

[49] "[A] declaration of war in itself creates a state of war under international law and legitimates the killing of enemy combatants, the seizure of enemy property, and the apprehension of enemy aliens." Jennifer Elsea & Matthew Weed, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, CONG. RES. SERV. at i (April 18, 2014), https://www.fas.org/sgp/crs/natsec/RL31133.pdf; *see id.* at 23 ("States likely still retain a right to issue declarations of war, at least in exercising the right of self-defense; and such a declaration seemingly would still automatically create a state of war"); Dunlap, *supra* note 47 ("[B]y automatically establishing a state of war, perhaps in circumstances where the level of violence would not otherwise create it, a declaration of war could control the timing of the application of the laws of war and influence other aspects of international law, including neutrality law. Depending on the circumstances, this ability could be quite significant from a strategic and tactical perspective").

[50] *See infra* section II.270.

However, justifying the use of force in a war against a non-state actor[51] is more tenuous given the intrusion it permits on the sovereignty of the territorial state. Therefore, complementary restrictions are needed to ensure the use of force is necessary and not abusive. This is accomplished in two ways. First, organizations against which force may be used in self-defense is limited to terrorists classified as *hostis humani generis*. Secondly, restrictions on when and where such organizations may be attacked limits the intrusion upon the sovereignty of the territorial state wherein the terrorists operate. This allows a victim state to defensively exercise force against a non-state actor while simultaneously restricting a use of force which intrudes on the sovereignty of a territorial state to the narrowest circumstances.

II. Justification for the Use of Force against *Hostis Humani Generis*

The designation of *hostis humani generis* justifies the use of force against terrorists while simultaneously reducing the need for the use of force.[52] There is a reduced need for force because the designation permits all states to criminally prosecute the group by exercising universal jurisdiction. Universal jurisdiction gives courts authority to try criminals when the court otherwise lacks authority because the crime was committed beyond the recognized jurisdictional reach of the court.[53] This is important because the use of the legal system to apprehend and punish terrorists entails a decrease in the need for the use of force.[54] However, where criminal prosecution is not practicable, the

[51] A non-state actor means any organization within a state which is not representative of, nor responsible to that state's government.

[52] The Separate Opinion of Vice-president Weeramantry, in the Gabcikovo-Nagyoros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7 (Sept. 25) (separate opinion by Weeramantry, J.), obvserved that an advancement of international law is accomplished by drawing in benefits of the insights available and looking to the past. He finds that seeking out principles *a posteriori* from the experience of the past, rather than setting out new principles *a priori* is in keeping with the formation of international law dating back to Grotius, who followed a similar practice.

[53] "The term 'universal jurisdiction' refers to the idea that a national court may prosecute individuals for any serious crime against international law — such as crimes against humanity, war crimes, genocide, and torture — based on the principle that such crimes harm the international community or international order itself, which individual States may act to protect. Generally, universal jurisdiction is invoked when other, traditional bases of criminal jurisdiction do not exist, for example: the defendant is not a national of the State, the defendant did not commit a crime in that State's territory or against its nationals, or the State's own national interests are not adversely affected." *Universal Jurisdiction*, INT'L JUST. RESOURCE CTR., http://www.ijrcenter.org/cases-before-national-courts/domestic-exercise-of-universal-jurisdiction/ (last visited Nov. 11, 2017).

[54] *See id.*

designation as *hostis humani generis* also justifies a state's use of force to eliminate the organization.[55]

A. Terrorists as Hostis Humani Generis

In order to justify the use of force against terrorists the *hostis humani generis* designation must first be applied to them.[56] The idea of expanding *hostis humani generis* to include terrorists, largely in reference to pirates, the first class to be so distinguished,[57] was discussed in *Hostis Humani Generi: Piracy, Terrorism and a New International Law* by Dr. Doug Burgess.[58] Dr. Burgess's proposition focuses on the comparison for the benefit of criminal prosecution under universal jurisdiction.[59] This article will expand on that discussion for its utility in justifying military action, not a first recourse, but only where criminal prosecution is impractical. But, the analysis of both historical relevance and criminality is useful for the current undertaking as well and some relevant points are highlighted below.

The designation of *hostis humani generis* was initially applied to pirates by Cicero and the Roman Empire.[60] It encompassed two concepts: that piracy occurred beyond the jurisdiction of any one state, making pirates an enemy to the entire human race, and that the right to prosecute pirates was

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[55] *See* Section II.A.

[56] *See* Elimma C. Ezeani, *The 21st Century Terrorist:* Hostis Humani Generis, 3 BEIJING L. REV. 158, 169 (2012) (arguing that modern terrorism is different and should now be classified as *hostis humani generis*). The idea was advocated decades ago by Professor Thomas Opperman (Fed. Rep. of Germany), who boldly stated that "[t]he modern terrorist has to be outlawed as "*hostis humanis generis*." International Terrorism, 57 INT'L L. ASS'N REP. CONF. 119, 128 (1976).

[57] Traditionally, the class of crimes subject to universal jurisdiction and universal condemnation under the designation of *hostis humani generis* included only piracy. United States v. Yousef, 327 F.3d 56 (6th Cir. 2003). Universal jurisdiction was expanded to include other crimes, including: slavery, genocide, and torture. However, some of these were only recently recognized. For example, violations of the laws of war was not suggested until the Second World War. *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554, 572 (1995) (citing Hersh Lautherpacht, *The Law of Nation and the Punishment of War Crimes*, 2 BRIT. Y.B. INT'L L. 58, 65 (19944), as the first to propose universal jurisdiction over war criminals). Similarly, prohibition on torture were only solidified in international law in the years following World War II under the Universal Declaration of Human Rights and other subsequent international and regional human rights treaties. *See The Legal Prohibition Against Torture, infra* note 71. This demonstrates the evolving nature and growing scope of universal jurisdiction and the *hostis humani generis* designation.

[58] Doug R. Jr. Burgess, *Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT'L & COMP. L. REV. 293, 342 (2006).

[59] *See Id.* at 294 ("I will argue that the existing international common law regarding piracy, particularly as a crime of universal jurisdiction, is the most useful framework for defining terrorism and determining a legitimate state response.").

[60] Burgess, *supra* note 58, at 301 (citing ALFRED P. RUBIN, THE LAW OF PIRACY 17 n.61., 18 (2nd ed. 1998)).

consequently common to all nations.[61] Even though "[t]he idea of pirates as *hostis humani generi*…may be two thousand years old…it has taken almost all of that time for that conception to gain ultimate acceptance in international law."[62] This is in part due to the practice of privateering, the employment of pirates by nations to achieve state objectives, which created political and legal conflicts among nations as to the legitimacy of piracy.[63] It was not until the Declaration of Paris in 1856, that piracy was found to be too heinous a crime to be used by states as a tool of achieving their political objectives.[64]

Dr. Burgess draws the conclusion that "[s]ince piracy and terrorism share a *mens rea*, *actus reus*, and *locus*, we may conclude that they are, in effect, the same crime."[65] At the risk of oversimplifying his conclusions, he offers that the *mens rea*[66] of piracy is one of intent,[67] the *actus reus*[68] of piracy includes, among other acts, acts of homicide and destruction,[69] and the *locus*[70] of piracy, once confined to the high seas, now encompasses acts "committed on state territory by 'descent from the sea.'"[71] He further offers that because they are the same crime, "[t]hey must also, accordingly, share a legal definition. Terrorists, like pirates, are *hostis humani generi* under international law."[72]

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[61] *Id.* at 302 (citing BARRY DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY 42 (1980)).

[62] *Id.* at 298.

[63] *Id.*

[64] ALFRED P. RUBIN, THE LAW OF PIRACY 203 n.255 (2nd ed. 1998) (signatories of the Paris Declaration agreed "[p]rivateering is, and remains, abolished"); Ivan Shearer, *Piracy*, *in* MAX PLANCK ENCYCLOPEDIA PUB. INT'L L., online edition (2010), *available at* http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472?rskey=01IRon&result=1&prd=EPIL (last visited Dec. 5, 2017) ("Privateering was formally abolished by the Paris Declaration of 1856. The right to attack merchant ships in time of war is now governed by the modern law of armed conflict, including international humanitarian law.").

[65] Burgess, *supra* note 58, at 323.

[66] "*Mens Rea* refers to criminal intent. The literal translation from Latin is 'guilty mind'…. A *mens rea* refers to the state of mind statutorily required in order to convict a particular defendant of a particular crime….The *mens rea* requirement is premised upon the idea that one must possess a guilty state of mind and be aware of his or her misconduct…." *Mens Rea*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/mens_rea (last visited Nov. 09, 2017).

[67] Burgess, *supra* note 58, at 322 (quoting the U.N. Conference on the Law of the Sea, Montego Bay, 10 December 1982, art. 101, 21 I.L.M. 1245.).

[68] "The act or omissions that comprise the physical elements of a crime as required by statute." *Actus Reus*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/actus_reus (last visited Nov. 09, 2017).

[69] Burgess, *supra* note 58, at 322.

[70] "Latin for 'place,' or the location where something occurred." *Locus*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/locus (last visited Nov. 09, 2017).

[71] Burgess, *supra* note 58, at 322 (quoting Harvard Draft Convention of 1932, also known as Harvard Research in International Law, *Draft Convention on Piracy, with Comment,* 26 AM. J. INT'L L. SUPP. 739, 775 (1932), 775.).

[72] Burgess, *supra* note 58, at 323.

Although parallel criminal elements are a strong indicator of and justification for extending the designation to terrorism, Dr. Burgess also explores the practical and historical similarities, relevant to the current discussion:

> [P]irates and terrorists…share the same means, the same motivations, and the same extraterritorial identity…. [T]errorism, like piracy, is not a legitimate political tool; second…states…may not use it as a means of political coercion; third, that all instances of terrorism…are equally unlawful,…fourth, that terrorism, like piracy, is therefore an international crime *sui generis*… fifth, that this crime is by nature international in scope…and sixth, that terrorists, as *hostis humani generis*, are likewise subject to universal jurisdiction.[73]

Against the backdrop of previous works arguing that terrorists are *hostis humani generis*, this discussion now turns to policy similarities which contemplate justification for action beyond criminal prosecution.

B. Policy Considerations

The author posits that there are several unique policy considerations prompting the designation of a group as *hostis humani generis*, and which serve to justify the use of force against them.[74] Similar to the criminal elements previously mentioned, the policy considerations are present in both piracy and terrorism. These considerations are satisfied where: (1) a universally condemned action, (2) by a non-state actor, (3) is conducted from an ungoverned area, (4) which affects multiple states, and (5) necessitates a cooperative response. These five policy considerations embody the justification for a literal interpretation of the notion of being at war with the world. They are addressed below as a necessary pretext to establishing the justification for the use of force against *hostis humani generis*, a group at war with the world.

1. The Conduct is Universally Condemned

First, the unlawful conduct of the group to be classified as *hostis humani generis* must be universally condemned.[75] To be universally condemned, no state can properly advocate a right to engage in the practice, nor oppose its eradication.[76] This is not to say that every state must have an identical law

[73] *Id.*, at 315–17.

[74] *See infra* notes 77–175 and accompanying text.

[75] *See, e.g.*, M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 44 (2011).

[76] *See The Legal Prohibition Against Torture*, HUMAN RIGHTS WATCH (visited Oct. 19, 2017), https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture (noting that torture is universally condemned because "no country publicly supports torture or opposes its eradication"); *Universal Jurisdiction*, DUHAIME'S LAW DICTIONARY, http://www.duhaime.org/LegalDictionary/U/UniversalJurisdiction.aspx (last visited on Oct.

prohibiting the conduct. Although, treaties and domestic laws may aid in identifying conduct which is widely condemned. Universally condemned conduct has also been held as conduct contrary to *jus cogens*.[77] Thus, only "the most serious crimes" merit universal condemnation.[78] This consideration personifies the two-fold purpose of criminal law which proscribes conduct and delineates a state's responsibility to affect the capture, trial, and punishment of offenders.

The international community hesitated to universally condemn piracy because states engaged in the practice of employing privateers, corsairs, or buccaneers, who were state sponsored pirates; parties commissioned by the government to use armed ships to seize primarily merchant ships of hostile states.[79] However, states realized this practice was a double-edged sword because it "created a beast [states] could no longer control," as "corsairs continued their attacks…long after peace was concluded…" they became a serious threat to the economic prosperity of the imperial powers.[80] This prompted the consensus reached in the Declaration of Paris, after which states no longer advocated for piracy as a legitimate form of government action.[81]

Terrorism shares a similar background in that state sponsored terrorism deterred its acceptance as a universally condemned action. However, recent developments indicate any reservations have been overcome, notwithstanding potential covert state-sponsored practices. Among these are the creation in 2017 of the United Nations Office of Counter-Terrorism, tasked

20, 2017) ("Jurisdiction over the offender of a heinous crime that is universally condemned internationally even though neither offender nor victim may be citizens.").

[77] "*Jus cogens* (from Latin: compelling law; English: peremptory norm) refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted." *Jus Cogens*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/jus_cogens (last visited Nov. 9, 2017). Meaning that crimes prescribed under international law, or crimes committed against internationally recognized rights, are universally condemned. *See* Regina v. Bartle and the Commissioner of Police for the Metropolis and other Ex Parter Pinochet, House of Lords 1999: (identifying on criteria of universal jurisdiction under customary international law is that the conduct be contrary to *jus cogens*). *See The Legal Prohibition Against Torture*, *supra* note 76 (indicating that acts violating *jus cogens* or acts embodied in *jus cogens* as criminal are subject to universal jurisdiction).

[78] *See* R. v. Hape, [2007] 2 SCR 292, 2007 SCC 26 (CanLII); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 794 (1988) (noting pirates are *hostis humani generis* because their crimes are so heinous). Examples of universally condemned crimes include the genocides perpetrated during the holocaust. Despite the absence of uniform laws, the conduct was so egregious and horrific that it was universally condemned by all nations as an act of evil. *See* G.A. Res. 60/7, ¶ (2005) U.N. Doc A/RES/60/7.

[79] *Privateer*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/privateer

[80] Burgess, supra note 58 at 314.

[81] *See supra* note 64.

to prevent and combat terrorism.[82] Also of note are the numerous United Nations Security Council resolutions which consistently reaffirm "that terrorism in all forms and manifestations constitutes one of the most serious threats to international peace and security and that any acts of terrorism are criminal and unjustifiable…."[83] Additionally, at least 140 states have passed counterterror laws since 2001.[84] Terrorism is universally condemned, at least in word, notwithstanding the adage that "one man's terrorist is another man's freedom fighter,"[85] a saying which is as erroneous as the literal interpretation of the idiom that "all is fair in love and war."[86] There is no state that openly advocates for the right to use terrorist tactics,[87] indeed such practices directly conflict with established human rights laws and the Laws of Armed Conflict.[88]

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[82] Established through the adoption of G.A. Res. 71/291 (June 15, 2017). http://www.un.org/en/counterterrorism/; Pillar II of the U.N. Global Counter-Terrorism Strategy, https://www.un.org/counterterrorism/ctitf/un-global-counter-terrorism-strategy.

[83] S.C. Res. 2370 (2017); S.C. Res. 2368 (2017); S.C. Res. 2354 (2017); S.C. Res. 2341 (2017); S.C. Res. 2322 (2016); S.C. Res. 2199 (2015); Statement by the President of the Security Council S/PRST/2013/1; G.A. Res. 70/291 (1 July 2016), U.N. Doc. A/RES/70/291.

[84] *Global: 140 Countries Pass Counterterror Laws since 9/11*, HUM. RIGHTS WATCH (June 29, 2012), https://www.hrw.org/news/2012/06/29/global-140-countries-pass-counterterror-laws-9/11.

[85] *See* President Ronald Regan's Radio Address to the Nation on Terrorism May 31, 1986, available at http://www.presidency.ucsb.edu/ws/?pid=37376 ("Effective antiterrorist action has also been thwarted by the claim that—as the quip goes—'One man's terrorist is another man's freedom fighter.' That's a catchy phrase, but also misleading. Freedom fighters do not need to terrorize a population into submission."); Boaz Ganor, *Defining Terrorism - Is One Man's Terrorist Another Man's Freedom Fighter?*, INT'L INST. FOR COUNTER TERRORISM (Jan. 01, 2010) (distinguishing terrorists from revolutionaries and guerilla fighters).

[86] The saying conveys the idea that "in love and war you do not have to obey the usual rules about reasonable behavior." *Definition of "All's Fair in Love and War"*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/all-s-fair-in-love-and-war (last visited Nov. 10, 2017). While true to a degree, taken at face value it is a false assertion. For example, the killing of enemy combatants under peace time laws would be considered murder, but under the Laws of Armed Conflict and International Humanitarian Law, such killings are permissible. However, intentionally killing civilians is always prohibited, even in times of war.

[87] Even states accused of state sponsorship of terrorism decry terrorism as condemnable, voicing "unequivocal condemnation of all acts of terrorism in all its forms and manifestations, including State terrorism, economic terrorism wherever, against whoever and by whoever may be committed." International Conference on the Global Fight against Terrorism, Tehran, 25-26 June 2011. This is a critical first step in realizing a full and actual condemnation wherein states completely abandon the practice of their own accord.

[88] "The most important general prohibition of State sponsored terrorism may be traced back to the U.N. General Assembly's Friendly Relations Declaration (1970) (G.A. Res. 2625 (XXV)), according to which '[e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.'"). Christian Walter, *Terrorism, in* MAX PLANCK ENCYCLOPEDIA OF PU. INT'L L., online edition (2011), *available at*. http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-

In opposition to the proposition that terrorism is universally condemned is the argument that terrorism cannot be universally condemned because it is not universally defined.[89] It is proper to concede that working definitions fluctuate among states. However, it would be disingenuous to say that a base understanding of what conduct constitutes terrorism remains elusive.[90] Rather, the contention of variable definitions is rooted in the inconsistency of applying the term "terrorist" to specific groups.[91] This is not so much an issue of ill definition, but one of politics.[92] The lack of a standard definition is overcome by two concepts.

First, there is a basic understanding of what conduct constitutes terrorism.[93] Terrorism, for the purposes of this article, include activities by non-state actors "intended to cause death or serious bodily harm to civilians…with the purpose of intimidating a population or compelling a government…to do or abstain from doing any act."[94] Even if a state does not accept this definition

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9780199231690-e999?rskey=aEwP4K&result=1&prd=EPIL (last visited Dec. 2, 2017). *See also*, RYAN DOWDY ET. AL., LAW OF ARMED CONFLICT DESKBOOK 136 (David Lee ed., 5th ed. 2015) ("The essence of the principle [of distinction] is that military attacks should be directed at combatants and military targets, and not civilians or civilian property."); Protocol Additional To The Geneva Conventions of 12 August 1949, art. 48–51 (protecting civilians by prohibiting indiscriminate attacks); *Civilians Protected Under International Humanitarian Law*, INT'L COMMITTEE OF THE RED CROSS (Oct. 29, 2010), https://www.icrc.org/eng/war-and-law/protected-persons/civilians/overview-civilians-protected.htm ("The protection of civilians during armed conflict is therefore a cornerstone of international humanitarian law.").

[89] *See* United States v. Yousef, 327 F.3d 56 (6th Cir. 2003); *Agreed Definition of Term 'Terrorism' Said to be Needed for Consensus on Completing Comprehensive Convention Against It*, GA/L/3276 (Oct. 07, 2005), https://www.un.org/press/en/2005/gal3276.doc.htm; Burgess, *supra* note 58 at 342 ("The hackneyed adage that 'one man's terrorist is another man's freedom fighter' renders any attempt at definition virtually impossible, dividing states on ideological lines and convoluting the situation all the more.").

[90] *See infra* note 94 and accompanying text for a basic definition.

[91] "Terrorism is a term without any legal significance. It is merely a convenient way of alluding to activities, whether of States or of individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both." Judge Rosalyn Higgins, *The General International Law of Terrorism*, *in* INT'L L. & TERRORISM 28 (London Routledge 1997).

[92] *See* Tams, *supra* note 13, at 374 (noting that "[t]here is still no comprehensive anti-terrorism convention, but special sectoral treaties have mushroomed, and have been complemented by far-reaching anti-terrorism rules enacted as part of secondary United Nations law.")

[93] *In the Name of Security Counterterrorism Laws Worldwide since September 11*, HUM. RIGHTS WATCH (June 29, 2012), https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11 ("While there is no single definition of terrorism under international law, definitions put forward in various international treaties typically center on the use of violence for political ends."). *See supra* note 94 and accompanying text for a definition of terrorism.

[94] Report of the Secretary-General "In Larger Freedom. Towards development, security and human rights for all", U.N. Doc. A/59/2005, at ¶91; *see also* S.C. Res. 1566 (2004) ("Recalls that

verbatim, there is an underlying definition to which states ascribe the meaning. Evidence of this intangible definition is apparent in the act of designating groups as terrorists. For example, the United Nations designation of the Islamic State and Al-Qaida as terrorists shows those groups satisfy whatever definition of terrorism was used in considering whether to classify them as such.[95]

Secondly, the universal condemnation of terrorism is nascent and a cogent definition is not to be expected in its formative years. This was the case for piracy, which lacked a comprehensive definition for over 100 years after it was abolished as a state practice.[96]At the risk of putting the cart before the horse, the international community's determination to defeat terrorism shows the community has a general understanding of terrorism, even if it fails to articulate which "terrorism" is to be defeated. For the time being, "[d]efinitions of 'terrorism' …are the prerogative of Member States…."[97] While a "definition may also help to confine the scope of U.N. Security Council resolutions…which have encouraged states to pursue unilateral and excessive counter-terrorism measures,"[98] the impasse in defining terrorism is a perfect representation of Voltaire's ominous observation that "the best is the enemy of the good."[99] Given the limitations to be discussed below, the ambiguity of defining "terrorism" is permissible for the time being and does not hinder it from being universally condemned.

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criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature").

[95] The United Nations Global Counter-Terrorism Strategy Plan of Action to Prevent Violent Extremism Report of the Secretary-General, A/70/674; G.A. Res. 70/291 (July 1, 2016), U.N. Doc. A/RES/70/291.

[96] *See*, Shearer *supra* note 64. ("Piracy received its first comprehensive definition by an international convention in Art. 15 Geneva Convention on the High Seas of 1958. That definition, and the ancillary provisions relating to piracy in Arts 14 and 16 to 21, were based on the preparatory work of the United Nations International Law Commission, which, in turn, drew on the Draft Convention on Piracy prepared by the Harvard Research in International Law published in 1932.").

[97] Geneva Conference on Preventing Violent Extremism – The Way Forward Organized by the United Nations in partnership with the Government of Switzerland 7 & 8 April 2016 Geneva, Switzerland Concept Note at 4, https://www.un.org/counterterrorism/ctitf/sites/www.un.org.counterterrorism.ctitf/files/Geneva%20PVE%20Conference%20Concept%20Note%20Final.pdf.

[98] Ben Saul, *Defining Terrorism in International Law*, OXFORD SCHOLARSHIP ONLINE (Jan. 2010).

[99] VOLTAIRE, PHILOSOPHICAL DICTIONARY, (H.I. Wolf Translator) (2010).

2. Conduct by a Non-State Actor

The second consideration is that the conduct must be perpetrated by a non-state actor. This denotes an absence of state sanction or advocacy.[100] It also removes the designated group from applications of international law that would otherwise apply and provide suitable remedies.[101] The absence of a responsible state precludes the international community from responding in ways other than the use of force. For example, to deter state sponsored terrorism by Iran, North Korea, Cuba, Syria, Libya, and Sudan, the United States implements four main sets of actions: bans on arms-related exports and sales; controls over the export of dual-use items, which might increase the military capability of the state; prohibitions on economic assistance; and miscellaneous financial restrictions.[102] Sanctions, restricting diplomatic ties, or other avenues of political pressure are all useless in the face of non-state actors because they are not concerned with their presence or legitimacy on the international stage; nor do they need legitimate political channels to thrive.[103]

This is particularly relevant given the power that non-state actors have acquired. The most powerful pirate in history was Cheng I Sao, who operated in the South China Sea. Her fleet has been estimated to comprise 1500 ships, exceeding the size and power of most states' navies at the time.[104] Similarly, terrorist organizations have obtained notable power. ISIS was estimated to be capable of spending $900 million to $3 billion (USD) a year on military expenditures, ranking the organization within the top sixty nations for

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[100] Admittedly, there may be some state-sponsored activity, though practiced without an affirmation of a right to so do. *See supra* note 88 and accompanying text.

[101] As has been mentioned, much of international law is concerned with state-to-state relations. It is the absence of state participation which places the conduct in a distinct position restricting the responses available under international law. For example, if the conduct were by a state then it may be more appropriately subjected to political recourse or the doctrine of state responsibility. *See* MATH NOORTMANN ET AL, NON-STATE ACTORS IN INTERNATIONAL LAW 118-20 (2015) (discussing the ICJ's advisory opinion in Reparations for Injuries which may have opened the door to subjecting non-state actors to international law despite a lack of international legal personality, and subsequently discussing previous mitigation of this issue by use of the *hostis humani generis* designation).

[102] US Dept. of State, *State Sponsors of Terror Overview*, in COUNTRY REP. ON TERRORISM 2014, at 171.

[103] *See* Sara Malm, *How ISIS is Funded by Black-Market Oil Trading, Illegal Drugs and Internet cafes*, DAILY MAIL (Feb. 22, 2015), http://www.dailymail.co.uk/news/article-2964028/oil-drugs-internet-ISIS-funded.html.

[104] *See, e.g.*, Maggie Koerth, *Most Successful Pirate Was Beautiful and Tough*, CNN (Aug. 28, 2007), http://www.cnn.com/2007/LIVING/worklife/08/27/woman.pirate/index.html; Urvija Banerji, *The Chinese Female Pirate Who Commanded 80,000 Outlaws*, ATLAS OBSCURA (Apr. 06, 2016), https://www.atlasobscura.com/articles/the-chinese-female-pirate-who-commanded-80000-outlaws ("The Red Flag Fleet under Ching Shih's [Cheng I Sao] rule went undefeated, despite attempts by Qing dynasty officials, the Portuguese navy, and the East India Company to vanquish it. After three years of notoriety on the high seas, Ching Shih finally retired in 1810 by accepting an offer of amnesty from the Chinese government.").

"defense" spending, alongside the Philippines, Sudan, and Peru.[105] The power and influence of non-state actors makes them a unique threat necessitating a unique response by the whole of the international community.

3. Effects Suffered by the International Community

Thirdly, the universally condemned conduct perpetrated by the group to be designated as *hostis humani generis* must affect multiple states. It is insufficient that the harm be realized among one state. Rather, the harm must correspond to the reprehensibility. Widespread harm justifies intervention by multiple victims under an objective territorial interest.[106] Additionally, crimes of such magnitude harm more than the immediate victims, an idea embodied by the phrase "crimes against humanity."[107] A crime is not merely of great effect for its resultant body count, but also for the adverse impact it has upon the world.[108] To wit, piracy was condemned because a pirate was a "ruthless savage whose existence was not only in conflict with the nation's laws, but

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[105] George Arnett and Sylvia Tippman, *Iraq Crisis: How do Isis's Cash and Assets Compare with Other Military Spending?*, GUARDIAN (June 16, 2014), https://www.theguardian.com/news/datablog/2014/jun/16/iraq-isis-cash-and-assets-compare-military-spending. Equally terrifying is a non-state actor's ability to control a region and subject a population to systematic oppression and subservience. This has been seen by the implementation of shadow governments in Iraq, Afghanistan, and Somalia, which are responsible for gross human rights violations and countless murders. See ….

[106] "Under the objective aspect of territorial jurisdiction a sovereign is recognized as having the power to adopt a criminal law that applies to crimes that take effect within its borders even if the perpetrator performs the act outside of its borders." *Two Aspects of the Territorial Principle* available at http://www.kentlaw.edu/faculty/rwarner/classes/carter/tutorials/jurisdiction/Crim_Juris_16_Text.htm (last visited Nov. 10, 2017).

[107] Crimes Against Humanity include genocide, torture, and slavery. *Crimes Against Humanity*, UNITED NATIONS OFFICE ON GENOCIDE PREVENTION & THE RESPONSIBILITY TO PROTECT (last visited on Oct. 21 2017), http://www.un.org/en/genocideprevention/crimes-against-humanity.html; Flartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir. 1980); *See* JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW chapter 6 (2012); Elizabeth Borgwardt, *Commerce and Complicity: Human Rights and the Legacy of Nuremburg*, *in* MAKING THE AMERICAN CENTURY: ESSAYS ON THE POLITICAL CULTURE OF TWENTIETH CENTURY AMERICA (ed. Bruce J. Schulman, 2014). Terrorism has also been presented as a crime against humanity. *See, e.g.*, James D. Fry, Note, *Terrorism as a Crime against Humanity and Genocide: The Backdoor to Universal Jurisdiction*, 7 UCLA J. INT'L L. & FOREIGN AFF. 169, 169–170 (2002).

[108] "Genocide devalues individuals by depriving them of membership in groups in such a way that it also renders impossible the keeping of the promise of equality to all humans." LARRY MAY, GENOCIDE: A NORMATIVE ACCOUNT 72, (Cambridge Univ. Press 2010). The infliction of torture deprives all involved of the sense of the "inherent dignity of the human person." Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984 entry into force 26 June 1987. Slavery violates the "equal and inalienable rights of all members of the human family…." The Universal Declaration of Human Rights (1948).

with civilization itself."[109] Similarly, terrorism affects every state through its impact on the financial sector,[110] international relations,[111] domestic laws and policies,[112] and the psychological impact.[113] Consequently, these crimes violate the very essence of humanity and inflict a harm beyond the borders of any one state.

4. Necessity of a Cooperative Response

If the conduct and harm occurred within only one state, it would be unnecessary to involve other states. But, the versatility of the conduct makes any single state incapable of eliminating it. So, prosecution of the conduct and

[109] Burgess, *supra* note 58, at 313 (*citing* David J. Starkey, *Pirates and Markets,* in BANDITS AT SEA: A PIRATES READER 111 (C.R. Pennell ed., 2001)).

[110] Sean Ross, *Top 5 Ways Terrorism Impacts the Economy*, Investopedia (Aug. 21, 2016), http://www.investopedia.com/articles/markets/080216/top-5-ways-terrorism-impacts-economy.asp (Direct Economic Destruction, Increased Uncertainty in the Markets, Insurance, Trade, Tourism and FDI, Surrendering Economic Freedom for Security, and Increased Nationalism and Foreign Skepticism); Impact of Global Terrorism, Ambassador Francis X. Taylor, Coordinator for Counterterrorism, Remarks to Executives Club of Chicago Leadership Symposium in Chicago, IL March 14, 2002 (addressing costs of infrastructure replacement, economic losses, job losses, and insurance instability).

[111] Daniel Wagner, *Terrorism's Impact on International Relations*, INT'L RISK MANAGEMENT INST. (March 2003), https://www.irmi.com/articles/expert-commentary/terrorism's-impact-on-international-relations/ (noting the "significant shift in bilateral relations between the United States and Europe, Russia, and China as a result of the debate on the war on Iraq.").

[112] *In the Name of Security: Counterterrorism Laws Worldwide since September 11*, HUM. RIGHTS WATCH (June 29, 2012), https://www.hrw.org/report/2012/06/29/name-security/counterterrorism-laws-worldwide-september-11 (finding "more than 140 countries enacted or revised one or more counterterrorism laws" since the 9/11 terrorist attacks); COUNCIL OF STATE GOVERNMENTS, THE IMPACT OF TERRORISM ON STATE LAW ENFORCEMENT at 7 (Apr. 2005) http://www.csg.org/knowledgecenter/docs/Misc0504Terrorism.pdf (noting changes in response to the 9/11 terrorist attacks in the United States which resulted in the "creation of the new Department of Homeland Security and shifting priorities within the Federal Bureau of Investigation and other federal law enforcement agencies."); *see* Kenneth Wainstein, *The Changing Nature of Terror: Law and Policies to Protect America*, HERITAGE FOUND. (Sep. 18, 2013), http://www.heritage.org/terrorism/report/the-changing-nature-terror-law-and-policies-protect-america; Taylor M. Scimeaca, Note, *The European Immigration Crisis: An Analysis of how Terror Attacks have Affected Immigrant and Refugee Populations in Western Europe*, UNIV. CENT. FLA. (2017) (analyzing how terrorism has affected migrant populations).

[113] Nehemia Friedland and Ariel Merari, *The Psychological Impact of Terrorism: A Double-Edged Sword*, 6 POL. PSYCHOL. 591, 591, 598 (Dec. 1985) (finding terrorism is highly effective in causing fear); Saiqa Razika, Thomas Ehringbc, Paul M.G. Emmelkamp, *Psychological consequences of terrorist attacks: Prevalence and predictors of mental health problems in Pakistani emergency responders*, 207 PSYCHIATRY RES. 80, 80-85 (May 15, 2013), (observing prevalence rates of post-traumatic stress disorder and other mental health problems in emergency personnel exposed to terrorist attacks).

prevention of the harm necessitate a cooperative response.[114] Without cooperative action safe havens would arise to which perpetrators could resort. Havens are created either by complicit states[115] or states which lack the power to enforce the rule of law. A single state which chooses not to cooperate in prosecuting the *hostis humani generis* creates a haven and obstructs other states from eliminating the threat.

Havens were used by pirates to repair ships, acquire supplies, and unload their spoils.[116] Among the most well-known pirate havens was Port Royal. The harbor's association with piracy began in the mid-1600s, after the Jamaican governors offered it as a haven in return for protection from the Spanish.[117] The town became a major staging ground for British and French privateers.[118] Early American colonists also enabled piracy and provided a type of haven through the practice of trading with pirates.[119] More recently, Somali pirates have found haven in the port of Eyl, where an impoverished populace tolerated crime to benefit from the wealth it generates.[120] Such havens facilitate and perpetuate the conduct.

Similarly, terrorists enjoy the protection and other advantages offered by havens in the absence of a cooperative response. Among the most well-known examples of terrorist havens are the areas of Pakistan to which Taliban and Haqqani fighters travel in order to avoid U.S. military operations in Afghanistan[121] and ungoverned areas of Somalia where Al-Shabab resides and from which they plan and conduct horrific attacks against Kenya.[122] In order

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[114] Robert Alfret, Jr., *Hostis Humani Generis: An Expanded Notion of U.S. Counter-Terrorist Legislation*, 6 EMORY INT'L REV. 171, 171 (1992).

[115] Complicit states provide a community, a sense of acceptance of the conduct as legitimate, and protection under from persecution by other states.

[116] Wombwell, *infra* note 141, at 4–6.

[117] Evan Andrews, *6 Famous Pirate Strongholds*, HIST. CHANNEL (Jan. 21, 2014), http://www.history.com/news/history-lists/6-famous-pirate-strongholds; Wombwell, *infra* note 141, at 10.

[118] Andrews, *supra* note 117.

[119] Bruce Elleman, *Historical Piracy and its Impact*, *in* HISTORIES OF TRANSNAT'L CRIME 14 (G. Bruinsma ed. 2015).

[120] *See* Mary Harper, *Life in Somalia's Pirate Town*, BBC (Sep. 18, 2008), http://news.bbc.co.uk/2/hi/africa/7623329.stm.

[121] DEP'T DEF. REP. TO CONGRESS, ENHANCING SECURITY AND STABILITY IN AFGHANISTAN, (Dec. 2016), (finding the Taliban, Haqqani, and Al-Qaeda retain safe havens inside Pakistani territory used to regenerate and conduct attack planning).

[122] U. S. DEP'T STATE, BUREAU COUNTERTERRORISM & COUNTERING VIOLENT EXTREMISM, COUNTRY REPORTS ON TERRORISM 2015 at 307, ("Al-Shabaab's capacity to rebound from counterterrorism operations is due in large part to its ability to maintain control of large swaths of rural areas and routes in parts of Somalia. The Federal Government of Somalia and its regional administrations lacked the capacity and resources to fill security voids left in the wake of AMISOM's operations with civilian law enforcement. These gaps allowed al-Shabaab to retain the freedom of movement necessary to establish new safe havens and re-infiltrate areas that AMISOM cleared but could not hold.").

to effectively combat a global problem, like piracy or terrorism, states must act together. For this reason, the Security Council passes resolutions "[s]tressing that the active participation and collaboration of all States…is needed to impede, impair, isolate, and incapacitate the terrorist threat"[123] and "underlining the need for Member States to act cooperatively…."[124] This approach is necessary because terrorists "know how to take advantage of failed or failing states and ungoverned spaces…."[125]

5. Operating from Ungoverned Areas

Lastly, the action must arise from an ungoverned area, an area for which no single state is responsible. If the conduct occurred in a governed area, the conduct would be subject to the jurisdiction of the controlling state. It is the lack of a controlling government in the operational area which sets *hostis humani generis* apart.

Ungoverned areas include areas of non-appropriation, like the high seas,[126] as well as areas bereft of governance, such as ungoverned spaces within failed states.[127] This includes both areas where the government itself refuses to enforce the law[128] and areas where the it lacks the capacity to do so.[129] In either

[123] S.C. Res. 2370 (2017), U.N. Doc S/2017/2370.

[124] S.C. Res. 2250 (2015), U.N. Doc S/2015/2250.

[125] Deeks, *infra* note 182, at 548.

[126] Grotius asserted the world's oceans were incapable of acquisition by a state in his work *Mare Liberum*. HUGO GROTIUS, THE FREEDOM OF THE SEAS (reprinted 1952).

[127] Matthew Hoisington, *International Law and Ungoverned Space*, 1 INDON. J. INT'L & COMP. L. 424, 456–60 (2014). *But cf.* Jennifer Keister, *The Illusion of Chaos: Why Ungoverned Spaces Aren't Ungoverned, and Why That Matters*, 776 CATO INST. POL'Y ANALYSIS (Dec. 2014)

[128] This idea is present in the use of universal jurisdiction against crimes of torture, war crimes, and genocide. Despite the presence a government, when these crimes are committed they overcome the presumption that the responsible government is functioning properly. Because these crimes are not derogable, any violation of them inherently shows that a government is not inconformity with international law and unable to enforce the laws. Even though sovereign immunity and *jus cogens* are like ships passing in the night as distinctly procedural and substantive rules, where no conflict arises, violations of *jus cogens* are punished by the international community rather than by the state in which they were committed. Jurisdictional Immunities of the State (Ger. v. It., Greece Intervening), 2012 I.C.J. 1, ¶ 93 (Feb. 3); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 60 (Feb. 4) ("Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law.") Contemporary laws of state responsibility govern a state's purposeful absence of the rule of law, but this article addresses how to respond when territorial state cannot enforce the rule of law.

[129] *See* United States v. Yousef, 327 F.3d 56, 105 (6th Cir. 2003) (observing that war crimes became universally enforceable like piracy because "[i]n both situations there is…a lack of any adequate judicial system operating on the spot where the crime takes place" and holding that universal jurisdiction extends only where the crime occurs outside of a state or in an area where no state is capable of punishing the crime). "More than a century of state practice suggests that it is lawful for State X, which has suffered an armed attack by an insurgent or

situation the interest is the same, preventing the creation of a criminal haven. Thus, the conduct occurring within ungoverned areas calls for special consideration.[130]

C. At War against the World

Because "[t]errorists and pirates are defined as *hostis humani generis* under the law of nations,"[131] the states operating against them enjoy an expanded authority to use force. While universal jurisdiction is an important aspect of *hostis humani generis*, the author finds that it is not synonymous. The designation includes a second notion of an enemy at war with the world. This could denote the universal reprehensibility of the conduct, as described above, but it also embodies a more sinister notion, the "condition of war against everyone."[132] This notion has been given literal effect; *hostis humani generis* were found to have declared war against all the world, and were subjected to forceful intervention.[133] Admittedly, this view would be a departure from current views on international law's restrictions on the use of force,[134] but it is not one without precedent.[135]

"In effect, the categorization of pirates as *hostis humani generi* created a third legal category in international law halfway between states and individuals; pirates were deemed at 'war' with civilization itself, and thus granted neither the protections of citizenship nor the sovereignty of states."[136] By applying this designation to terrorist, they too fall into this unique legal category which hold them to be "not only criminals, but enemies of humanity" permitting action beyond legal prosecution.[137] This unique legal category is warranted

terrorist group, to use force in State Y against that group if State Y is unwilling or unable to suppress the threat." Deeks, *infra* note 182, at 486

[130] "Piracy no doubt can take place independently of the sea, under the conditions at least of modern civilization; but the pirate does not so lose his piratical character by landing within state territory that piratical acts done on shore cease to be piratical.... [P]iracy may be said to consist in acts of violence done upon the ocean or unappropriated lands, or within the territory of the state through descent from the sea, by a body of men acting independently of any politically organized society." Burgess, *supra* note 58, at 322 (citing William Edward Hall, A Treatise on International Law 313-314 (8' ed. 2001) (1924)).

[131] D.R. BURGESS, THE WORLD FOR RANSOM: PIRACY IS TERRORISM, TERRORISM IS PIRACY 244 (Prometheus Books 2010).

[132] GLEN NEWEY, ROUTLEDGE PHILOSOPHY GUIDEBOOK TO HOBBES AND LEVIATHAN 86 (London: Routledge, 2008).

[133] *See infra* notes 139–42 and accompanying text.

[134] Franklin Berman, *The UN Charter and the Use of Force*, 10 SINGAPORE YEAR BOOK OF INT'L L. AND CONTRIBUTORS 9, 10 (2006) (observing the prominent view is "that the essence of international law is to prevent force being used at all costs").

[135] *See infra* notes 140–41 and accompanying text.

[136] Burgess, *supra* note 58, at 299.

[137] Burgess, *supra* note 58, at 313; *See also* BARRY DUBNER, THE LAW OF INTERNATIONAL SEA PIRACY (1980).

because *hostis humani generis* are "men who band[] together in extraterritorial conclaves, remov[ing] themselves from the protection and jurisdiction of the nation-state, and declar[ing] a personal war against civilization itself."[138] Alberico Gentile's *De Jure Belli Libri Tres* observed that such men:

> "[A]re common enemies, and they are attacked with impunity by all, because they are without the pale of the law. They are scorners of the law of nations; hence they find no protection in that law. They ought to be crushed by us... and by all men. This is a warfare shared by all nations."[139]

This distinct "third legal category" permits states to engage *hostis humani generis* through both legal and military channels.[140] As something more than individuals, but something less than states, *hostis humani generis* cannot be addressed neatly within the traditional state-to-state framework of international law.

As a result, military force was used against pirates. Certain naval vessels were specifically commissioned to hunt pirates. "[N]ations organize[d] and dispatch[ed] antipirate naval forces.…Powerful naval squadrons [sought] out and destroy[ed] pirate forces at sea."[141] Of equal importance was the practice of assaulting pirate strongholds ashore.[142] This practice encompassed the notion of descent from the sea as well. It does not connote the idea of a "land pirate" whose conduct is punishable under other criminal provisions of the territorial state, but seeks to include acts of piracy beyond sea based actions, as when pirates went ashore to do piratical acts upon coastal localities.

The practice of using force against pirates ashore has endured. The U.N. Security Council resolution passed in 2008 extended authorization for nations to conduct military operations on land and by air against pirates plaguing the waters near the coast of Somalia.[143] The fact that states can reach into the sovereign areas of another state to fully combat piracy is not without parallel in combating terrorism. As Dr. Burgess observed:

> By equating terrorists with pirates, the problem of capture in a recalcitrant or openly hostile state is neatly avoided. A pirate may be captured wherever he is found.… If the same rule were

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[138] Marcus Rediker, *The Seaman as Pirate - Plunder and Social Banditry at Sea, in* BANDITS AT SEA 139 (C.R. Pennell ed. 2001); *see id.* at 139–40, 146, 154.

[139] ALBERICO GENTILI, DE JURE BELLI LIBRI TRES 423 (trans. John C. Rolfe, 1995).

[140] *See* Burgess, *supra* note 58, at 300.

[141] A. James Wombwell, *The Long War Against Piracy: Historical Trends*, COMBAT STUD. INST. 3 (2010). While these operations were often unilaterally performed by the major naval power in the region, cooperative efforts are also used to hunt pirates. One historic example was a multination effort consisting of British, American, Chinese, and Portuguese naval forces during the 1850's in the South China Sea. *Id.* at 112.

[142] *Id.* at 3.

[143] S.C. Res. 1851 (Dec. 16, 2008), U.N. Doc S/RES/1851 (2008).

> extended to terrorists, states might enter and retrieve them within the borders of other states without risking impingement on that state's sovereignty. By the same logic, states would have no legal standing to offer protection to terrorists within their borders.[144]

Terrorists, too, are at war with the world. This does not mean that all counterterrorism efforts must entail a full-scale war. Rather, it means that terrorists and states consider themselves in open conflict, wherein one will prevail and the other will fail. Many nations have participated in the "global war on terror," a phrase universal in scope.[145] This concept is also embodied in Security Council resolutions asserting a determination "to enhanc[e] the effectiveness of the overall effort to fight this scourge [of terrorism] on a global level."[146] For fear that the language be viewed as a mere means of political and legal prosecution, the council has "[reaffirmed] the need to *combat by all means*, …threats to international peace and security caused by terrorist acts…."[147]

More importantly, terrorists have declared war against the world, both literally and conceptually.[148] The Islamic State has literally declared war on the United States,[149] the United Kingdom,[150] France,[151] and Germany. [152] Lest this be construed as a war against the West, they have also declared war on

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[144] Burgess, *supra* note 58, at 300.

[145] *See* Tams, *supra* note 13, at 374 ("An increasing number of states considers terrorist activities to be a threat which has to be addressed through multilateral or unilateral action, including by forcible means….").

[146] S.C.Res. 2370 (Aug. 2, 2017), U.N. Doc S/RES/2370 (2017).

[147] S.C.Res. 2199 (Feb. 12, 2015) (emphasis added), U.N. Doc S/RES/2199 (2015).

[148] *See* Will Mccants, *How the Islamic State Declared War on the World*, FOREIGN POL'Y (Nov. 16, 2015), http://foreignpolicy.com/2015/11/16/how-the-islamic-state-declared-war-on-the-world-actual-state/; Lizzie Dearden, *ISIS Calls on Supporters To Wage 'All-Out War' on West During Ramadan with New Terror Attacks*, INDEPENDENT (May 26, 2017), http://www.independent.co.uk/news/world/middle-east/isis-ramadan-2017-all-out-war-west-new-terror-attacks-manchester-suicide-bombing-islamic-state-a7758121.html.

[149] Siobhan Mcfadyen, *ISIS Declares Trump Inauguration Day 'Bloody Friday'*, EXPRESS (Dec. 05, 2016), http://www.express.co.uk/news/world/739508/ISIS-declare-Bloody-Friday-war-on-Trump-inauguration-day.

[150] *See* Peter B. Zwack (B.G Ret.), *With Paris, ISIS Has Declared War on Us. Here's How We Should Respond*, HUFFINGTON POST (visited Oct. 27, 2017), https://www.huffingtonpost.com/peter-b-zwack/paris-isis-war-respond_b_8604500.html.

[151] Jethro Mullen and Margot Haddad, *'France is at War,' President Francois Hollande Says After ISIS Attack*, CNN (Nov. 16, 2015), http://www.cnn.com/2015/11/16/world/paris-attacks/index.html.

[152] Tom Batchelor, *Now Germany Declares War on ISIS and Sends Tornado Jets, Naval Frigate & 1,200 Troops*, EXPRESS NEWS (Dec. 01, 2015), http://www.express.co.uk/news/world/623293/Islamic-State-Germany-Tornado-jets-naval-frigate-troops-ISIS.

Indonesia, Malaysia,[153] Spain,[154] Russia,[155] China,[156] and even the Taliban.[157] The Islamic State is an easy example, but it is not the only terrorist organization at war with the world.[158] Similarly, states have reciprocated and declared war on terrorists.[159] Conceptually, the existence of a state of war[160] is evident in a study observing that terrorist attacks were conducted in 92 countries in 2015, with more than 55% of the attacks occurring in: Iraq, Afghanistan, Pakistan, India, and Nigeria.[161] Ideologically and through force, terrorism ravages a large portion of the states across the globe. A move to classify terrorists as enemies rather than just criminals is not a denial of due process, but a war function since the body of terrorists are enemies of the world.

This article suggests that the necessity requirement of a self-defense justification for the use of force is satisfied by the aggregation of several

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[153] Petaling Jaya, *ISIS videos declare war on Malaysia and Indonesia*, STRAITS TIMES (Jul. 5, 2016), http://www.straitstimes.com/asia/se-asia/isis-videos-declare-war-on-malaysia-and-indonesia.

[154] *ISIS Warns of More Spain Attacks in New Spanish-Language Video*, FOX NEWS (Aug. 24, 2017), http://www.foxnews.com/world/2017/08/24/isis-warns-more-spain-attacks-in-new-spanish-language-video.html.

[155] Saagar Enjeti, *ISIS Declares War on Russia*, DAILY CALLER (Aug. 01, 2016), http://dailycaller.com/2016/08/01/isis-declares-war-on-russia/.

[156] Robbie Gramer, *The Islamic State Pledged to Attack China Next. Here's Why*, FOREIGN POL'Y (Mar. 01, 2017), http://foreignpolicy.com/2017/03/01/the-islamic-state-pledged-to-attack-china-next-heres-why/.

[157] David Rivers, *ISIS declares WAR on Taliban for 'betraying Islam'*, DAILY STAR (June 26, 2017), https://www.dailystar.co.uk/news/world-news/625227/ISIS-war-Taliban-Afghanistan-Islam-London-Bridge-Manchester-Westminster.

[158] *See* Jon Lee Anderson, *The Most Failed State: Is Somalia's New President a Viable Ally?*, NEW YORKER (Dec. 14, 2009), https://www.newyorker.com/magazine/2009/12/14/the-most-failed-state (Al Shabaab declared war on the U.N.); Brendan O'Leary, *IRA: Irish Republican Army, in* TERROR, INSURGENCY, AND THE STATE: ENDING PROTRACTED CONFLICTS 226 (Marianne Heiberg ed., 2007) (Irish Republican Army declared War on Great Britain); *Basque raid 'declaration of war'*, BBC (Oct. 06, 2007), http://news.bbc.co.uk/2/hi/europe/7031815.stm (Basque separatists considered at war with the Spanish government); Arthur Brice, *Shining Path rebels stage comeback in Peru*, CNN (Apr. 21, 2009), http://edition.cnn.com/2009/WORLD/americas/04/21/peru.shining.path/ (Shining declared war on Peruvian government); *Boko Haram Declares War*, AFRICA CONFIDENTIAL (June 24, 2011), https://www.africa-confidential.com/article-preview/id/4039/Boko_Haram_declares_war (declaring war on Nigeria).

[159] *See, e.g., Saudi-led 'Arab NATO' declares total war on terrorism; Iran, Iraq & Syria not invited*, RT NEWS (Nov. 27, 2017), https://www.rt.com/news/411030-saudi-islamic-military-alliance-terrorism/.

[160] A state of war or an undeclared war is a military conflict between nations without the issuance of a formal declaration of war by either side. *See* James M. Crain, *War Exclusion Clauses and Undeclared Wars*, 39 TENN. L. REV. 328, 329 (1972).

[161] *Annex of Statistical Information: Country Reports on Terrorism 2015*, NATIONAL CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM 3 (June 2016).

existing principles.[162] While this practice is not novel,[163] it is novel to suggest that terrorists are subject to military action[164] by virtue of their classification as *hostis humani generis* and at the expense of another state's sovereignty.[165] *Part III* explores limitations on the use of force against transnational terrorists.

III. Respecting Sovereignty and Preventing Abuse

There are significant risks which inhere in granting a victim state[166] the power to use force in a territorial state.[167] These risks are enhanced by the fear that the international community has liberally accepted claims of self-defense which do not necessarily serve a defensive purpose.[168] Conversely, it is necessary to recognize the security interests of states exercising the "inherent right" to defend against attacks in order to prevent harms to the victim state and its citizenry. Recognition of this right is especially important given that Security Council action has not always been timely.[169]

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[162] The ICJ rejected Uganda's claim of self-defense in response to attacks by rebels from within the Democratic Republic of the Congo, because the attacks were not attributable to the DRC. But, the court notably left open the question as to "whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces." Armed Activities on the Territory of the Congo (Dem. Rep. Congo v Uganda), 2005 I.C.J. Rep. 201, at ¶147 (Dec. 19). Of interest are opinions of Judges Buergenthal, Kooijmans, and Simma who all seemed to accept the self-defense claim against armed attacks even if they are not directly attributable to the territorial State. *Id.* at ¶12 (separate opinion of Simma, J.); *id.* at ¶30 (separate opinion of Kooijmans, J.); see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, 2004 I.C.J. Rep. 131, at ¶6 (July 9) (separate opinion of J. Buergenthal).

[163] Examples may include: the Ethiopian invasion in Somalia, Israel's bombing of Palestine in 2003, or their invasion of Lebanon in 2006 — which although controversial for the disproportionate use of force, was accepted by a number of states as a legitimate act of self-defense — and Turkey's repeated incursions into northern Iraq to combat the PKK. Tams asserts that "[w]hen looking at uses of force below the threshold of invasions proper, the number of instances in which states have used force against terrorist attacks increases considerably." Tams, *supra* note 13, at 379.

[164] *See* Tams, *supra* note 13, at 374 ("the fight against terrorism is increasingly regarded as a legitimate cause which might warrant a 'military approach' and allow readjustments to the *jus ad bellum*…").

[165] "Attempts to place war within a legal framework date back to the earliest articulation of the theory of 'just war', by virtue of which war was considered a 'just' response to illegal aggression. Ultimately, it was a means to restore the rights offended by the aggressor as well as a means of punishment. By relying on the validity of the cause for war, this doctrine brought into place a legal regime that reflected the belligerents right to resort to force." Jasmine Moussa, *Can* Jus Ad Bellum *Override* Jus en Bello*? Reaffirming the Separation of the Two Bodies of Law*, 872 INT'L REV. RED CROSS 963, 966 (Dec. 2008).

[166] *Supra* note 8.

[167] *Supra* note 10.

[168] Tams, *supra* note 13, at 391.

[169] *See generally* Deeks, *infra* note 182, at 508.

While sovereignty is important, international law "is supposed to protect human rights, not just sovereignty."[170] A state's duty to protect its citizens' lives is paramount[171] and can't be subverted in order to preserve sovereign integrity, especially where that integrity is already compromised.[172] To prevent abuses of the right to self-defense, and to prevent unwarranted subversion of the right to sovereignty, a balanced standard for the use of force is necessary.[173] To achieve this balance, the question must turn on "not whether self-defense is permissible against non-state actors; rather, the questions are when, how, and where a state may take action."[174]

Although the idea of encroaching on a state's sovereignty, the "hallmark of statehood" and "the basis of the international system" is often repugnant, it is at times necessary.[175] In the context of this article, the conflict between self-defense and sovereignty concerns a state's internal sovereignty and the principle of non-intervention.[176] "International internal sovereignty refers to the international rights and duties of a State that pertain to its ultimate authority and competence over all people and all things within its territory."[177] If an ungoverned zone exists within a state, its sovereignty is already degraded as it is not acting as the ultimate authority within the area.[178]

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[170] Ryan Lizza, *Was Trump's Strike on Syria Legal?*, NEW YORKER (April 7, 2017) https://www.newyorker.com/news/ryan-lizza/was-trumps-strike-on-syria-legal (*quoting* Harold Koh, former legal adviser of the U.S. Department of State, Sterling Professor of International Law at Yale Law School).

[171] "The oldest and simplest justification for government is as protector: protecting citizens from violence. Thomas Hobbes' Leviathan describes a world of unrelenting insecurity without a government to provide the safety of law and order, protecting citizens from each other and from foreign foes." Anne-Marie Slaughter, *3 Responsibilities Every Government has Towards Its Citizens*, WORLD ECON. FORUM (Feb. 13, 2017), https://www.weforum.org/agenda/2017/02/government-responsibility-to-citizens-anne-marie-slaughter/.

[172] *See infra* note 178 and accompanying text.

[173] *See* Deeks, *infra* note 182, at 511 ("When a rule is not clear, actions taken pursuant to the rule are of questionable legitimacy.").

[174] Michael N. Schmitt, *Extraterritorial Lethal Targeting: Deconstructing the Logic of International Law*, 52 COLUM. J. TRANSNAT'L L. 77, 85 (2013).

[175] THOMAS G. WEISS, HUMANITARIAN INTERVENTION: WAR AND CONFLICT IN THE MODERN WORLD, 223 (Third ed., 2016).

[176] Samantha Besson, *Sovereignty, in* MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L. ¶70, online edition (2011), *available at* http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472?rskey=01IRon&result=1&prd=EPIL (last visited Dec. 5, 2017).

[177] *Id.*

[178] The existence of an ungoverned zone within a state indicates the state is incapable of enforcing the rule of law. The inability to enforce its laws and exercise authority over the area denotes that the state is not the ultimate authority there. Therefore, it cannot be said that the state exercises sovereignty in the ungoverned zone. Accordingly, its integrity as a sovereign is not as threatened by the incursion of another state seeking to cure a threat created within the ungoverned area.

So, incursions there do not implicate a state's sovereignty to the fullest degree. Rather, what is left is the state's sovereign right to exclude others from exercising authority there. This right is enshrined by the principle of non-intervention.

However, intervention is only prohibited if it is "bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely."[179] The principle of sovereignty does not permit a state to allow terrorist forces to threaten or use force against another state.[180] Therefore, intervention against such threats is not prohibited by the principle of non-intervention and does not violate the principle of sovereignty. Furthermore, action against terrorists within an ungoverned area does not "deprive[] peoples … of [their] right to self-determination and freedom and independence."[181] It enhances these rights by removing terrorists which threaten the independence of the state from which they operate. The mere presence of terrorists undermines the authority and legitimacy of the state.

However, to ensure the use of force by a victim state against a terrorist threat within another state does not violate that territorial state's sovereignty and interfere with its independence, it is necessary to impose restraints. The comments below briefly address the restraints of the unwilling or unable test and the conceptualization of the zone of combat.

A. The Unwilling or Unable Test

The unwilling or unable test was articulated by Professor Ashely Deeks as a previously unrecognized normative standard.[182] The test restricts a victim state's ability to use force to instances of absolute necessity. The test is much more than a one-step determination by the victim state concerning the capacity of the territorial state, it is an involved process which whittles down the need to intervene in the territory of another state. Simply stated, the test permits a victim state to take action against a non-state actor within a territorial state when the territorial state is either unwilling or unable to adequately address the threat posed to the victim state.

However, determining whether a territorial state is unwilling or unable to act involves a number of steps. Among these are the "requirement that a victim state undertake certain inquiries and engage in certain exchanges with the territorial state" to gauge their willingness and capacity.[183] This may be a

[179] *Paramilitary Activities*, *supra* note 35, at ¶205.

[180] *Id.* at para 192.

[181] *Id.* at ¶191.

[182] Ashley S. Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, (2011-2012). Though the test is debated, the author of this article accepts that it has been formidably presented and stands as a reasonable representation of current practice.

[183] *See* Deeks, *supra* note 182, at 490.

relatively brief inquiry or a lengthy one, depending on the urgency with which the victim state needs to act.[184] The depth of the inquiry can vary based on the established history of the territorial state.[185] A long history of incapacity as a failed state may permit a brief and cursory inquiry with the territories government before taking action.

Additionally, this test only operates in the limited time frame permitted under Article 51 of the United Nation's Charter.[186] That period is restricted to the time in between the need arising and the time when the Security Council has acted. Meaning, the test "assumes that the victim state urgently needs to respond to an armed attack in the period before the Security Council has had time to address the situation."[187] This necessarily makes the victim state the judge in at least the preliminary determination of whether the territorial state is unwilling or unable to act. But, the Security Council will ultimately assume responsibility for making that assessment, discouraging abuse of the justification by a victim state.

The test also places premier importance on the notion that while the law of self-defense itself imposes no locational limits of the defensive action, the victim state must take into account the territorial state's sovereignty.[188] But, when making a determination of whether or not to use force, the author sides with the position that force may be used where a territorial state fails to remedy a threat because it is unable by either of two measures: an outright lack of the military capability, or a lack of progress in addressing the threat of concern to the victim state.[189] Meaning that although a territorial state is engaged in the conflict seeking to prevent harm to the victim state, if the territorial state fails to prevent or eliminate the threat, the victim state may take action to prevent the harm.[190]

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[184] *Id.* at 495.

[185] *Id.* at 521–25.

[186] *Id.* at 495.

[187] *Id.*

[188] *Id.* at 509, 520.

[189] *See supra* note 129 and accompanying text.

[190] The goal of eliminating or neutralizing terrorists is best realized under the principle of economy of force. This term is used both in its traditional sense of "discriminat[e] employment and distribution of forces" as well as in a broader sense that it is more economical for one state to engage in a conflict than for another. U.S. ARMY OPERATIONS, FIELD MANUEL 3–0 (2008). If the economy of force is reduced, the conflict may be protracted, and a greater loss of life may ensue. Operating under the premise of sovereign equality, one must expect that the lives of each state's citizens are to be valued equally as well. Given this, the secondary meaning of the term is meant to indicate that it is more economical for one state to employ force than it is for another measured by the expected cost of life. A determination of which state could more economically employ force is dependent upon factors such as technological advancement, access to targets, national interest and commitment, manpower, funding, and the costs of inaction. Each hinderance by the international community to the use of force by a victim state decreases the economy of force and necessarily increases the body

B. Locational Restraints

The unwilling or unable test limits the interpretation of necessity as to when a state may take action. But, it does not address many other limitations that may be appropriate to narrow the justification provided by the *hostis humani generis* designation. Because this article proposes using force within the territory of another state, it seem appropriate to impose locational limits on where within the territorial state force may be used.

Since any action in another state's territory infringes its sovereignty, a use of force must be as limited as possible within the territorial state to minimize the contravention. The conceptualization of a zone of combat[191] is meant to restrict a victim state's operations to the terrorist havens within the territorial state. In theory, the territorial state maintains the capacity to conduct effective operations elsewhere within its own borders and the use of force by the victim state is not necessary outside of the ungoverned area. The Law of Armed Conflict provide a framework for when a zone of combat exists and where it exists.[192] Essentially, the zone of combat blends concepts of armed conflict and counterterrorism and can be "characterized as broadly as anywhere terrorist attacks are taking place, or perhaps even being planned and financed."[193]

Specific geographic limits are often difficult to determine in asymmetric conflicts.[194] By their very nature, geographic limits are self-defeating because any terrorist learning of them will expeditiously slip in and out of the zone of combat to avoid being targeted. Thus, the zone of combat must be a flexible construct.[195] As difficult as this may prove, establishing this restraint is necessary to prevent a victim state's use of force throughout the entirety of a

count of the conflict. This is generally true for both combatants and non-combatants, since civilians have been estimated to account for up to ninety percent of wartime causalities. *See* Adam Roberts, *Lives and Statistics: Are 90% of War Victims Civilians?*, 52 SURVIVAL 115, 115 (2010); *Patterns in Conflict: Civilians are Now the Target*, U,N. CHILDREN'S FUND, https://www.unicef.org/graca/patterns.htm (last visited Oct. 11, 2017). The principle of economy of force means states "employ all combat power available in the most effective way possible; allocate minimum essential combat power to secondary effects." Robert R. Leonhard, *Economy of Force*, *in* THE ARMCHAIR GENERAL (2013), available at http://www.jhuapl.edu/ourwork/nsa/papers/economyofforce.pdf (last visited Oct. 11, 2017).

[191] Laurie R. Blank, *Defining the Battlefield in Contemporary Conflict and Counterterrorism: Understanding the Parameters of the Zone of Combat*, 39 GA. J. INT'L & COMP. L. 1, 4 (2010).

[192] *Id.* at 1–2.

[193] *Id.* at 4.

[194] *Id.* at 22.

[195] "For non-international armed conflicts, Common Article 3 refers to conflict 'occurring in the territory of one of the High Contracting Parties' suggesting that, at a minimum, the territory of the state in which the conflict is taking place forms part of the geographic area of conflict." *Id.* at 11.

territorial state, which becomes an usurpation of the territorial state's sovereignty.

These restraints are but two of many which could be imposed in order to prevent abuses by the victim state. Some restraint is an absolute necessity, given the disproportionate military capacities and political designs of the various states. But, it would be self-defeating to impose too many or too stringent restraints which undermine the use of force in self-defense against terrorist threats.

Conclusion

As a final assertion for the need to apply the existing legal standards in the ways described above, stands the importance of economy of force. The principle of economy of force suggests that states "employ all combat power available in the most effective way possible."[196] The phrase can be conveyed in both in its traditional sense of "discriminat[e] employment and distribution of forces" as well as in a broader sense that it is more economical for one state to engage in a conflict than for another.[197] Operating under the premise of sovereign equality, one must expect that the lives and resources of each state's citizens are to be valued equally. Given this presumption, the second meaning indicates that it is more economical for one state to employ force than it is for another, measured by the expected cost of life to the warfighters of each state. A prediction of which state could more economically employ force is dependent upon factors such as technological advancement, access to targets, national interest and commitment, manpower, funding, and the costs of inaction, among others.

Acting under the principles advocated by this article enhances the economy of force of a state because it eliminates impediments to the use force. By justifying limited use of force while threats are still nascent, a state may decrease the expected causality count of the conflict, because the number of causalities must necessarily increase with the duration of the conflict. This is generally true for both combatants and non-combatants, since civilians have been estimated to account for up to ninety percent of wartime causalities.[198] So, allowing the state with the greatest economy of force to eliminate a terrorist threat brings the most expeditious end to the human rights abuses perpetrated by the terrorists.

Given the risks that terrorism presents to a state's security and stability, special measures are needed to effectively combat it. The international

[196] Robert R. Leonhard, *Economy of Force*, ARMCHAIR GENERAL (2013), http://www.jhuapl.edu/ourwork/nsa/papers/economyofforce.pdf.

[197] U.S. ARMY OPERATIONS, FIELD MANUEL 3-0 (2008).

[198] *See* Adam Roberts, Lives and Statistics: Are 90% of War Victims Civilians?, 52 SURVIVAL 115, 115 (2010); *Patterns in Conflict: Civilians are Now the Target*, U.N. CHILDREN'S FUND, available at https://www.unicef.org/graca/patterns.htm (last visited Oct. 11, 2017).

community's aversion to the use of force has prioritized inaction over intervention and allows circumstances conducive to conflict to fester. Applying the existing legal framework of self-defense and *hostis humani generis* to terrorists provides the limited but necessary justifications for the action needed to effectively combat terrorism. Just as prescribed burns are needed to eliminate fuel loads and prevent uncontrollable fires, the use of force is sometimes needed to eliminate threats before they fuel larger conflicts. This carries a risk of sparking an event, but properly employed it can be a successful preventative measure.

This article demonstrated how a state can adapt existing international laws to justify the use of force against an international terrorist threat in its nascent stage, precluding the exacerbation of a full-scale conflict. Specifically, this article showed that a victim state can use force in self-defense against a terrorist organization, operating from a separate territorial state which is unwilling or unable to address the threat to the victim state.

In order to move this application of international law forward, states must first embrace the designation of *hostis humani generis* for terrorists. Domestic legislation to this end is not the only way whereby this step is accomplished. A normative analysis may be sufficient to establish this practice. Secondly, states must cooperate in reaching a consensus as to which organizations are properly classified as terrorists. While reaching a consensus on the definition of terrorism would be ideal, this step can also be accomplished as effectively on a group-by-group basis through the designation of an organization as terrorists by the international community. Third, states must work in harmony to apply in earnest the principles restraining the use of force to prevent abuses.

This is perhaps the most pivotal step for ensuring the longevity of the approach advocated in this article. Further discussion is warranted concerning the systems and practices for determining a zone of combat and designating a state as unwilling or unable to intervene. If these discussions are carried to a meaningful conclusion, future operations against terrorists as *hostis humani generis* will become a powerful tool in eliminating threats while preserving international peace. States will be justified in eliminating terrorist threats before a full-scale conflict becomes necessary and lives will ultimately be saved.

*Selman Ozdan**

IMMUNITY VS. IMPUNITY IN INTERNATIONAL LAW: A HUMAN RIGHTS APPROACH**

Abstract

The concept of immunity does not imply protection for States, Heads of State, and diplomatic agents by any means; at its core, immunity is designed to facilitate the smooth functioning of relations among States, State organs, and their representatives. Although the international community has tended to abolish impunity in cases involving the violation of human rights, this movement is not yet fully fledged and the abolition of impunity is far from assured. Be that as it may, equating immunity with impunity in cases of fundamental human rights violations presents a major handicap against the establishment of justice and the promotion of human rights. This article aimed to develop the distinction between immunity and impunity in terms of the adverse impact of impunity in respect of fundamental human rights. Further, it aimed to demonstrate that tolerating impunity threatens the future and development of human rights; consequently, it argued that the contradiction between immunity and human rights cannot be resolved unless impunity and immunity are clearly differentiated.

Annotasiya

İmmunitet konsepsiyası hər hansı bir vasitə ilə dövlətlər, dövlət başçıları və diplomatik nümayəndələr üçün müdafiəni nəzərdə tutmur; onun nüvəsində immunitet dövlətlər, dövlət orqanları və onların nümayəndələri arasında əlaqələrin hamar fəaliyyətini təmin etmək üçün işlənib hazırlanır. Baxmayaraq ki, beynəlxalq ictimaiyyət cəzasızlığı insan hüquqlarının pozulması ilə bağlı işlər kontekstində ləğv etməyə çalışmışdı, hazırda işlər gözlənilən kimi getmir və cəzasızlığın ləğvi xeyli uzaq görünür. Başqa sözlə immunitet və cəzasızlığı əsas insan hüquqlarının pozulması kontekstində eyniləşdirmək sülhün bərqərar olunması və insan hüquqlarının inkişafında əngəl meydana gətirməkdədir. Məqalə immunitet və cəzasızlıq arasındakı müxtəliflik əsas insan hüquqlarına təsir etməyi hədəfləmişdir. Bununla yanaşı məqalədə cəzasızlığa tolerant yanaşmanın insan hüquqlarının gələcəyi və inkişafını təhdid etdiyini nümayiş etdirmək məqsədlənmiş; nəticə etibarilə, cəzasızlıq və immunitetin aydın şəkildə fərqləndirilmədiyi təqdirdə immunitet və insan hüquqları arasında olan ziddiyyətin həllinin mümkünsüzlüyü iddia edilmişdir.

CONTENTS

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** An earlier draft of this article was presented at the 108th Annual Conference of the Society of Legal Scholars of the UK and Ireland in the Sutherland School of Law in September 7, 2017.

Introduction

This article serves as a guide to the concepts of immunity and impunity, offering a descriptive analysis of both terms and the distinctive features of each. It is concerned mainly with the argument that immunity does not always amount to impunity in international law. It offers an in-depth discussion of the difference between immunity and impunity.

The article is organised as follows. A short introduction of sovereign immunity is provided in Section 1, which also seeks to explain the need for sovereign immunity from criminal prosecution, to provide an overview of the history of immunities under international law and to review legal and social descriptions of immunity and the origin of international immunities. Section 2 clarifies the relevant international immunities within the frame of this article. Section 3 explores the question of why impunity should be differentiated from immunity, and analyses the reasons to resist such impunity. This section also provides a brief review of the literature on impunity, and particularly the "culture of impunity", and elucidates the notion of impunity from both social and legal perspectives. Section 4 summarises the most pertinent struggles of international criminal justice to end impunity for those who violate international law. Specifically, the contributions of the International Criminal Tribunals for Rwanda and for the Former Yugoslavia and the International Criminal Court are briefly explained. Section 5 interprets the implications for human rights when impunity is tolerated, and underscores the importance of distinguishing between immunity and impunity. Finally, the last section concludes by re-evaluating the concept of impunity and the consequences of tolerating impunity. The central aim of this article is to explicate that immunity does not always amount to impunity in international law.

I. Sovereign Immunity in International Law: A Short Introduction

International law has launched an instrument which is able to cope with undesirable incompatibilities of jurisdiction: in legal terms, this instrument is known as *immunity*.[1] In order to facilitate international relations, the State, its high-ranking representatives and other high-ranking officials who are charged with diplomatic duties and relations, are provided with immunities and privileges under international law. Robert Cryer describes the origins of immunity as follows:

In order to maintain channels of communication and thereby prevent and resolve conflicts, societies needed to have confidence that their envoys could have safe passage, particularly in times when emotions and distrust were at their highest. Domestic and international law developed to provide for inviolability of a foreign State's representatives and immunities from the exercise of jurisdiction over those representatives.[2]

The question of immunity derives from the sovereignty-oriented approach of international law and provides legal protection for the State and its highest-ranking officials from investigation by foreign governments. The application of foreign State jurisdiction is interrupted by immunities. The jurisdiction is able to be reactivated only if the State that is endowed with immunity rights is willing to waive its immunity. Because of this, immunity has become one of the most remarkable and functional factors in limiting jurisdiction under international law.[3]

International immunities are customarily vested in particular institutions or bodies which are permitted, by law, in order to defend them from foreign intervention and to ensure that foreign governments can perform their duties and effectively maintain international relations.

Immunity, as a legal term, establishes a right for a sovereign State. This right provides an "exemption from the exercise of the power to adjudicate as well as to the non-exercise of all other administrative and executive powers by whatever measures or procedures by another sovereign State".[4] It may be said that sovereign immunity means that "the sovereign or government is

[1] Bruno Simma & Andreas Th. Muller, *Exercise and Limits of Jurisdiction, in* The Cambridge Companion to International Law 134, 151 (James Crawford & Martti Koskenniemi eds. 2012).

[2] Robert Cryer, Hakan Friman, Darryl Robinson & Elizabeth Wilmshurst, An Introduction to International Criminal Law and Procedure, 531 (2nd ed. 2010).

[3] *See generally* Simma & Muller, *supra* note 1; Ramona Pedretti, Immunity of Heads of State and State Officials for International Crimes (2014).

[4] Sompong Sucharitkul (Special Rapporteur on Jurisdictional Immunities of States and Their Property), *Preliminary Report on the Topic of Jurisdictional Immunities of States and Their Property*, [1979] 2 Y.B. INT'L. L. COMM'N., at 238, A/CN.4/323; Roger O'Keefe & Christian J. Tams, *Article 1, in* The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary 35, 38 (Roger O'Keefe & Christian J. Tams eds. 2013).

immune from lawsuits or other legal actions except when it consents to them".[5] In this sense, sovereign immunity can be deemed as legal immunity; in other words, it provides, as a judicial doctrine, legal protection for certain entities and people in specific circumstances. Sovereign immunity fundamentally shields those who benefit from it from legal proceedings. The sovereign equality doctrine has been regarded as one of the essential principles of international law, by virtue of which one sovereign cannot exercise authority over another. The "practical application of the doctrine means that the many activities carried out by a foreign state cannot be the subject of" municipal court proceedings.[6] This doctrine stems from the premise on which ancient English law is based, that "the King can do no wrong".[7]

There are two basic categories of legal immunity: international and national. While the first category includes those immunities which are designed to enable representatives of States to carry out their commitments under international law, the second category includes such immunities which are vested in *de jure* (lawful) institutions or people at a national level. State immunity, diplomatic immunity, Head of State immunity and immunity of international organisations, are recognised as international immunities under public international law. Immunities of judges, police, member of parliaments etc. are identified as domestic immunities.[8] The focus of this article is on international immunities, and specifically cases in which human rights have been used to challenge sovereign immunity under public international law.

The legal basis of these forms of immunity lies deep in human history, emerging whenever a ruler has been assigned a duty to rule in accordance with international law. Even before the invention of the modern States, it was recognised that if State-like institutions were to communicate effectively in diplomatic, commercial, political and other fields, it would be necessary to create a settlement bestowing freedom from suit or arrest on their representatives in the hosting State. Although reciprocal in nature, the bestowing of sovereign immunity can be read as both limiting the sovereign rights of the granting State and conferring an advantage on the receiving State in terms of its foreign relations.[9]

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[5] Sovereign Immunity, Legal Information Institute, Cornell University Law School (CULS), http://www.law.cornell.edu/wex/sovereign_immunity (last visited Feb 6, 2018). *See also* Henry C. Black, Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, 1396 (6th ed. 1990).

[6] Tim Hillier, Sourcebook on Public International Law 222 (1998).

[7] *See* James F. Stephen, II A History of the Criminal Law of England 3 (2014).

[8] *See generally* Matthias Kloth, Immunities and the Right of Access to Court Under Article 6 of the European Convention on Human Rights (2010).

[9] *See generally* Ilias Bantekas & Susan Nash, International Criminal Law (3rd ed. 2007); Cryer et al., *supra* note 2; Linda S. Frey & Marsha L. Frey, The History of Diplomatic Immunity (1999).

Immunities are "exceptions to a state's jurisdiction by virtue of which international law acknowledges the primordial interests of another state to deal with the matter in question".[10] Sovereign immunity, in international law, is customarily recognised as a demand to be exempted from any restrictions embraced by a foreign State.[11] Consequently, it is seen as a kind of armour plating that protects the State and certain of its representatives from scrutiny by foreign authorities. The main purpose of this protection is to create a suitable environment for the development of relations between States and their representatives, within legal and reasonable bounds. Indeed, sovereign immunity exists to endorse and reinforce strong relationships between States and to promote non-intervention by States in other States' affairs.[12]

The origin of the concept of absolute immunity can be found in the principle of *par in parem non habet imperium* (equals do not have authority over one another). According to the Oxford Dictionary of Law, this Latin phrase implies that in public international law "one sovereign power cannot exercise jurisdiction over another sovereign power. It is the basis of the act of state doctrine and sovereign immunity".[13] Considered in light of this principle, the importance of the words of Lord Wilberforce in the decision of the House of Lords *I Congreso del Partido* becomes clear: "The basis upon which one state is considered to be immune from the territorial jurisdiction of the courts of another state is that of *par in parem* which effectively means that the sovereign or governmental acts of one state are not matters upon which the courts of other state will adjudicate".[14] Let us now consider relevant international immunities for this article.

II. Relevant International Immunities

International immunities have not evolved for the benefit of any particular person or group of people. International immunities are vested only for the benefit of the State or its representatives such as presidents, foreign ministers, or diplomats in the international arena.[15] Three types of immunity have been subject to human rights challenges to date; they are: State immunity, Head of State immunity and diplomatic immunity.

[10] Simma & Muller, *supra* note 1, at 151.

[11] *See generally* Pedretti, *supra* note 3.

[12] *See generally* Sean D. Murphy, *Does International Law Obligate States to Open Their National Courts to Persons for the Invocation of Treaty Norms That Protect or Benefit Persons?, in* The Role of Domestic Courts in Treaty Enforcement: A Comparative Study 61 (David Sloss ed. 2009).

[13] Elizabeth A Martin, A Dictionary of Law 393 (2009).

[14] I Congreso del Partido [1983] 1 A.C. 244, at 262; Elihu Lauterpacht & C.J. Greenwood, 64 International Law Reports, 313 (1983).

[15] *See generally* Chanaka Wickremasinghe, *Immunities Enjoyed by Officials of States and International Organizations, in* International Law 395 (Malcolm D. Evans ed., 2nd ed. 2006).

State immunity imbues "the legal person of the state as well as its property with immunity (according to the venerable principle of *par in parem non habet jurisdictionem*)".[16] Almost all major countries adopt a form of restrictive immunity with regard to other States.[17] That is, on the one hand, the doctrine allows the assertion of immunity in respect of the actions of those serving in the capacity of sovereign authority (*acta jure imperii*); on the other hand, the doctrine does not prevent a State from being brought before a foreign State's court if commercial transactions are involved (*acta jure gestionis*).[18]

The second configuration of immunities that presents a challenge to international human rights is the immunity enjoyed by Heads of State. Individuals in this critical position enjoy absolute immunity as long as they remain in office. When they leave office, their immunity endures only in relation to official acts.[19] The debate over whether State officials who violate fundamental human rights should be held responsible and liable to punishment in public international law is informed "by the basic tension that exists between the desire to protect human rights and calls to respect state sovereignty".[20]

The third configuration is comprised of the legal immunities of consular and diplomatic representatives, in other words, diplomatic immunities;

[16] Simma & Muller, *supra* note 1, at 151.

[17] China is exceptional in this regard, in that China has reservations about applying a restrictive doctrine in respect of State immunity. For further details *see generally* Sompong Sucharitkul, *Jurisdictional Immunities in Contemporary International Law from Asian Perspectives*, 4 CHIN. J. INT. LAW 1 (2005).

[18] *See generally* Hazel Fox QC & Philippa Webb, The Law of State Immunity (3rd ed. 2013). *Acta jure imperii* refers sovereignty of a foreign State and constitute its official acts; *acta jure gestionis*, by contrast, do "not raise any question of the exercise of public power […] [T]he question which must be decided is whether or not the foreign State acted as a private person or on the basis of its *imperium*". Elihu Lauterpacht & C.J. Greenwood, 82 International Law Reports INTERNATIONAL LAW REPORTS, 102 (1990); *see generally* George Kahale & Matias A. Vega, *Immunity and Jurisdiction: Toward a Uniform Body of Law in Actions Against Foreign States*, 18 COLUMBIA J. TRANSNATL. LAW 211 (1980); Cedric Ryngaert, *The Immunity of International Organizations Before Domestic Courts: Recent Trends*, 7 INT. ORGAN. LAW REV. 121 (2010); Carlo Focarelli, *Denying Foreign State Immunity for Commission of International Crimes: The Ferrini Decision*, 54 INT. COMP. LAW Q. 951 (2005). *See also* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Philip B. Perlman, Acting Att'y. Gen. (May 19, 1952), *reprinted in* 26 DEP'T. ST. BULL. 984, 984 (1952).

[19] However, in recent cases, 'while the general principle of granting immunity to states and their high-ranking representatives is uncontroversial, there is an ongoing debate on the precise limits of such immunities, notably with respect to gross violations of human rights'. Simma & Muller, *supra* note 1, at 152.

[20] Dapo Akande, *The Application of International Law Immunities in Prosecutions for International Crimes*, *in* Bringing Power to Justice?: The Prospects of the International Criminal Court 47, 47 (Michael Milde, Richard Vernon & Joanna Harrington eds. 2006).

which continue even after the diplomatic agent's duty in office ends, as it relates to official acts.[21]

Adopted on 18 April 1961, the Vienna Convention on Diplomatic Relations, which came into force after 24 April 1964, was mentioned by the International Court of Justice in the *United States Diplomatic and Consular Staff in Tehran* case, stating that the Vienna Conventions, "codify the law of diplomatic and consular relations, state principles and rules essential for the maintenance of peaceful relations between States and [is] accepted throughout the world by nations of all creeds, cultures and political complexions".[22] The principle of immunity, as enshrined and set out in the 1963 Vienna Convention on Consular Relations and the 1961 Vienna Convention on Diplomatic Relations, is a demonstration of the sovereign equality of States, and this principle enables States and their representatives to embark on international relations.[23]

III. Reasons to Combat Impunity: Why a Distinction Should Be Made Between Immunity and Impunity

Immunity is a general rule of international law whereby certain State officials are deemed to be endowed with immunity from criminal prosecution and civil suits initiated in foreign States.[24] Impunity can be described as exemption from penalty or punishment. When the sovereign immunity principle is applied to the practice of sovereign impunity, individuals, who have administrated and participated in fundamental human rights violations, are often beyond the capacity of the law to provide a remedy.[25]

Fundamentally, impunity alludes to a situation where perpetrators circumvent punishment for violations that inflicted suffering upon someone and, a failure to bring such perpetrators of human rights violations to justice.[26]

Raul Molina Mejia and Patrice McSherry identify three different types of impunity: structural impunity, strategic impunity, and political or psychological impunity.[27] Structural impunity includes institutional and legal mechanisms which aim to protect individuals who abuse the power of the State. The second method, strategic impunity, applies to "the active measures

[21] *See generally* Simma & Muller, *supra* note 1.

[22] Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, at 24 (May 24).

[23] *See generally* Jacques Fomerand, Historical Dictionary of Human Rights (2014).

[24] *Ibid.*

[25] *See generally* Kingsley Chiedu Moghalu, *Reconciling Fractured Societies: An African Perspective on the Role of Judicial Prosecutions, in* From Sovereign Impunity to International Accountability: The Search for Justice in a World of States 197 (Ramesh C. Thakur & Petrus A.M. Malcontent eds. 2004).

[26] *See generally* Fomerand, *supra* note 23.

[27] *See generally* J. Patrice McSherry & Raúl M. Mejía, *Confronting the Question of Justice in Guatemala*, 19 SOC. JUSTICE 1 (1992).

taken by state officials at specific moments, including laws, decrees, amnesties, or pardons to derail processes of, or demands for, truth and justice".[28] The main purpose of these kinds of specific action is to protect people from punishment for the crimes already committed. For this reason, the Belfast Guidelines state that "rather than protecting human rights, the impunity created by amnesties may embolden beneficiaries to commit further crimes and destabilise efforts to achieve sustainable peace".[29] Diane Orentlicher contends that:

we would do well to resist the tendency to address the wisdom of amnesties in terms of stark dichotomies, such as "punish or pardon" and "amnesty or accountability". These dichotomies present unduly narrow options, detracting from more constructive efforts to balance the demands of justice against those of reconciliation and, ultimately, to promote reconciliation within a framework of accountability.[30]

Finally, political or psychological impunity emanates from the fear and manipulation generated by actors who violate international law. This form of impunity can cause eternal terror.[31]

By ending impunity, a significant enabling element of fundamental human rights violations can be notably chipped away. According to a 1997 report of the former UN Sub-commission of Human Rights on Impunity by El Hadji Guisse, impunity means "the absence or inadequacy of penalties and/or compensation for massive and grave violations of the human rights of individuals of groups of individuals".[32] Immunity has been proven "to be not only a living anachronism, but one which often leads to impunity for the worst kinds of rights violations. It was precisely real and feared impunity that led to changes in the way in which state immunity was understood and applied".[33] It is for this reason that the international society requires that a distinction be drawn between impunity and immunity.

Impunity transpires when perpetrators of violations of human rights are exempted from punishment for their deeds. According to the *Brussels Principles against Impunity and for International Justice*, impunity results from

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[28] Raúl M. Mejía, *The Struggle Against Impunity in Guatemala*, 26 SOC. JUSTICE 55, 58 (1999).

[29] The Belfast Guidelines on Amnesty and Accountability with Explanatory Guidance (2013), http://peacemaker.un.org/sites/peacemaker.un.org/files/BelfastGuidelines_TJI2014.pdf.pdf (last visited Feb 6, 2018) at 26.

[30] Diane F. Orentlicher, *Swapping Amnesty for Peace and the Duty to Prosecute Human Rights Crimes*, 3 ILSA J. INT. COMP. LAW 713, 714 (1997).

[31] *See generally* Mejía, *supra* note 28.

[32] El Hadji Guissé (Special Rapporteur on the Impunity of Perpetrators of Human Rights Violations), *Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights) pursuant to Sub-Commission Resolution 1996/24*, 49th Sess., E/CN.4/Sub.2/1997/8, at para. 20-21 (June 27, 1997).

[33] Greta L. Rios & Edward P. Flaherty, *Mr. Ban - Tear Down the U.N.'s Wall of Immunity/Impunity (Before a National Court Does)!!*, 18 ILSA J. INT. COMP. LAW 439, 439 (2012).

"failing to investigate, prosecute and try natural and legal persons guilty of serious violations of human rights and international humanitarian law". The Brussels Principles emphasised that impunity has disastrous consequences in that it allows the perpetrators to believe that their actions are not subject to legal challenge. Also, according to the Brussels Principles, impunity "ignores the distress of the victims and serves to perpetuate crime. Impunity also weakens state institutions; it denies human values and debases the whole of humanity".[34]

The most authoritative definition of impunity has been provided by the UN Sub-Commission on Human Rights: impunity makes it impossible, either practically or legally (*de facto* or *de jure*), to call the people who perpetrate human rights violations to account, "whether in criminal, civil, administrative or disciplinary proceedings, *because they cannot be held accountable to any investigation which might conduce to detention, allegation, trial, conviction with appropriate penalties or reparations to victims*".[35] With regards to *de facto* impunity, Nigel Rodley states that *de facto* impunity "is the usual form: the state's judicial machinery is simply manipulated to ignore the crime". By contrast, in regard to *de jure* impunity, Rodley notes that it is "the more notorious form: the state adopts formal legal means of exempting those concerned from legal liability, for example, through an amnesty".[36]

Impunity, therefore, leads to a social and political environment in which laws established to preclude human rights violations are either brushed aside or inadequately redressed by the State. Two types of impunity can be identified in the literature. The first is legal impunity (*de jure* impunity), which occurs when regulations or laws bestowing immunity create a legal bar to bringing perpetrators to justice and prosecuting them for human rights violations or abuses. The second kind of impunity is functional (*de facto* impunity) and occurs when the failure to prosecute or investigate is deliberate; when the law does not apply any sanction or when a legal regime is incapable of meeting its commitments to investigate and prosecute.[37] *De*

[34] Brussels Principles against Impunity and for International Justice, Adopted by the Brussels Group for International Justice Following on from the Colloquium 'The Fights Against Impunity: Stakes and Perspectives' (2002), https://www.iccnow.org/documents/BrusselsPrinciples6Nov02_En.pdf (last visited Feb 6, 2018).

[35] *The Administration of Justice and the Human Rights of Detainees, Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) Revised Final Report Prepared by Mr. Joinet pursuant to Sub-Commission Decision 1996/119*, 49th Sess., E/CN.4/Sub.2/1997/20/Rev.1, at 26 (Oct 2, 1997) [emphasis added].

[36] Nigel S. Rodley, *Breaking the Cycle of Impunity for Gross Violations of Human Rights: The Pinochet Case in Perspective*, 69 NORD. J. INT. LAW 11, 14 (2000).

[37] *See generally* Mahmoud C. Bassiouni, *The Permanent International Criminal Court*, *in* Justice for Crimes Against Humanity 173 (Mark Lattimer & Philippe Sands eds. 2003); Mahmoud C. Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 LAW

facto impunity arises from weaknesses in the legal system and from the actions of officials which prevent the course of justice. Both types of impunity conduce toward more violations of human rights and erode confidence in the government; *de jure* impunity conveys a negative message to victims about State apathy and connivance in their suffering.[38]

The updated version of the United Nations Commission on Human Rights Report on the *Promotion and Protection of Human Rights*[39] released in 2005 outlines a clear mission for States with regards to their essential responsibilities and the steps that they must take to combat impunity. Principle 19 of this Report establishes a decisive and explicit framework for action. It points out that States have an obligation to "undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished".[40] The Report also notes that when States fail to comply with their obligations to investigate infringements and to develop proper policies or take measures to punish the perpetrators, impunity occurs in both the domestic and the international realm. The Preamble to the UN Report of 2005 includes an unequivocal expectation that States accept "that the duty of every State under international law to respect and to secure respect for human rights requires that effective measures should be taken to combat impunity".[41] Immunity and impunity, therefore, should be distinguished. While immunity is a necessary instrument to maintaining smooth international, social, political and legal relations, impunity may enable perpetrators who violate fundamental human rights to escape punishment.

CONTEMP. PROBL. 9 (1996); Mahmoud C. Bassiouni, Introduction to International Criminal Law (2nd rev. ed. 2012).

[38] *See generally* Everyone Lives in Fear: Patterns of Impunity in Jammu and Kashmir, 18 Human Rights Watch (2006), https://www.hrw.org/report/2006/09/11/everyone-lives-fear/patterns-impunity-jammu-and-kashmir (last visited Feb 6, 2018).

[39] *Promotion and Protection of Human Rights: Impunity - Report of the Independent Expert to Update the Set of Principles to Combat Impunity by Diane Orentlicher: Addendum - Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,* 61st Sess., E/CN.4/2005/102/Add.1 (Feb 8, 2005).

[40] *Ibid.*, Principle 19.

[41] *Ibid.,* Preamble.

IV. The Efforts by the International Courts to End the Culture of Impunity

Before discussing the vital measures taken by the international community to combat impunity, a distinction should first be drawn between impunity and sovereign immunity. As Eli Rosenbaum, the Director of the United States Department of Justice Office of Special Investigation, has pointed out, the Twentieth Century has been termed *The Age of Atrocity* and also *The Age of Impunity*. It isn't hard to see why. Between 1900 and 1987 alone, it is estimated that governments and government-like organizations murdered fully 169 million civilians. That deeply shocking statistics speaks volumes about the urgent need for systematic and aggressive law enforcement action to apprehend and bring to justice the perpetrators of *fundamental human rights violations.*[42]

The international community has established a number of institutions/organisations for the purpose of ending impunity. The International Criminal Tribunal for Rwanda, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court are prominent examples. Martha Minow states that it is difficult not to notice "the enormous gap in time between the Nuremberg trials and any comparable effort to prosecute war crimes in international settings".[43] This omission was addressed decisively in 1993, when the United Nations established the International Criminal Tribunal for the Former Yugoslavia, and shortly thereafter the International Criminal Tribunal for Rwanda. These two *ad hoc* institutions and the "unspeakable tragedies that culminated in their creation, provided the necessary catalyst for the long-awaited" creation of a permanent International Criminal Court.[44] The establishment of international institutions such the International Criminal Court, the International Criminal Tribunal for Rwanda, and the International Criminal Tribunal for the Former Yugoslavia demonstrates that there is a commitment to putting an end to impunity for human rights violations which amount to war crimes.

Rwandan ambassador Manzi Bakuramutsa stated at a 1994 Security Council meeting, it is "impossible to build a state of law and arrive at true national reconciliation if we do not eradicate the culture of impunity which has characterized our society".[45] Likewise, the impact of the International

[42] Eli M. Rosenbaum, *Remarks*, 27 CARDOZO LAW REV. 1667, 1667 (2006) [emphasis added].

[43] Martha Minow, Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence, 27 (1998).

[44] Mary M. Penrose, *Impunity - Inertia, Inaction, and Invalidity: A Literature Review*, 17 BOSTON UNIV. INT. LAW J. 269, 309 (1999).

[45] *The Situation Concerning Rwanda: Establishment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Such Violations Committed in the*

Criminal Tribunal for the Former Yugoslavia on ending the culture of impunity should not be overlooked. The main objective of this Tribunal is to put an end to human rights violations by taking powerful measures to bring to justice perpetrators for having committed human rights violations with the aim of contributing to the maintenance and restoration of peace and discouraging possible perpetrators in the future.[46] Most particularly, the adoption the Rome Statute of the International Criminal Court is accepted as a watershed moment in international law. Abolishing impunity for fundamental human rights violations which serve to contribute to the prevention of such violations, constitutes an act of collective willpower on the part of the international community.[47]

Kofi Annan, as UN Secretary-General, called the adoption of the Rome Statute of the International Criminal Court a crucial step forward. At the Diplomatic Conference in Rome in 1998, the Secretary-General highlighted that:

People all over the world want to know that humanity can strike back – that whatever and whenever genocide, war crimes or other such violations are committed, there is a court before which the criminal can be held to account; a court that puts an end to a global culture of impunity […].[48]

Since the Second World War, the international community has had a growing tolerance for the impunity of those who commit human rights violations. It is believed that identifying the perpetrators of human rights violations not only helps to satisfy and solace victims, but also promotes reconciliation and the preservation of peace. Additionally, the abolition of impunity becomes a functional deterrence factor and prevents future violations.[49]

These advances reflect a growing awareness within the international community that there is a crucial distinction between immunity and

Territory of Neighbouring States, 49th Sess., 3453rd mtg., U.N. Doc. S/PV.3453, at 14 (Nov 8, 1994); *see also* Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994,* 18 BOSTON UNIV. INT. LAW J. 163, 164 (2000).

[46] *See generally* Gabrielle Kirk McDonald, *Problems, Obstacles and Achievements of the ICTY*, 2 J. INT. CRIM. JUSTICE 558 (2004); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT. LAW 7 (2001).

[47] Robert C. Johansen, *Peace and Justice? The Contribution of International Judicial Processes to Peacebuilding, in* Strategies of Peace: Transforming Conflict in a Violent 189, 199 (Daniel Philpott & Gerard F. Powers eds. 2010).

[48] *UN Secretary-General Declares Overriding Interest of International Criminal Court Conference must be that of Victims and World Community as a Whole,* United Nations Press Release, SG/SM/6597 L/2871 (June 15, 1998), http://www.un.org/press/en/1998/19980615.sgsm6597.html (last visited Feb 6, 2018).

[49] *See generally* Mitsue Inazumi, Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law, 21 (2004).

impunity. The International Court of Justice, for example, distinguishes immunity from impunity as follows:

[T]he immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity [...] the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.[50]

In recent years, when human rights violations were at stake, jurisdictional immunities have been reviewed. Furthermore, the related law has been subject to significant re-examination and important revisions. What follows "therefore does not attempt to prescribe what the law ought to be, but simply seeks to describe the law as it is in its current stage of development".[51]

Impunity can be described as "an act of violence"[52] and as "a recipe for continued violence and instability".[53] Impunity emerges when persons who hold sovereign rights on behalf of the State are exempt from punishment for human rights violations. While the main purpose of immunity is to facilitate the activities of States, Heads of State and diplomatic agents, impunity functions to exempt those from punishment by very specific means. There is ultimately no possible sustainable resolution unless the concept of impunity is differentiated from immunity. This differentiation as a means of combating impunity can be seen as a vital step towards preventing fundamental human rights violations.

V. Tolerating Impunity: A Great Threat to the Future of Human Rights in International Law

Living after genocide, mass atrocity, totalitarian terror [...] makes remembering and forgetting not just about dealing with the past. The treatment of the past through remembering and forgetting crucially shapes the present and future for individuals and entire societies.[54]

The impact of allowing perpetrators of human rights violations to have impunity has been articulated most strongly by Paz Rojas Baeza, who describes impunity as "a human decision, an intention to disguise and cover up, and even more, an obligation to reach oblivion. But oblivion is *unfeasible*

[50] Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. Rep. 3, at paras. 60-61 (February 14).

[51] Wickremasinghe, *supra* note 15, at 413.

[52] *See generally* Paz R. Baeza, *Breaking the Human Link: The Medico-Psychiatric View of Impunity, in* Impunity: An Ethical Perspective: Six Case Studies from Latin America 73 (Charles Harper ed. 1996).

[53] Akhavan, *supra* note 46, at 30.

[54] Minow, *supra* note 43, at 119.

in the case of fundamental human rights violations, because these violations will forever remain in the persons directly affected, and also in society, in the collective imagination, which will transmit them for generations".[55]

One of the reasons that human rights violations occur is the prevalence of impunity. Impunity means exemption from punishment in the case of human rights violations, alleviating the perpetrators' fear that they will face judgement. A legitimate mechanism developed by the State has sometimes been used by high-ranking representatives, and thus impunity constitutes the greatest impediment to the full realisation of human rights.[56] Impunity has a significant impact on humanity and the international order because it "knows no territorial bounds and speaks no specific language. It is not unique to any religion or race, and is not limited to any particular geographical region. Impunity therefore remains a universal problem".[57]

As is understood from the United Nations Report on impunity, the term signifies "exemption or freedom from punishment and connotes the lack of effective remedies for victims of crimes". In recognition of "human rights law, impunity implies the lack of or failure to apply remedies for victims of human rights violations".[58] The absence of a remedy for a perpetrator's victims is considered an outcome of impunity, rather than a feature of impunity itself.[59]

As Director of Amnesty International UK, Kate Allen, emphasised the negative aspects of impunity within the context of human rights as follows: "Impunity not only denies justice to victims of human rights abuses and their families, it sends out a message to others that they will not be brought to trial for some of the worst crimes known to humanity. Hence it leads to a climate in which more of these crimes are committed, and where the law is seen to protect the perpetrators of the crimes, not their victims".[60]

The roll-back of impunity for perpetrators of human rights violations and the promotion of human rights are directly connected: these two acts share similar futures. There is a complicated relationship between the battle against impunity and the furtherance of human rights.[61] Articles 91 and 60 of the

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[55] Paz R. Baeza, *Impunity: An Impossible Reparation*, 69 NORD. J. INT. LAW 27, 28 (2000) [emphasis added]. "Dr Paz Rojas Baeza is a Chilean psychiatrist who played a leading role in treating the victims of the massive violations committed during the Pinochet dictatorship in Chile".

[56] *See generally* Penrose, *supra* note 44.

[57] *Ibid.*, at 270.

[58] Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 DENVER J. INT. LAW POLICY 591, 595–96 (1998).

[59] *See generally* Katherine Hooper, *The Ending of Impunity and the Fight for Justice for Victims of Human Rights Violations: A Chasm Too Great To Be Crossed?*, 9 FLINDERS J. LAW REFORM 181 (2006).

[60] Kate Allen, *Impunity - The Good News and The Bad*, 18 THE BARRISTER (2003), http://www.barristermagazine.com/barrister/archivedsite/articles/issue18/impunity.htm (last visited Feb 6, 2018).

[61] *See generally* Hooper, *supra* note 59.

Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, address the impunity problem in relation to human rights. The World Conference viewed "with concern the issue of impunity of perpetrators of human rights violations" and endorsed the view that "States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law".[62]

The 2005 Human Rights Resolution on Impunity by the UN Commission on Human Rights acknowledges that impunity prompts violations of human rights. Impunity also encourages future abuses.[63] On this point, the Resolution states that "impunity for violations of human rights and international humanitarian law that constitute crimes encourages such violations and is a fundamental obstacle to the observance and full implementation without discrimination of any kind of human rights".[64] Principle 16 of the Resolution declares that:

policies to combat impunity that are based on broad consultation can contribute significantly to ensuring public accountability and hence in securing lasting justice […] and exposing the truth regarding violations of human rights […] and therefore encourages States to involve, as appropriate, all those concerned, including civil society, victims, human rights defenders and persons belonging to minorities and vulnerable groups.

As Katherine Hooper has observed, when perpetrators can violate fundamental human rights of "their victims without fear of sanction, then those rights become little more than empty words of aspiration". Any society that "wishes to overcome the horrors of past human rights abuses must confront them in the present".[65] Prosecution and punishment of perpetrators of human rights violations are essential for the prevention of future human rights violations. Deterrence is essential to the project of disabling possible future human rights violations.

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[62] *Vienna Declaration and Programme of Action*, World Conference on Human Rights, U.N. Doc. A/CONF.157/23, arts. 60-91 (June 25, 1993).

[63] The following statement was made by Corinne Dufka, Associate Director of Human Rights Watch: In 'a quick bid to end the first brutal Liberian civil war and in the face of massive crimes committed against civilians, UN and West African leaders agreed to a peace plan that dispensed with justice and rushed an election that installed warlord Charles Taylor as president in 1997. Not surprisingly, within a short time, the country was back at war. The six years of repressive rule by President Charles Taylor that followed and the next war were characterized by the same egregious abuses against civilians as the earlier war and further set the country back'. Combating War Crimes in Africa: Testimony of Corinne Dufka before the U.S. House International Relations Committee, Africa Subcommittee, Human Rights Watch (2004), http://www.hrw.org/news/2004/06/25/combating-war-crimes-africa (last visited Feb 6, 2018).

[64] *Human Rights Resolution 2005/81: Impunity*, 61st Sess., E/CN.4/RES/2005/81 (Apr 21, 2005).

[65] Hooper, *supra* note 59, at 181.

Fundamental human rights violations while accepted as profoundly immoral, must also be accepted as unlawful. Perpetrators of such violations of the law should be subjected to judgment and not be exempted from punishment.

Conclusion

Louis Joinet summaries this unpleasant situation as follows:

From the origins of mankind until the present day, the history of impunity is one of perpetual conflict and strange paradox: conflict between the oppressed and the oppressor, civil society and the State, the human conscience and barbarism; the paradox of the oppressed who, released from their shackles, in turn take over the responsibility of the State and find themselves caught in the mechanism of national reconciliation, which moderates their initial commitment against impunity.[66]

Although the distinction between immunity and impunity still requires more concrete and unconditional resolution, there is a good and affirmative signal in the international order to put an end to impunity. The establishment of the Rome Statute of the International Criminal Court and the legal proceedings brought against Augusto Pinochet[67] may be seen as proof of a significant movement in international society to abolish impunity by bringing persons responsible for human rights violations to justice.

Impunity always presents a challenge to those responsible for preventing violations of fundamental human rights and establishing a just society. When impunity is allowed, it may become a significant obstacle to justice and peace. While "immunities are valuable in preventing interference with representatives, and thereby maintaining the conduct of international relations, they can also frustrate prosecutions" for human rights violations, unless a distinction is made between impunity and immunity.[68]

Punishing perpetrators helps to build public confidence that those who exploit the rights of others will not be exempt from punishment. Prosecution and punishment of perpetrators are of vital importance to ensuring the cycle

[66] *The Administration of Justice and the Human Rights of Detainees*, *supra* note 35, at 51.

[67] *See* R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 1) [1998] 4 AII ER; R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 2) [1999] 2 W.L.R. 272; R v. Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 3) [2000] 1 A.C. 147; Rodley, *supra* note 36; Reed Brody & Michael Ratner eds., The Pinochet Papers: The Case of Augusto Pinochet Ugarte in Spain and Britain (2000); Andrea Bianchi, *Immunity versus Human Rights: The Pinochet Case*, 10 EUR. J. INT. LAW 237 (1999); Charles Pierson, *Pinochet and the End of Immunity: England's House of Lords Holds That a Former Head of State Is Not Immune for Torture*, 14 TEMPLE INT. COMP. LAW J. 263 (2000).

[68] Cryer et al., *supra* note 2, at 531.

of impunity is abolished.[69] Triumphing over impunity is a prerequisite for enhancing human rights.

Abolishing impunity for perpetrators of fundamental human rights violations is a crucial step towards achieving justice and deterring prospective human rights violations. While the essential objective of ending impunity is to enable investigation of past crimes and the prosecution and punishment of perpetrators, the obligation to end impunity is also relevant for the future. Failure to meet legal obligations to investigate, prosecute and punish such criminals creates an environment in which an impunity culture takes root and thrives. Efforts to address human rights violations have two main objectives: First, the prevention of further human rights violations and second, provision of compensation for victims.

Impunity must be distinguished from immunity; the two terms must not be used interchangeably. Impunity is "the torturer's most relished tool. It is the dictator's greatest and most potent weapon. It is the victim's ultimate injury. And, it is the international community's most conspicuous failure".[70] The right to immunity enjoyed by States and their high-ranking representatives must not turn into impunity. Immunity can rightly create an obstacle to the prosecution of particular persons at a particular time and for particular violations. However, this right to immunity should not acquit such persons who have committed violations of fundamental human rights guaranteed by peremptory norms of general international law.[71]

Showing tolerance toward impunity can perpetuate violence, both by implicitly allowing illegal acts and by creating a culture of vengeance and insecurity that may afterwards be manipulated by rulers or leaders intending to instigate violence for their own political ends. By contrast, "pursuing justice in the long run may help strengthen rule of law by enhancing domestic criminal enforcement mechanisms. Holding trials can help combat revisionist versions of events by those who seek to deny that crimes occurred".[72] An accurate adjustment of the meaning of immunity in both the legal and the political sense can positively influence the future.

[69] *See generally* Hooper, *supra* note 59.

[70] Penrose, *supra* note 44, at 270.

[71] *See generally* Lauri Hannikainen, Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status (1988); *see also* Karen Parker & Lyn B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT. COMP. LAW REV. 411 (1989); Alexander Orakhelashvili, Peremptory Norms in International Law (2006).

[72] Sara Darehshori, Selling Justice Short: Why Accountability Matters for Peace 75 (2009).

Andy Loo & Walter E. Block[*]

THREATS AGAINST THIRD PARTIES: A LIBERTARIAN ANALYSIS

Abstract

The non-aggression principle (NAP) is a core building block of the entire civilized edifice. But, proscribed by this principle are not only physical invasions. The threat thereof also runs counter to just law. The present essay is an attempt to wrestle with this all-too-often hidden, or at least less-than-fully-appreciated aspect, of this legal philosophy.

Annotasiya

Aqressiya tətbiq etməmək prinsipi bütün sivil strukturun təməlidir. Lakin bu prinsiplə qadağan olunan ancaq fiziki qəsdlər deyil. Təhlükə həmçinin hüquqa qarşı da yönəlir. Məqalə bu hüquqi fəlsəfənin əsasən gizli qalan və ya daha az dəyərləndirilən aspektini həll etməyə təşəbbüs göstərir.

CONTENTS

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Introduction

In December 2015, Donald J. Trump, a then candidate in the United States Republican presidential primaries, proposed to "take out" the families of terrorists in order to deter terrorism.[1] While actual aggression against innocent persons decidedly violates libertarian law, we shall explore the question of whether it would be licit under libertarianism to threaten to harm a third party in order to stop someone from committing certain acts. We contend that the answer depends on whether that third party learns of the threat or not.

I. Background

To begin with, we offer a brief account of what the libertarian legal code is. The two basic building blocks of libertarianism are the non-aggression principle (NAP) and a theory of private property rights based on homesteading and voluntary exchange.

The NAP asserts that it is illicit for anyone or any group of people to initiate aggression against the person or property of others. (The question of what constitutes "aggression" will be addressed more precisely in the next section.) The use of force is, however, permitted in self-defense.

To determine whether an act is an intrusion upon another person's property or merely the retrieval of one's own possessions, we need a theory of property rights. Libertarianism holds that any property title obtained via homesteading or voluntary exchange is just and may not be deprived of the owner without consent.[2]

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[1] See LoBianco (2015), "Donald Trump on terrorists: 'Take out their families.'" CNN. December 3; http://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/.

[2] On homesteading, see: Walter Bock, *Earning Happiness Through Homesteading Unowned Land: a comment on 'Buying Misery with Federal Land' by Richard Stroup*, 15 Journal of Social Political and Economic Studies, Summer 237, 237-253 (1990); Walter Block, *Homesteading City Streets; An Exercise in Managerial Theory*, 5 Planning and Markets 18, 18-23 (2002); Walter Block, *On Reparations to Blacks for Slavery*, 3 Human Rights Review 53, 53-73 (2002); Walter Block and Michael R. Edelstein, *Popsicle sticks and homesteading land for nature preserves*, 7 *Romanian Economic and Business Review 7, 7-13;*
http://www.rebe.rau.ro/REBE%207%201.pdf; Walter Block and Guillermo Yeatts, *The Economics and Ethics of Land Reform: A Critique of the Pontifical Council for Justice and Peace's 'Toward a Better Distribution of Land: The Challenge of Agrarian Reform*, 15 Journal of Natural Resources and Environmental Law *37*, 37-69 (1999-2000); Walter Block v. Richard Epstein, *Debate on Eminent Domain*, 1 NYU Journal of Law & Liberty 1144, 1144-1169 (2005); Per Bylund, Man and Matter: A Philosophical Inquiry into the Justification of Ownership in Land from the Basis of Self-Ownership, Lund University (2004): http://www.uppsatser.se/uppsats/a7eb17de8f/;
http://perbylund.com/academics_polsci_msc.pdf; http://www.essays.se/essay/a7eb17de8f/;

It is worth noting that the scope of libertarianism is limited to judging whether a given act constitutes illicit aggression and therefore can be justly repelled or punished by force. It does not imply that any act that does not violate the NAP (and would therefore be legally permitted in a libertarian world) is necessarily desirable, commendable or even excusable.[3]

II. Why threat constitutes aggression

In this section we characterize in greater detail what the concept of "aggression" encompasses.[4] The primary form of aggression is the use of physical violence: one violates the NAP through the nonconsensual seizure or physical alteration of another person's property, such as through theft, robbery, murder or rape. (The last two types of action violate one's property right in their own body.) For example, if the policeman actually kills a terrorist's innocent son (not just threatens to do it), he will be guilty of a NAP violation.

From this starting point, two derived forms of aggression can be identified. The first of these is fraud. Suppose X and Y enter into a contract whereby X agrees to give Y an apple on the condition that Y gives X an orange. Suppose that, after X delivers an apple to Y, Y refuses to supply any orange to X. In

http://www.lunduniversity.lu.se/o.o.i.s?id=24965&postid=1330482; Per Bylund, *Man and matter: how the former gains ownership of the latter,* 4 Libertarian Papers 43 (2012): http://libertarianpapers.org/articles/2012/lp-4-1-5.pdf; Hoppe, Hans-Hermann, *Of Private, Common, and Public Property and the Rationale for Total Privatization*, 3 Libertarian Papers 1, 1-13 (2011) http://libertarianpapers.org/2011/1-hoppe-private-common-and-public-property/; Hugo Grotius, *Law of War and Peace (De Jure Belli ac Pacis) 113 (1625)* (translated by A.C. Campbell, London, 1814; Paul, Ellen Frankel. 1987); Stephan Kinsella, *A libertarian theory of contract: title transfer, binding promises, and inalienability*, 17 Journal of Libertarian Studies 11, 11–37 (2003): http://www.mises.org/journals/jls/17_2/17_2_2.pdf; Stephan N Kinsella, How we come to own ourselves 7 (2006);
http://www.mises.org/story/2291; Stephan N Kinsella, Homesteading, Abandonment, and Unowned Land in the Civil Law, 18 (2009): http://blog.mises.org/10004/homesteading-abandonment-and-unowned-land-in-the-civil-law/; John Locke, An Essay Concerning the True Origin, Extent and End of Civil Government, in E. Barker, ed., *Social Contract* 17-19 (1948); John Locke, Second Treatise of Civil Government 51 (1955). Marko Marjanovic, Least, Sufficient Force: Libertarian Theory of Defense §5 (2013); Murray N Rothbard, For a New Liberty 32 (1973): http://mises.org/rothbard/newlibertywhole.asp.

[3] For example, under this philosophy, pornography, prostitution, drug usage, would be legal, for consenting adults. However, that does not mean that libertarians *favor* engagement in such acts. For the difference between libertarianism which need not do so, and libertinism, which does, see Walter Block, *Libertarianism and Libertinism*, 11 The Journal of Libertarian Studies: An Interdisciplinary Review *117*, 117-128.

[4] See on this Murray N Rothbard, The Ethics of Liberty (1998): http://www.mises.org/rothbard/ethics/ethics.asp.

effect, Y is violating the condition on which X agrees to give Y the apple, and is therefore taking X's apple without his consent. But suppose Y offers a rock to X instead of the agreed upon orange. Would this still constitute fraud? After all, Y did express willingness to give X *something* in exchange for the apple he received. Yes, this would still be fraudulent, since X values the apple more than the rock, and, Y is contractually obligated to supply X with an orange, not a rock.[5]

The second form of derived aggression is threat.[6] Suppose V points a gun to W's head and claims that he will shoot W unless W gives him $100. This forces W to give up some of his property in order to avoid another property right violation against him (namely, murder). In other words, no matter which alternative W chooses, he necessarily loses control of some of his property.

A special kind of threat deserves separate treatment. Suppose that, rather than requesting money, V simply purports that he will shoot W no matter what W does. There is nothing W can do to change V's alleged plan, so W is not really forced to renounce any property titles in the way we saw in the last paragraph. If V does not end up shooting him (i.e. the threat is just bluff), it may seem that no coercion has occurred. However, we argue that there is still coercion in this case, as W would be prompted to increase security measures by wearing a bullet-proof vest, not going to places where he may encounter V, etc. In short, W would be forced to alter the way he spends his wealth in order to try to avoid the anticipated violent attack. Consequently, such a threat is still illicit as undermining W's full control of his property.

While we have just characterized illicit threat, it should be noted that the word "threat" is also often used to refer to utterances or acts that are licit, at least under libertarian law. Suppose A threatens to worship Gaia in order to stop B from eating broccoli. Is this "compulsion" against B a legal one? Yes, since A has the right to worship whosoever he wants. Consider in this regard blackmail versus extortion. There are threats in both cases. Take the former. The seller "threatens" to withhold the good[7] from the buyer, unless the latter

[5] But suppose that the "rock" is actually a diamond. Then, yes, it is still fraud, in that this valuable "rock" was not specified in the agreement. However, X might well "forgive" Y's fraud, and accept the diamond in lieu of the orange.

[6] The word "threat" has two distinct meanings: (1) intimidating claim, and (2) danger or hazard. In this paper, we deal strictly with the first and not the second meaning of the term. If someone secretly buries a landmine in an unowned piece of land, he is making the environment dangerous, hence posing a "threat" in the second sense, to passers-by. However, since the perpetrator has not made any intimidating claim, his act does not constitute "threat" in the first sense, and is therefore irrelevant to the focus of the present paper.

[7] Silence; refraining from engaging in malicious gossip, which also, of course, is perfectly legal.

pays him. Similarly, the buyer "threatens" not to pay the seller unless the agreed upon good or service is supplied to him. Licit, all around (Block, 2013). In very sharp contrast indeed, extortion is the threat of initiatory violence against the victim,[8] unless he accedes to the wishes of this criminal.

What we infer from this is that in order for a threat to the law. It is entirely licit to "threaten" to withhold a good or service unless paid. Ditto for "threatening" not to pay an agreed upon price unless delivery of the good or service is made. In extortion, the threat is to kidnap the target's children and/or in some other such manner deliver mayhem to the victim, which he has no right to do. In sharp contrast, in blackmail, the "threat" is to engage in gossip, at the target's expense. Since telling tales about people is and should be legal, this would be a legitimate, lawful threat.

III. Threat against third parties

So far we have established that it is illicit under libertarianism for someone, say A, to demand someone else, say B, to do something (which B has the right not to do) by threatening to aggress against *that same person B* if he does not comply. In this section we consider a variant of this type of act: what if, instead of threatening to aggress against B, A threatens to aggress against a third person C as a consequence of B's non-compliance?

We will divide our analysis into several cases. But before we proceed, it is important to reiterate that it is surely against libertarian law to actually aggress against an innocent third party as a "punishment" for someone else's action. In the following cases, we confine ourselves to the sole question of whether it would be licit to *utter a threat to do so*, without executing the content of the threat.

A. C does not learn of the threat

Suppose A tells B that A will aggress against C if B does not do a certain thing, but C is not aware of this assertion by A at all. Has A violated the non-aggression principle? There are two sub-cases here. The answer is the same in both sub-cases, but the sets of reasons are different.

1. Threat is used to stop non-rightful act by B

Suppose B, a terrorist, plans to commit a violent attack (which is plainly not a rightful act), and A, a (ideally private) policeman, wants to prevent this from happening.

Before we even consider the possibility of A threatening to hurt C, let us ask the question of whether it would be licit for A to threaten *B himself* in order

[8] Which of course is not licit, at least not in the libertarian society.

to deter him. Suppose A tells B, "If you commit a terrorist attack, I will torture you for 30 years!" Is this a licit threat?

Recall that in section III, we concluded that certain threats are illicit because they leave the victim with no choice but to give up certain property rights. For example, if a victim is forced by a threat to give $100 to a robber, the victim loses $100. But the situation with the terrorist is different. For B has no right to commit any terrorist attack in the first place. If he is forced by the threat to refrain from committing a terrorist attack, he is not losing any property rights (he is merely rendered unable to acquire illegitimate additional ones). Thus, A's threat against B is not aggressive in nature.[9]

[9] Note that this has nothing to do with whether A's alleged punishment against B "fits the crime." The point is not about A giving advance notice of the proper legal consequences of B's crime, but merely about A using a threat as a tool to convince B not to commit the crime. For libertarian theories concerning punishments that "fit" the crime, see Block, Walter. 1999. "Market Inalienability Once Again: Reply to Radin," *Thomas Jefferson Law Journal*, Vol. 22, No. 1, Fall, 37-88; http://www.walterblock.com/publications/market_inalienability.pdf; Block, Walter, *Berman on Blackmail: Taking Motives Fervently*, 23 Florida State University Business Review 57-114 (2003); Block, Walter, *Libertarianism vs. Objectivism; A Response to Peter Schwartz*, 26 *Reason Papers*, 39-62 (2003); Block, Walter, *The Non Aggression Axiom of Libertarianism*: http://archive.lewrockwell.com/block/block26.html;
Block, Walter, *Austrian Law and Economics: The Contributions of Adolf Reinach and Murray Rothbard*, (2004) Quarterly Journal of Austrian Economics 69-85; Block, Walter, Reply to Frank van Dun's *Natural Law and the Jurisprudence of Freedom*, 18 Journal of Libertarian Studies 65-72 (2004); Block, Walter, *Radical Libertarianism: Applying Libertarian Principles to Dealing with the Unjust Government,* Part II" 28 Reason Papers 85-109 (2006); http://www.walterblock.com/publications/block_radical-libertarianism-rp.pdf; Block, Walter E. 2009A. "Toward a Libertarian Theory of Guilt and Punishment for the Crime of Statism" in Hulsmann, Jorg Guido and Stephan Kinsella, eds., *Property, Freedom and Society: Essays in Honor of Hans-Hermann Hoppe,* Auburn, AL: Ludwig von Mises Institute, 137-148; http://mises.org/books/hulsmann-kinsella_property-freedom-society-2009.pdf; Block, Walter, Libertarian punishment theory: working for, and donating to, the state" 1 Libertarian Papers 5, 8 (2005); http://libertarianpapers.org/2009/17-libertarian-punishment-theory-working-for-and-donating-to-the-state/; Block, Walter E, *Rejoinder to Kinsella and Tinsley on Incitement, Causation, Aggression and Praxeology*, 22 Journal of Libertarian Studies 641, 641–664 (2011)
http://www.constitution.org/cb/crim_pun.htm. Beccaria's Of Crimes and Punishments; Block, Walter E., William Barnett II and Gene Callahan, The Paradox of Coase as a Defender of Free Markets, 1 NYU Journal of Law & Liberty 1075-1095 (2005); http://tinyurl.com/2hbzd4; Gregory, Anthony and Walter E. Block, *On Immigration: Reply to Hoppe*, 21 Journal of Libertarian Studies 25, 25-42 (2007); http://mises.org/journals/jls/21_3/21_3_2.pdf; Stephen Kinsella, *Punishment and Proportionality: the Estoppel Approach,* 12 The Journal of Libertarian Studies 51, 51-74 (1996); http://www.mises.org/journals/jls/12_1/12_1_3.npdf; Morris, Herbert. 1968. "Persons and Punishment." 52 The Monist 475, 475-501; http://www.law-lib.utoronto.ca/bclc/crimweb/bboard/personsandpunishment.pdf; Robert Nozick (1981):

It follows that A's threatening to hurt C in order to stop B from committing a terrorist attack is *a fortiori* justified. Again, if B refrains from committing a terrorist attack, he is not losing any property rights.

2. Threat is used to stop rightful act by B

Suppose A threatens to kill C in order to stop B from eating broccoli (which B of course has the right to do). Now, one of the two alternatives that A gives B – not to eat broccoli – constitutes a loss of (property) rights on the part of B, as he can no longer use his broccoli, fork, hands, mouth, etc. in whatever way he wishes. However, the other alternative available to B – eating broccoli anyway and letting C be killed – does not result in any loss of (property) rights on the part of B, since C is not B's property.[10]

B. C learns of the threat

In the previous case, in order to determine whether a threat is licit, we only needed to examine whether it violates B's rights; since C does not even learn of the threat, no aggression against C could have transpired. But we now consider the case that C does learn of the threat. Then the possibility of violating C's rights also comes into the picture. Indeed, since we have established that any threat to hurt C does *not* violate B's rights (and our arguments do not depend on whether C learns of it), the only way the threat could be illicit is to violate C's rights.

Whether the act that A is trying to prevent B from doing is rightful or not, C has no direct control over whether B does it. Therefore, this scenario relates back to our discussion of unconditional threats in section III: there is nothing

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Philosophical Explanations, Cambridge, MA: Harvard University Press, 363-373; Charles Olson, *Law in Anarchy*, 12 Libertarian Forum 4, 4 (1979);

Whitehead, Roy and Walter E. Block, *Taking the assets of the criminal to compensate victims of violence: a legal and philosophical approach*, 5 Wayne State University Law School Journal of Law in Society 229, 229-254. In the view of Rothbard (1998, p. 88, ft. 6): "It should be evident that our theory of proportional punishment—that people may be punished by losing their rights to the extent that they have invaded the rights of others—is frankly a *retributive* theory of punishment, a 'tooth (or two teeth) for a tooth' theory. Retribution is in bad repute among philosophers, who generally dismiss the concept quickly as 'primitive' or 'barbaric' and then race on to a discussion of the two other major theories of punishment: deterrence and rehabilitation. But simply to dismiss a concept as 'barbaric' can hardly suffice; after all, it is possible that in this case, the 'barbarians' hit on a concept that was superior to the more modern creeds."

[10] The two authors of this paper disagree on whether or not A's threat in scenarios such as this is licit. We therefore leave this question unanswered in this paper, and record the two authors' thoughts in the Appendix for the reference of future explorers of this intriguing question.

C can do (without persuading others to cooperate) that can affect the realization of the condition for A's punishment upon him. Another way to look at the matter is as follows: C is forced by the threat to take certain measures to stop B from committing the act in question, *or* to increase C's own security measures, in an attempt to avoid C's own demise. All in all, such threats by A interfere with C's autonomy and are therefore illicit, regardless of whether it is used to stop a rightful or non-rightful act by B.

IV. Indirect Knowledge of Threat

Let us probe a bit deeper into the issue of whether or not A's threat to B, that A will murder C, is a violation of the latter's rights. Clearly, if C never learns of this, there can be no question of any rights violation.[11] However, in the case under discussion, C is the innocent son of B, the terrorist, who is about to kill millions with a nuclear device. C hears of this threat, if he ever does, *after* the threat is uttered by A against B. Presumably, the nuclear menace is now long gone, resolved one way or the other. If C is now a decent adult, and first hears of this threat of A's against B, he is likely to be more than ready to forgive A, for attempting in this way to save millions of people's lives. It is only if he is still a child, and/or is not "decent" that he will harmed by this

[11] A similar case is that of attempted murder, where the target never learns of an unsuccessful attempt to murder him. If this attempt never impacts the target, then there can be no more guilt for the entirely unsuccessful perpetrator than if he "attempted" to commit this foul deed by thinking bad thoughts about his "victim" or by employing voodoo. See on this Kinsella, 1996, 68-69, 2006B, 2009A, 2009B. See also O'Neill and Block, 2013, on how the victim's knowledge of a threat enters into the determination of its legitimacy: Given a libertarian theory of punishment grounded in the notion of estoppel (Kinsella, 1996), it is sensible that the estoppel claim is raised whenever a person attempts to violate the NAP, even if they somehow fail. For example, if X swings his axe at a shape hidden behind the curtains, thinking it to be Y, then X is intending to initiate force against Y (assuming it is not retaliation for a prior aggression). This is so even if nothing turns out to be there, and X's axe tears his own curtain and nothing more. If Y is far away from the scene at the time there is no crime, because there has been no actual force and no threat of force known to Y. However, if Y is close enough to be aware of this action, or if he is away at the time, but later becomes aware of it, then this might constitute an assault on Y insofar as it puts him in anticipation of unlawful aggression against him--it is a threat to initiate force. This holds notwithstanding the fact that Y is physically unharmed (typically, when a threat is uttered, the target is physically unharmed, at least for the moment). In such a case Y is entitled to restitution from X for this assault and X is legitimately estopped from asserting his own rights (to a proportionate extent) against Y. X has aggressed against Y, albeit in a way that did not achieve X's intended outcome. (There may be issues as to the proximity of Y to the event, and whether X's behavior really does constitute a threat if Y is far away. The key point is that to establish a crime Y must also establish that some actual threat has occurred by virtue of the conduct complained of.)

threat, and/or be unwilling to forgive A, in which case A will be guilty of an illicit threat and restitution will be in order. Yes, we take the position that if a victim fully forgives his invader in such types of examples, there is a strong case to be made that the initial act was not really an invasion, not a NAP violation, in the first place.

What about the owner of a cabin in the woods, broken into by a starving, frost-bitten person in the middle of the winter? He saves his life by doing so, while eating the food stored within. The home invader leaves his name and address and sends payment for his "theft." Is he really a trespasser or a thief? It all depends upon the owner of the cabin, in our view. To the degree the victim forgives the perpetrator, it was not a crime, ex post, even though ex ante it certainly was.[12]

V. Legality vs. Morality

It is crucially important to distinguish legality and morality. In the former case, violence comes into play. If an act is illegal, this is justification for the employment of physical force, in defense against it or in retaliation for it. If murder, theft, rape, arson and fraud are against the law, it is justified for the forces of law and order to utilize ferocity, if need be, against the murderers, thieves, rapists, arsonists and fraudsters. This is something libertarians applaud, since these law-breakers are guilty of the prior initiation of aggression against innocent people. Similarly, if laws prohibiting paying low wages, charging high rents or interest rates, pornography, prostitution and gambling are illegal, this serves as the justification for physically subduing malefactors. Libertarians reject such laws, however, since the law breakers in these cases violate no rights. They are victimless "crimes." They take place between and among consenting adults, only, in which case there were no prior rights violations.

Morality is an entirely different matter. There is no one who doubts that the first set of behaviors are immoral, murder, etc. All decent people are repulsed by them. Even those who perpetuate these evil deeds recoil from them were they to be perpetuated upon themselves.[13] Similarly, all proper societies ban them by law. The second set of acts, violating price controls, engaging in prostitution, etc., are very different. Most people regard all of

[12] On the other hand, if the owner booby trapped the cabin, whether or not he placed a prominent sign to that effect on the front door, he is guilty of no crime.

[13] Yes, yes, there are exceptions. For example, a masochist might enjoy being the "victim" of an assault and battery, a suicidal person might welcome being murdered. We speak in overwhelming generalities in the text above.

them as immoral. Libertarians, at least qua libertarian, have no opinion in this issue at all, since this philosophy is solely concerned with legality[14] and strictly eschews all other issues of ethics.

How do libertarians deal with the trolley[15] challenge to their philosophy? Here, matters are a bit more complicated. Suppose we can throw the proverbial fat man onto the path of the trolley, thereby killing him, an outright act of murder. By doing so, we can save, oh, one billion innocent people.[16] In this case, morality and legality diverge once again, at least for most people, but in an entirely different manner. For the majority opinion would think this entirely justified behavior from a moral point of view. Again, libertarians, qua supporters of this philosophy, have no view on this matter, may not have any opinion on it, are precluded from doing so.[17] But, clearly, such behavior is

[14] Which acts should be legal, and which ones prohibited by law is the only concern of the libertarian qua libertarian.

[15] See on this Clark, Josh. Undated. "How the Trolley Problem Works." http://people.howstuffworks.com/trolley-problem.htm; Phillipa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, Virtues and vices and other essays in moral philosophy 19 (1978); Greene, Joshua. "The terrible, horrible no good very bad truth about morality and what to do about it, (2002): http://www.wjh.harvard.edu/~jgreene/GreeneWJH/Greene-Dissertation.pdf; http://mises.org/journals/jls/21_3/21_3_2.pdf; Kamm, Francis Myrna. 1989. *Harming Some to Save Others*, 57 *Philosophical Studies* 227-60; Mikhail, John, et al. 1998. "Toward a universal moral grammar." *Proceedings of the Twentieth Annual Conference of Cognitive Science Society*; http://www.law.georgetown.edu/faculty/mikhail/documents/Toward_a_Universal_MoralGrammar_pdf.pdf; Saxe, Rebecca. 2005. "Do the right thing." *The Boston Review*. September/October. http://bostonreview.net/BR30.5/saxe.html; Skulmowski, Alexander, Andreas Bunge, Kai Kaspar and Gordon Pipa. 2014. "Forced-choice decision-making in modified trolley dilemma situations: a virtual reality and eye tracking study." *Frontiers in Behavioral Neuroscience*. http://journal.frontiersin.org/article/10.3389/fnbeh.2014.00426/full; Stanford Encyclopedia of Philosophy. 2004."Doctrine of the Double Effect." July 28; http://plato.stanford.edu/entries/double-effect/; Swartz, Luke. 2000. "Silicon at the Switch: A Computational Moral Grammar for Solving Trolley Problems." Stanford University; http://xenon.stanford.edu/~lswartz/trolley/; Thomson, Judith Jarvis. 1985. "The Trolley Problem" *The Yale Law Journal*, Vol. 94, No. 6 (May), 1395-1415; http://www.jstor.org/stable/796133 http://philosophyfaculty.ucsd.edu/faculty/rarneson/courses/thomsontrolley.pdf; Unger, Peter. 1996. Living High and Letting Die (Oxford: Oxford University Press, 1996); Zimmer, Carl. 2004. "Whose life would you save?" Discover Magazine. April 21; http://discovermagazine.com/2004/apr/whose-life-would-you-save

[16] Why be pikers? Let us increase the usual numbers of people thereby saved in these examples.

[17] If they do, they are not libertarians, at least on this one issue. States Rothbard, 1982, p. 152: "… we are not, in constructing a theory of liberty and property, i.e., a 'political' ethic, concerned with all personal moral principles. We are not herewith concerned whether it is

contrary to one of the most basic building blocks of libertarianism, the non-aggression principle (the NAP), in this case proscribing the murder of an innocent fat person. What, then, to do, to rescue the perspective from the charge that it would in effect condemn on billion people to death, in order to save merely one person? The answer, emanating from this quarter is that we view it like any other NAP violation: it must be punished.[18] So, hopefully, a "hero" will rise up amongst the populace, kill, no, murder, the fat man by pushing him onto the path of the oncoming trolley, save the one billion who otherwise would die, and face the punishment dealt out to all murderers; presumably, the death penalty. However, there is a safety net available to libertarian theory when dealing with the trolley problem: who decides whether or not the full penalty should be imposed upon the murderer? His heirs. May they even go so far as to entirely forgive the murderer in such cases. Yes, indeed, they may do so.[19] Here is the out, or the saving grace for our hero. The victim himself, if he is philosophically oriented, will have anticipated just this sort of eventuality. His heirs will very likely take into account the extenuating circumstances of the trolley challenge. Presumably, although there can be no guarantee here, the heirs will forgive the heroic murderer, given the number of lives saved thereby.

moral or immoral for someone to lie, to be a good person, to develop his faculties, or be kind or mean to his neighbors. We are concerned, in this sort of discussion, solely with such 'political ethical' questions as the proper role of violence, the sphere of rights, or the definitions of criminality and aggression."

[18] For the libertarian view on punishment, see: Block, 1999, 2002-2003, 2003A, 2003B, 2004A, 2004B, 2006, 2009A, 2009B; Block, Barnett and Callahan, 2005; Gregory and Block, 2007; Kinsella, 1996; Marjanovic, 2013; Morris, 1968; Nozick, 1981, 363-373; Olson, 1979; Rothbard, 1998, 88; Whitehead and Block, 2003. In the view of Rothbard (1998, p. 88, ft. 6): "It should be evident that our theory of proportional punishment—that people may be punished by losing their rights to the extent that they have invaded the rights of others—is frankly a *retributive* theory of punishment, a 'tooth (or two teeth) for a tooth' theory. Retribution is in bad repute among philosophers, who generally dismiss the concept quickly as 'primitive' or 'barbaric' and then race on to a discussion of the two other major theories of punishment: deterrence and rehabilitation. But simply to dismiss a concept as 'barbaric' can hardly suffice; after all, it is possible that in this case, the 'barbarians' hit on a concept that was superior to the more modern creeds."

[19] Unless the victim has left a clear message indicating how his murderer, in such cases, should be treated, to the contrary.

Conclusion

Here we record the two authors' differing opinions on the question considered in sub-case IV(a)(ii), viz. whether it would be licit to threaten to aggress against a third party in order to stop someone from committing a rightful act.

Block's opinion:

A threatens B that if B eats broccoli, A will murder C. Suppose C is B's son, and B values this child of his very much, far more than eating broccoli. This is an illicit threat, since if carried out, it would deprive B of something greatly important to him, his son's life. If B gives in to this threat, he still loses a right of his, albeit less valuable: his ability to eat that vegetable. Now posit that A threatens to kill D in order to stop B from eating broccoli and that D is a stranger to both of them, particularly to B. Now the issue turns on even so, whether or not B values D at all. Let us assume B is a decent sort and would regret A's murder of D sufficiently to leave off ever eating broccoli again.[20] Then, again, we should count this as an illegitimate threat since it deprived B of a value he otherwise would have had; the life of D, a stranger or the right to eat broccoli. Next case: A threatens to kill E in order to stop B from eating broccoli, and B does not wish to protect the life of E. Then and only then will B not be directly forced to change his cuisine. However, even in this case, B will still be in fear of A. The former will think the latter a madman, capable of doing just about anything violent. Even if B gives not a fig for E, if B has any decency at all,[21] he will still give up his favorite food, and thus his rights will be violated. Next case: A threatens B that A will kill F, and B hates F; wishes the latter dead. Then and only then will B not become a victim of A's. B can still eat all the broccoli he wants. However, if F hears of this, A's threat to B will be a violation of F's rights, not B's.

Loo's opinion:

I contend that such a threat is still licit, because it leaves open a second alternative for B: to eat broccoli and let C be killed. As counter-intuitive as it may sound, this does *not* deprive B of any rights, even if C is B's son. In principle, this is the same as A threatening to litter in a random neighbor's backyard. B's deep concern for C's welfare should not make any difference in the legal realm. The fact remains that C is a separate person.

To make the logic even clearer, consider the following example: instead of threatening to kill C, A threatens to commit suicide if B commits a terrorist attack. Such a threat obviously does not violate B's rights. But *relative to B*, A

[20] A's threat is a very powerful one.

[21] I continue to consider A an all-powerful, unstoppable criminal

is in an analogous position as every other person in the world, including C. So we see that A's threatening to kill C cannot be deemed to violate B's rights either.

Note that the "harmless" nature (as far as B is concerned) of the alleged punishment not only renders a threat in this sub-case licit, but it also provides an extra reason why threats in the previous sub-case (which are employed to stop non-rightful acts) are licit, besides the reason already discussed before. Simply speaking, a threat in subcase IV(a)(i) is licit because "both horns are good," while a threat in subcase IV(a)(ii) is licit because "one horn is good." A threat is licit as long as "at least one horn is good."

Lala Abdurrahimova[*]

THE CASE LAW OF THE ECHR ON THE CONTRADICTIONS ARISING FROM THE RIGHT TO PRIVATE LIFE AND FREEDOM OF EXPRESSION

Abstract

Both, the right to private life and freedom of expression are universal, inalienable, interdependent and indivisible human rights. They also interact with each other. But in some cases the right to private life can clash with the right to freedom of expression at multiple levels and at different aspects of daily life. The article is namely dedicated to find out their interplay, conflicts, controversial issues arising from these conflicts and also to uncover the criterias for the solution of controversial issues, which have been defined by the international mechanisms.

Annotasiya

Həm şəxsi həyata hörmət hüququ, həm də ifadə azadlığı universal, ayrılmaz, müstəqil və bölünməz insan hüquqlarıdır. Onlar həmçinin bir-biri ilə qarşılıqlı əlaqədədir. Lakin bəzi hallarda şəxsi həyata hörmət hüququ gündəlik həyatın müxtəlif aspektlərində və müxtəlif səviyyələrdə ifadə azadlığı ilə toqquşa bilər. Məqalə də məhz bu hüquqların qarşılıqlı əlaqəsini, ziddiyyətini və bu ziddiyyətdən yaranan mübahisəli məsələləri aşkar etməyə və həmçinin mübahisəli məsələlərin həlli üçün beynəlxalq mexanizmlər tərəfindən müəyyən olunmuş meyarları ortaya çıxarmağa həsr olunmuşdur.

CONTENTS

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Introduction

Both, freedom of expression and the right to private life are fundamental rights. They are equally recognised in the Universal Declaration of Human Rights and other international conventions such as the European Convention on Human Rights (hereinafter "the Convention") and in many national constitutions. There are some important questions as to how two rights relate to each other. How should conflicts between privacy and freedom of speech be resolved? It is necessary to take into account that the law can not protect both rights at the same time when these conflicts arise – neither is absolutely protected.

The privacy and freedom of expression are two sides of the same coin, each an essential prerequisite to the enjoyment of the other. The relationship between the right to privacy and the right to freedom of expression is a complex one,[1] which implies that it can be analysed from multiple perspectives and at multiple levels. Both rights are inalienable human rights and are generally mutually supportive and interdependent. They have a central role along with the values of autonomy, identity and dignity in the realization of human self-development. Today more than ever, privacy and free expression are interlinked; an infringement upon one can be both the cause and consequence of an infringement upon the other. In terms of specific impacts on freedom of expression, a number of different areas can be identified, as described below.

In most situations, the European Court of Human Rights (hereinafter "the Court") will be confronted with a conflict rendering the above solution impossible. In such cases, a course of action that upholds both human rights to the extent possible should be preferred over a situation, in which one right is sacrificed for the sake of the other.[2]

This research unveils the relationship between privacy and freedom of expression. Moreover, the article investigates how the Court deals with privacy and freedom of expression. The article illustrates the tension between these two fundamental rights by looking at the judgements of the Court. The article will attempt to show that the Court developed tests to determine which right should reign supreme in any given situation.

This article is structured in two primary parts. The first and the main part of this article reviews the public interest as a principle of balancing between the right to private life and freedom of expression and ECHR approach on this issue. Under this section one can find specific judgements of the Court

[1] Eric Barendt, Freedom of Speech 165 (2nd ed. 2007).

[2] Eva Brems, Introduction to Conflicts between Fundamental Rights 4-6 (2008).

related to this issue. The second part of this article is about criticism and private life of political figures and public officials.

I. The public interest as a principle of balancing between the right to private life and freedom of expression and ECHR approach on this issue

The right to privacy is often considered an essential requirement for the realization of the right to freedom of expression,[3] insofar as privacy protection plays an important role in the creation of the content required for adequate exercising of the rights to freedom of opinion and expression. For instance, it is well understood that individuals need private spaces protected against external pressures and interferences in order to develop their own thoughts, opinions and ideas, which is important not only for self-development, but also to promote innovation and social development.[4]

The principle of the indivisibility of human rights requires, however, that both rights carry equal weight. Therefore, the two human rights conflict with one another. Neither right can be used as a trump over the other and alternative means must be employed to resolve the conflict.[5]

It is well established under international law that where a conflict arises between two non-absolute rights freedom of expression and privacy, reference should be had to the overall public interest, or some such analogous test, to decide which interest should prevail.

While Article 10 of the Convention guarantees the right to freedom of expression, its second paragraph expressly refers to "the protection of the reputation or the rights of others" as one of the legitimate grounds for restricting that right.[6]

However, balancing of fundamental rights in general is not immune to criticism. Some argue that accepting the assignment of different burdens to some human rights, where such burden depend on the circumstances framing a particular case, shifts character of human rights principles. They also argue that the process of balancing can possibly restrain the rights. One solution against such critiques is to stick to the proportionality principle, by limiting power from interference.[7]

[3]Frank La Rue (Special Rapporteur), Rep. on The Promotion and Protection of The Right to Freedom of Opinion and Expression, UN Doc. A/HRC/23/40 (April 17, 2013).

[4]Joseph A. Cannataci et al., Privacy, Free Expression and Transparency 77 (2016).

[5] Stijn Smet, *Freedom of Expression and The Right to Reputation: Human Rights in Conflict*, 26 AM.U.INT'L L. REV. 184, 184-185 (2010).

[6] European Convention on Human Rights, Art. 10.

[7] Başak Çalı, *Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions*, 29 HUM. RTS. Q. 251, 253-254 (2007).

First and foremost, in order to make a fair decision, the Court should identify whether the concerned relationships constitute a private life or not. According to the Court, private life is a broad concept which is incapable of exhaustive definition.[8] The concept is clearly wider than the right to privacy, however, and it concerns a sphere within which everyone can freely pursue the development and fulfilment of his personality.[9] In 1992, the Court said that:

> …. it would be too restrictive to limit the notion [of private life] to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.[10]

A. Axel Springer v. Germany

The European Court of Human Rights delivered some crucial judgements recently concerning the appropriate balance exercise during a conflict between Article 8 and Article 10 of the Convention, the right to freedom of expression and the right to respect for private life. In these cases, the Court has set out in some detail the key balancing criteria to be taken into account when a conflict arises between freedom of expression and privacy.

One of the most significant cases is Axel Springer v. Germany. In this case, the applicant was the publisher of the German tabloid newspaper Bild. The newspaper published a front page article detailing the arrest of a well-known television actor for possession of cocaine at a festival. The article noted that the actor had a previous conviction for importing a small amount of cocaine, and quoted the public prosecutor confirming the circumstances of the arrest.

The Grand Chamber firstly set out its well-established Article 10 jurisprudence, and also took the opportunity to reiterate that the right to protection of reputation was a right protected by Article 8. The Court confirmed that in order to engage Article 8, an attack on a person's reputation must attain a certain level of seriousness and causing prejudice to this right (citing A. v. Norway, para. 64). Moreover, it stated that Article 8 cannot be relied upon to complain of a loss of reputation which is the foreseeable consequences of a person's actions such as the commission of a criminal offence (citing Sidabras and Džiautas v. Lithuania, para. 49).[11]

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[8] Costello-Roberts v. the United Kingdom, App. No. 13134/87, Eur. Ct. H.R., § 36 (1993), http://hudoc.echr.coe.int/eng?i=001-57804.

[9] Ursula Kilkelly, The Right to Respect for Private and Family Life: A Guide to The Implementation of Article 8 of The European Convention on Human Rights, 11 (2001).

[10] Niemietz v. Germany, App. No. 13710/88, Eur. Ct. H.R., § 29 (1992), http://hudoc.echr.coe.int/eng?i=001-57887.

[11] Von Hannover v. Germany (No.2), 2012-I Eur. Ct. H.R. § 83.

The Grand Chamber stated as a matter of principle that Article 10 and Article 8 deserved "equal respect", and consequently the Court may be required to verify whether the domestic authorities struck a "fair balance" when these two values come into conflict. In this regard, the Grand Chamber enunciated its standard of review: where the domestic courts have engaged in the appropriate balancing exercise consistent with Article 10 principles, the Court will require "strong reasons" to substitute its views for those of the domestic courts (citing MGN Limited v. the United Kingdom and Palomo Sánchez v. Spain).

The Court then proceeded to set out the six criteria for such a balancing exercise, and applied it the German courts' analysis:

***(a) Contribution to a debate of general interest*:** the Court considered that the articles concerned an arrest and conviction, which were "public judicial facts", which presented a degree of general interest. However, the degree of public interest may vary according to how well-known a person is.

***(b) How well-known is the person and subject matter*:** the Court stated as a matter of principle that it was primarily for domestic courts to assess how well-known a person is. However, the Court noted the different conclusions reached in the German courts, and held the actor was sufficiently well-known to qualify as a "public figure", which reinforced the public interest in being informed of his arrest and conviction.

***(c) Prior conduct of the person*:** the Court held that the actor had "actively sought the limelight", and coupled with his public figure status, meaning his "legitimate expectation" that his private life would be effectively protected was reduced.

***(d) Method of obtaining information and its veracity*:** it was held that the articles had a sufficient factual basis, the truth of which was not in dispute, and the information had not been published in bad faith.

***(e) Content form and consequences of publication*:** the manner in which a person is represented in an article or photograph is a factor to be taken into consideration. The Court held that the first article "merely related" to the actor's arrest, with the second article only reporting on the sentences imposed at the end of a public hearing. For the Court, the article did not therefore reveal details about the actor's "private life".

***(f) Severity of sanction*:** a final consideration was the severity of the sanctions, namely injunctions and fines totalling 11,000 euro, which the Court considered lenient, but capable of having a chilling effect.[12]

In light of these considerations, the Court concluded that the interference with freedom of expression had not been necessary in a democratic society, as there was no reasonable relationship of proportionality between the

[12] *Id.*, § 89-95.

restrictions and the legitimate aim pursued.[13] The applicant was awarded 50,000 euro in damages and costs.

B. Von Hannover v. Germany

The first case (*Von Hannover v. Germany*, 2004) involved a number of photos of Princess Caroline of Monaco, including of her riding on a horse, on a skiing holiday and tripping over something on a private beach. The photos were published in various magazines in Germany. The German courts, for the most part, upheld the publication of the pictures (with the exception of certain pictures taken in places where the princess had a reasonable expectation of privacy and some pictures involving her children). The Court, on the other hand, found that publication of the pictures represented a breach of the applicant's right to privacy. The Court once again highlighted the importance of freedom of expression, stating that "In the cases in which the Court has had to balance the protection of private life against the freedom of expression it has always stressed the contribution made by photos or articles in the press to a debate of general interest".[14] The Court recognised that photos are a protected form of freedom of expression.

In distinguishing between public interest debate and protected private life in the Hannover case, the Court stipulated that:

> The Court considers that a fundamental distinction needs to be made between reporting facts – even controversial ones – capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions.197 The domestic courts had held that Princess Caroline was a figure of contemporary society "par excellence" and therefore had no right to privacy unless she was in a secluded place out of the public eye. The European Court held that this standard might be appropriate for politicians exercising official functions, but was not applicable in the present case. As the Court noted in relation to the applicant, "the interest of the general public and the press is based solely on her membership of a reigning family whereas she herself does not exercise any official functions.[15]

The situation was largely the same in the second case (*Von Hannover v. Germany*, No. 2, 2012) with the exception that the photos in question focused mostly on the issue of the illness of the reigning Prince of Monaco, Prince Rainier, and the way his family were looking after him during his illness. The

[13] *Id.*, § 110.

[14] Von Hannover v. Germany, 2004-VI Eur. Ct. H.R. § 60.

[15] *Id.*, § 72.

Court reiterated many of its basic principles concerning privacy, including its primary purpose:

> The concept of private life extends to aspects relating to personal identity, such as a person's name, photo, or physical and moral integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is thus a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life. Publication of a photo may thus intrude upon a person's private life even where that person is a public figure.[16]

The Court also addressed the question of a possible hierarchy between the rights to freedom of expression and privacy, the different ways in which cases might come before the Court and how that might affect the margin of appreciation and the relative protection for each of these rights, stating "In cases such as the present one, which require the right to respect for private life to be balanced against the right to freedom of expression, the Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention, by the person who was the subject of the article, or under Article 10 by the publisher. Indeed, as a matter of principle these rights deserve equal respect. Accordingly, the margin of appreciation should in theory be the same in both cases".[17]

In cases of *Von Hannover v. Germany* (No. 1, 2004) and *Von Hannover v. Germany* (No. 2, 2012) the Grand Chamber of the European Court of Human Rights has used the above mentioned key balancing criteria to settle a conflict, which arise between freedom of expression and privacy.

C. Rubio Dosamantes v. Spain

In case of *Rubio Dosamantes v. Spain*, the European Court of Human Rights determined that Spain had violated the right to respect for private life of applicant. The case concerned a complaint by the pop singer Paulina Rubio that her honour and reputation had been harmed by remarks made on television about her private life.[18] Ms. Rubio had challenged several TV programmes broadcast in the spring of 2005 that had reported on various aspects of her private life such as her sexual orientation, the relationship with

[16] Von Hannover v. Germany (No. 2).

[17] *Id.*, § 106.

[18] Rubio Dosamantes v. Spain, Eur. Ct. H.R. (2017), http://hudoc.echr.coe.int/eng?i=001-171528

her boyfriend and his drug abuse. The Spanish courts had considered that the programmes had not impugned her honour and reputation.

Referring to its own case law, and notably the criteria set in its second Von Hannover decision of 2012, the ECHR observed that the comments had been frivolous, unverified and had exclusively concerned Ms. Rubio's private life. Furthermore, they had not contributed to a debate of public interest that would have justified their disclosure.

The Court also underscored the media's duty of care when reporting on aspects pertaining to a person's private life. It made clear that the "spreading of unverified rumours or the limitless broadcasting of random comments on any possible aspect of a person's daily life could not be seen as harmless". The media is required to balance the competing rights of Article 8 ECHR, a person's right to respect for their private life and Article 10 ECHR, the media's right to freedom of expression including the public's right to information, when determining whether or not to publish or air information. The ECHR concluded that the Spanish courts had violated their positive obligation in this respect.

The Court emphasized that even if information is already in the public domain without the person concerned having objected to its dissemination, this does not imply that the information is no longer private and individuals can no longer rely on their rights under Article 8. Even if Ms. Rubio was a subject of enhanced media attention, this did not give free the right broadcasters to publish "unchecked and unlimited comments" about her private life.

This case underpins the importance of the right to private life in today's society where information is susceptible to spreading instantly and globally, thus having a lasting damaging effect on a person's reputation and honour. The right to freedom of expression is so essential for the functioning of modern democracies is, nonetheless, limited where the private life of celebrities is concerned.

The public interest should be taken into account when applying the privacy exception to the right to access information held by public bodies (right to information). Thus, in a Joint Declaration adopted in 2004,315 the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression in 2004 stated: The right of access should be subject to a narrow, carefully tailored system of exceptions to protect overriding public and private interests, including privacy. Exceptions should apply only where there is a risk of substantial harm to the protected interest and where that harm is greater than the overall public interest in having access to the information.[19]

[19] Toby Mendel et al., Global Survey on Internet Privacy and Freedom of Expression 99 (2012).

II. Criticism and private life of political figures and public officials

Another major and controversial issue of concern is criticism and private life of political figures and public officials by journalists and an ordinary people.This raises several difficult and overlapping set of questions. First of all, are people entitled to know the moral record of politicians? Secondly, can it be argued that even politicians are entitled to some privacy?

To explore these questions, let's lay out an approach of the European Court of Human Rights on this issue. Ever since Lingens v. Austria case, the Court has distinguished between several categories of plaintiffs in defamation proceedings and established the limits of acceptable criticism against them.

In its first case on defamation, the European Court of Human Rights stated:

> The limits of acceptable criticism are … wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance.[20]

The Court has held that governments must tolerate even more criticism than politicians. In case of Castells v. Spain the Court stressed that:

> The limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion.[21]

Moreover, Article 1 of "Declaration on freedom of political debate in the media" (Adopted by the Committee of Ministers on 12 February 2004 at the 872nd meeting of the Ministers' Deputies) stipulates that freedom of expression and information through the media Pluralist democracy and freedom of political debate require that the public is informed about matters of public concern, which includes the right of the media to disseminate negative information and critical opinions concerning political figures and public officials, as well as the right of the public to receive them.[22]

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[20] Lingens v. Austria, App. No. 9815/82, Eur. Ct. H.R., § 42 (1986), http://hudoc.echr.coe.int/eng?i=001-57523.

[21] Castells v. Spain, App. No. 11798/85, Eur. Ct. H.R., § 46 (1992), http://hudoc.echr.coe.int/eng?i=001-57772.

[22] Declaration on Freedom of Political Debate in The Media, Article 1.

The Court has made it clear that enhanced protection also applies to governmental officials. In the case of *Thoma v. Luxembourg*, 2001, the Court stated that debate about officials, acting in their official capacity, is also covered by the heightened protection standard:

> Civil servants acting in an official capacity, like politicians are subjected to wider limits of acceptable criticism than private individuals.[23]

The Court has made it clear that this heightened degree of protection does not just apply to political debate, but extends to all matters of public interest, stating that there is "no warrant" for distinguishing between the two.[24]

In *Cihan Öztürk v. Turkey*, 2009, the applicant had published critical remarks about the protection of a historic building. He had worked as a manager, unveiling secrete and wasteful spending of public money in what was ultimately an unsuccessful restoration project. It resulted in the partial collapse of the building. The Court came out in favour of very strong protection for statements, which expose official wrongdoing or corruption:

> In this context, the Court observes that, while paragraph 2 of Article 10 of the Convention recognises that freedom of speech may be restricted in order to protect the reputation of others, defamation laws or proceedings cannot be justified if their purpose or effect is to prevent legitimate criticism of public officials or the exposure of official wrongdoing or corruption.[25]

Noting the importance of public debate on democratic issues in the public interest, the Court further said that freedom of the media provides the community with one of the best tools for discover and formulate opinions about political leaders' ideas and approaches. In general, the freedom of political debates lies at the heart of the concept of a democratic society.

In case of *Obershlick's v. Austria* (N2), the journalist called Mr. Hayderi (head of the Austrian Freedom Party) "Idiot'". Mr. Oberschlick's passage, entitled "P.S.: 'Trottel' statt 'Nazi' ("P.S.: 'Idiot' instead of 'Nazi'), read as follows: "I will say of Jörg Haider, firstly, that he is not a Nazi and, secondly, that he is, however, an idiot".[26] He used this phrase after the phrase "Mr. Hayder called the German soldiers fighting for peace and freedom in World War II". The court stressed that:

> The most important of these is Mr. Haider's speech, which Mr. Oberschlick was reporting on in his article. In claiming, firstly, that

[23] Thoma v. Luxembourg, 2001-III Eur. Ct. H.R. § 47.

[24] Thorgeir Thorgeirson v. Iceland, App. No. 13778/88, Eur. Ct. H.R. (ser. A), § 64 (1992), http://hudoc.echr.coe.int/eng?i=001-57795.

[25] Cihan Öztürk v. Turkey, Eur. Ct. H.R., § 32 (2009), http://hudoc.echr.coe.int/eng?i=003-2756454-3021135.

[26] Oberschlick v. Austria (No. 2), App. No. 20834/92, Eur. Ct. H.R., § 9 (1997), See: http://hudoc.echr.coe.int/eng?i=001-57716.

> all the soldiers who had served in the Second World War, whatever side they had been on, had fought for peace and freedom and had contributed to founding and building today's democratic society. Secondly, it suggested, that only those who had risked their lives in that war were entitled to enjoy freedom of opinion, Mr. Haider clearly intended to be provocative and consequently to cause a strong reaction.[27]

Finally, the Court found that the word "Idiot" can be considered as a disproportionate expression to caused Mr. Hayder's anger.

Furthermore, it should be mentioned that the people have a right to know about those in power to make decisions. There are some reasons for this finding. First and foremost, their salaries are paid by the people through taxes. Moreover, the decisions of public political figures affect many aspects of people's lives. In exchange the people have the right to make informed judgements about the kind of leaders they have. Any attempt to restrict what may be reported about public figures in the press could easily become a conspiracy to keep voters in the dark and to manipulate them. For example, many would think that, a politician who had an extra marital affair was equally capable of breaking his promises and lying to his country. Or if a tabloid paper reveals that a politician took drugs at university and justifies publication of that story with the argument that voters are entitled to know the moral record of someone who is standing for election as a member of parliament.

The ECHR has identified that politicians must display wider tolerance to media criticism:

> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society which prevails throughout the Convention. The limits of acceptable criticism are accordingly wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance.[28]

Besides the above-stated, a free media is essential to the functioning of a free-market economy, exposing corruption and dishonesty on the part of public officials and businesses in the democratic society. If investigative journalists are prevented from scrutinising the private lives of public figures,

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[27] *Id.*, § 31.

[28] Monica Macovei, A Guide to the Implementation of Article 10 of The European Convention on Human Rights, 50 (2nd ed. 2004).

then corruption and crime will be much easier to hide. For example, how does a senior civil servant afford a Ferrari, a yacht and a villa in Monaco on his government salary?

The similar provisions found their reflection in the "Declaration on freedom of political debate in the media". Article 4 of the mentioned Declaration lays down that public scrutiny over public officials. Public officials must accept that they will be subject to public scrutiny and criticism, particularly through the media, over the way in which they have carried out or carry out their functions, insofar as this is necessary for ensuring transparency and the responsible exercise of their functions.[29]

Apart from that, Article 7 of the same Declaration prescribes that, the private life and family life of political figures and public officials should be protected against media reporting under Article 8 of the Convention. Nevertheless, information about their private life may be disseminated where it is of direct public concern to the way in which they have carried out or carry out their functions, while taking into account the need to avoid unnecessary harm to third parties. Where political figures and public officials draw public attention to parts of their private life, the media have the right to subject those parts to scrutiny.[30]

Taking into account the above-stated, it is necessary to note that in terms of public interest the private lives of public figures should be partly open to press scrutiny.

At this point, it should be particularly mentioned that, journalists serve as watchdogs over governments and the private sector and draw the public's attention to important issues. Governments and private actors in many places try to silence journalists and create threatening environments for them. Watchdog reporting covers an array of malfeasance: from sex and personal scandals to financial wrongdoing, political corruption, enrichment in public office, and other types of wrongdoing.

The role of "public watchdog" is something that the ECHR has stressed on many occasions:

> Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog.[31]
>
> And:
>
> Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the

[29] Declaration on Freedom of Political Debate in The Media, Article 4.

[30] *Id.*, Article 7.

[31] Thorgeir Thorgeirson v. Iceland, App. No. 13778/88 , Eur. Ct. H.R. (ser. A), § 63 (1992).

> opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.[32]

The crazy statements are particularly vulnerable when it comes to responding to provocation. In the case of *Lopez Gomes da Silva v. Portugal,* journalist criticized Mr. Resender's political relationship with a candidate for membership in the municipality and called it "ridiculous", "clown" and "rude". This criticism was directed after Mr. Resender's statement. In those statements, he made abusive statements about a number of political figures, including insulting their physical characteristics. The court considered the conviction of a journalist as a violation of Article 10.

The freedom to criticise the government was explicitly upheld by the Court in 1986: it is incumbent on the press to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.

The Court's view that the scope of criticisms by public institutions, public and political actors is derived from the important role that freedom of expression plays in managing and developing a democratic society.

Conclusion

As was argued in this essay, the principle of "public interest" is the best approach to solve the contradictions between the right to private life and freedom of expression. In order to make a fair decision, courts should test the phrase "public interest". It is difficult to make a fair decision without putting the question to test.

In matters of public interest, the media should have a higher degree of protection than other persons exercising freedom of expression.

Summarising the case-law of the European Court of Human Rights reveals that the permissible limits for media criticising public bodies, political and official persons are wider than those of ordinary people. The degree of tolerance of criticism should be broader if the person has the ability to influence the social and political processes. The debate on political issues and other issues that are of interest to the public should tolerate harsh, whipping, and sometimes harsh words about politicians, government, and officials. Statements about politicians can be restricted only when this is absolutely necessary. The interest of protecting the authority of political and official persons should be balanced with public interest in the open discussion of political and public issues. The protection of the authority of the public

[32] Castells v. Spain, App. No. 11798/85, Eur. Ct. H.R. (ser. A), § 43 (1992), http://hudoc.echr.coe.int/eng?i=001-57772.

authority may only be consistent with the legitimate aims set out in Article 10 of the Convention, to protect the reputation of justice. The journalist may use certain episodes or even provocation to draw more attention to a publicly-debated subject. As media is playing an indispensable role in a democratic society, it should enjoy wider range of liberties. The permissible limits of political criticism are broader than those of public and other public organizations.

Elnur Kərimov[*]

UMBRELLA CLAUSES WITHIN ENERGY CHARTER TREATY

Abstract

Since the late 1950s, international investment law has experienced a new term so-called 'umbrella clauses' aimed for the protection of the observance of obligations agreed between foreign investors and host states. However, since the beginning of the new milennium, the umbrella clauses have faced a bunch of criticism, being condemned on eradicating the difference between contracts and public international law. Wordings in international energy investment agreements, including Energy Charter Treaty have caused the question that whether these clauses cover all obligations or specific commitments to investors. In this article, the notion of umbrella clauses has been discussed and Article 10(1) of the Energy Charter Treaty has been explained by references to the case law of international arbitration courts.

Annotasiya

Ötən əsrin 50-ci illərinin sonlarından etibarən, beynəlxalq investisiya hüququnda xarici investorlar və ev sahibi dövlətlər arasında razılaşdırılan öhdəliklərin yerinə yetirilməsinə təminat məqsədi güdən və 'çətir müddəaları' adlanan yeni bir termin ortaya çıxmışdır. Buna baxmayaraq yeni minilliyin başlanğıcından bəri, çətir müddəaları müqavilə hüququ və beynəlxalq ümumi hüquq arasındakı fərqi ortadan qaldırması kimi bir sıra tənqidlərlə üz-üzə gəlmişdir. Beynəlxalq enerji investisiya sazişlərində, o cümlədən Enerji Xartiyası Sazişində istifadə olunan sözlər bu müddəaların bütün öhdəlikləri, yoxsa investorlar qarşısında qəbul edilən spesifik öhdəlikləri əhatə etməsi sualını doğurur. Bu məqalədə çətir müddəaları anlayışı müzakirə edilmiş, Enerji Xartiyası Sazişinin 10-cu maddəsinin 1-ci bəndi beynəlxalq arbitrajların presedent hüququna istinad olunmaqla izah edilmişdir.

CONTENTS

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Introduction

Throughout the years, an increasing flow of investments from developed countries to developing ones has necessitated the conclusion of investment agreements between investors and invested states. When investors and host states reach a common point to finalize negotiations, they both usually sign investment contracts which are somewhere between treaties and private contracts.[1] In order to recover their market loss and avoid possible political risks, investors always look for contractual clauses which will at least relieve their damage. 'Umbrella clauses'[2] are one of these contractual clauses which are actively used by investors as a remedy for contractual breaches. They are quite prominent in the field of international investment law, as today two-fifths of more than 2700 BITs[3] contain umbrella clauses.[4] 'Umbrella clauses' has also an utmost importance in international investment law that Article 10(1) of the Energy Charter Treaty (ECT) comprises such a clause. In other words, foreign investors of state parties to the ECT can also bring their dispute before the treaty mechanisms and raise the question of state responsibility for contractual breaches.

This article is going to discuss the history and rationale of these clauses, in general, through the First Part. The Second Part will mainly focus on the ECT and the 'umbrella clause' contained therein. Although this article aims to discuss 'umbrella clauses' in relation to the ECT, it is not limited to the scope of the ECT, rather it overflows, from time to time, through the case law of the International Centre for Settlement of International Disputes (ICSID) and other dispute settlement institutions. However, the article will not touch *ratione personae* of the application of 'umbrella clauses' and will limit the scope with *ratione materiae*. All findings will be patched up in the Conclusion and final remarks will be introduced together with the author's views.

[1] E. Meurling & B. Volders, *Umbrella Clauses in International Investment Litigation*, 2 Eur. Procurement & Pub. Private Partnership L. R 80, 80 (2007).

[2] The clause is also referred as under the principle of *'pacta sunt servanda'* or the rule of *'sanctity of contract'* rule by some arbitration tribunals. *See, e.g., SGS Société Général de Surveillance S. A. v. The Islamic Republic of Pakistan*, , ICSID Case No. ARB/01/13, Decision of the Tribunal on Objections to Jurisdiction, ¶163 (6 August 2003), *see at:* https://www.italaw.com/cases/1009, (last visited: 26 October , 2017)

[3] Bilateral Investment Treaties.

[4] K. Yanacca-Small, Arbitration under International Investment Agreements: A Guide to the Key Issues, 483 (2010).

I. Origins and Rationale of Umbrella Clauses

A. Umbrella Clauses and Other Contractual Mechanisms

In any kind of investment relationships, an initial disequilibrium exists between a host state and an investor, mainly due to the unbalance between their bargaining powers. This stage is the outset of all transactions in an energy investment environment and the emergence of investment offers and acceptance, hence, especially foreign investors are dominant role players in energy investment negotiations with states. Grasping a strong bargaining power in their hands, foreign investors are mostly inclined to insert contract clauses that will provide a comprehensive protection[5] in favour of their investments. 'Umbrella clauses' stand out in this regard, as with their basic explanation, they enable foreign investors to elevate contractual claims up to the international level,[6] by a simple inclusion of the clause into BITs by their home state. Hence, the 'umbrella clauses' are different in character from other stabilization clauses because unlike other contractual clauses, the 'umbrella clause' is a product of negotiations between at least two states. Foreign investors do not include these clauses themselves, but these clauses enable them to sue host states relying on an article they did not even draft.

B. History and Origins of Umbrella Clauses

Historically speaking, the tendency of the inclusion of 'umbrella clauses' in International Investment Agreements (IIAs) originates from the tension between developed and developing countries.[7] The 'umbrella clauses' have started to appear in IIAs since the late 1950s as a part of the international investment movement, a kind of a reaction to the trend of liberal internationalism after the WWII and establishment of dispute settlement centres like the ICSID and Multilateral Investment Guarantee Agency (MIGA).[8] In 1959, the BIT concluded between Germany and Pakistan already contained the 'umbrella clause'.[9]

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[5] The comprehensiveness of the protection provided by the 'umbrella clauses' is reflected on the term itself, as BITs covers contractual obligations with its protective umbrella. C. Schreuer, *Travelling BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 J. World Investment & Trade 232, 250 (2004).

[6] D.M. Zenginkuzucu, *Şemsiye Klozların ICSID Hakem Mahkemesinin Yargı Yetkisine Etkisi*, 1 Uluslararası Ticaret ve Tahkim Hukuku Dergisi 166, 173 (2013).

[7] J. Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 Geo. Mason L. Rev. 137, 140 (2006).

[8] T.W. Wälde, *The Umbrella Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases*, 6 J. World Investment & Trade 184, 192 (2005).

[9] R. Dolzer & C. Schreuer, Principles of International Investment Law 167 (2012). E. Lauterpacht's legal advice to Anglo-Iranian Oil Company about the internationalization of contract obligations and further developments, such as Abs-Doelle Draft of 1958 and Article

The question why foreign investors need to include 'umbrella clauses' still in the presence of *'pacta sunt servanda'* principle may be of interest to this article. Wälde[10] found the answer in the notorious unwillingness of foreign investors' home states to invoke *'pacta sunt servanda'* principle for minor commercial disputes of their investors with host states, bearing in mind that the principle only covered interstate agreements.[11] When the properties of foreign investors in the host state were subject to a nationalization or expropriation, they became vulnerable, since they could not invoke international responsibility of host states, except the cases in which the due process of law of host states turned to be allegedly flawy. That hindrance was, to some extent, related to the concept of *'Calvo Doctrine'*.[12] This doctrine referred foreign investor-state agreements completely and exclusively to domestic law or in other words, the jurisdiction of host states.[13] In contrast, when 'umbrella clause' was developed as a new edition of *'pacta sunt servanda'*,[14] it was aimed to enable not only contracting parties but also the foreign investors to enforce IIAs for their investment disputes.[15]

From the author's perspective of, irrespective of the fact that *'pacta sunt servanda'* has not lost its international law character at all, they should not be considered tantamount to the 'umbrella clauses', because the latter is more specific for international investment law. But of course, the gist of our research lies in the historical evolution of the *'pacta sunt servanda'*, thereby its influence in this regard must be borne in mind.

2 of Abs-Shawcross Convention of 1959 were noteworthy milestones of the historical background of these clauses.

[10] Wälde, *supra note* 7, 192-3.

[11] For a thorough compilation and evaluation of doctrinal views on the applicability of the principle of *'pacta sunt servanda'* on energy investment contracts concluded between foreign investors and host states, *see also*, Mustafa Erkan, International Energy Investment Law: Stability Through Contractual Clauses, 160-6 (2011).

[12] Being classified as a body of international rule about jurisdictional matters on aliens in a foreign country and the restrictive scope of protection provided by their home state, this doctrine was advanced by Argentine diplomat Carlos Calvo in 1868 and restated by Argentine foreign minister Luis Maria Drago in 1902. For a more detailed explanation of 'Calvo Doctrine', *see*, Calvo Doctrine, https://www.britannica.com/topic/Calvo-Doctrine, (last visited: 29 October, 2017). In addition, one reflection of the philosophy behind the 'Calve doctrine' can be found in Article 27 of the ICSID Convention which prohibits the right of Contracting States on diplomatic protection.

[13] Wälde, *supra note* 7, 201.

[14] B.Ş. Köşgeroğlu, Enerji Yatırım Sözleşmeleri ve Bunların Uluslararası Yatırım Anlaşmaları ile Korunması 303 (2012).

[15] However, current practice reveals that states are reluctant to invoke this clause in favour of their investors' investment disputes, as the cases brought in front of miscellaneous dispute resolution centres are disputed, as a principle, by foreign investors.

C. The Link between Contractual and International Obligations

The logic behind the 'umbrella clause' explains that any investor who alleges the breach of the investment contract is able to invoke the concluded IIA and head to the international forum.[16] However, this situation is quite exceptional that in general, breaches of private contractual obligations end up with the hearing of cases before domestic courts or arbitration tribunals so agreed in investment contracts,[17] not at international arbitration facilities prescribed in IIAs. The main difference between contractual and treaty claims lies in the source of the right entitled.[18] It means that contractual claims only stems from private contracts, whereas treaty claims are always based on international treaties. Nevertheless, 'umbrella clauses' somehow fills the gap between contractual and international obligations. But is a single clause containing an observation of contractual obligations sufficient for holding contracting states of BITs or Multilateral Investment Treaties (MITs) responsible for the breach of the treaty? At this point, two clashing decisions issued independently by two arbitration tribunals respond to our question with "yes" and "no" in *SGS v. The Philippines*[19] and *SGS v. Pakistan cases* respectively that will be spoken of within the next part.

Switching the gears to the perspective of public international law, one can easily encounter with a strong critical opinion stating that state responsibility, as a part of treaties, is only a matter of public international law and it can only be invoked by contracting state parties to the agreements.[20] Hence, it should not be blended with results of contractual violations.[21] This argument was

[16] This case is still relevant even if the original contract with the host state has no provision for the settlement of disputes. *See*, José E. Alvarez, The Public International Law Regime Governing International Investment, 33 (2011). For a view explaining a notion of 'umbrella clauses" as an elevator of private contractual claims up to bilateral investment treaty breaches, and at the same time, entitling the parties to recourse to the dispute resolution mechanisms enumerated in bilateral investment treaties, *see also*, Dikran M. Zenginkuzucu, Uluslararası Ticaret ve Yatırım Uyuşmazlıklarında Dostane Çözüm: Kurumlar, Kurallar, Süreçler 9-10 (2013).

[17] Meurling & Volders, *supra note* 1, 81.

[18] Pedro Martini, *Umbrella Clauses in Investment Treaties*, 27 The International Litigation Quarterly 19, 19 (2011).

[19] *SGS Société Général de Surveillance S.A. v. The Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (29 January, 2004), *see at:* https://www.italaw.com/cases/documents/1019 (last visited 29 October, 2017).

[20] The Tribunal in the case of *SGS v. The Philippines* also touched this general principle, but eventually ignored it stating that this principle cannot be taken as an absolute principle, and it can only be referred as a method of interpretation. J. Bandrés de Lucas, *Umbrella Clause: Uncertain Contract Protection under IIAs*, 10 Revista de Globalización, Competitividad & Gobernabilidad 100, 107 (2016).

[21] Jaemin Lee, *Putting a Square Peg into a Round Hole? Assessment of the 'Umbrella Clause' from the Perspective of Public International Law*, 14 Chinese J. Int'l L. 341, 345-6 (2015).

further reinforced by the objectives of IIAs, most preambles of which aim to *"[s]trike a balance*[22] *between the interest of a foreign investor and the government of a host state."*[23] (emphasis added) However, this view, from the point of the author, can be contested by referring to the objective of international investment law, which is to protect foreign investors. That's why, in short, it always matters: whom do the parties intend to protect most?

In this respect, both extensive and restrictive interpretations of this clause will be analyzed together with their advantages and disadvantages but firstly, we find it appropriate to put a spotlight on Article 10(1) of Energy Charter Treaty.

II. Legal Nature of Umbrella Clauses and Energy Charter Treaty

A. An Overview of Energy Charter Treaty

In early 1990s, a bipartite need from Russia and its neighbouring countries, to be invested on the one side, and from Western block countries to export a capital and decrease the investment dependence on certain countries on the other side, were two sparking elements of the development of a uniform regional treaty for energy cooperation and investments.[24] With a global aim of building an integrated energy market by bridging Russian and Eastern European energy sector with Europe and the world, the ECT[25] is considered a constitution of international energy investment law.[26] Despite the ECT was

[22] Despite the fact that neither the Energy Charter Treaty, nor the ICSID Convention provides a plain provision for an objective of protecting the balance between parties, the provisions maintain that balance between the interests of an investor and the government of a host state in the ICSID Convention. *See*, Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Chapter III, Article 13, 41, available at https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf, (last visited: 7 November, 2017); Another reference to the balance and mutuality between benefits was given in *SGS v. Pakistan case*, *see*, *supra note* 2, para. 168.

[23] Lee, *supra note* 20, 350-351.

[24] Kaj Hober, *The Energy Charter Treaty: An Overview*, 8 J. World Investment & Trade 323, 324 (2007).

[25] Main objectives of the ECT are listed as development of trade in energy, cooperation in energy field and energy efficiency, environmental cooperation and dispute resolution. For more details of the ECT and the full text, *see*, The Energy Charter Treaty (With Incorporated Trade Amendment) and Related Documents, http://www.europarl.europa.eu/meetdocs/2014_2019/documents/itre/dv/energy_charter_/energy_charter_en.pdf (last visited: 30 October, 2017).

[26] The ECT entered into force on April 16, 1998, with 54 contracting parties and 39 countries with an observer status. Apart from the member countries who hold the observer status as well, 15 signatories of the EEC (1991) and 24 signatories of International Energy Charter (2015) are further accounted the observers of the Energy Charter Conference. For more information,

drafted for the implementation around the European region, the treaty has gradually evolved into a universal agreement after the accession of other countries from American and Asian continents.[27]

Concerning foreign investments, the ECT provides a regime *"[t]o establish level playing field for investments in the energy sector and to minimize non-commercial risks associated with such investments."*[28] (emphasis added) This MIT[29] also furnishes parties to any dispute with a right to resort to arbitration tribunals for dispute settlement provided that the party shall wait for minimum three months after the submission of the notice to the other.[30] Further, the ECT is one of those fewer agreements which contains an 'umbrella clause.' Although the ECT cannot be called a pure investment treaty because its scope is much more complex, obviously, the contracting parties have agreed even on the inclusion the 'umbrella clause.'

B. Evaluation Of Article 10(1) Of Energy Charter Treaty

1. Wording: Is The Content of the Umbrella Clause Necessary?

With regard to the protection, promotion and treatment of investments, Article 10(1) is of paramount importance. The last sentence of the Article 10(1) of the ECT reads as follows:

> "[E]ach Contracting Party shall observe any obligations it has entered into with an investor or an investment of an investor of any other Contracting Party."[31](emphasis added)

As will be discussed below, the wording in IIAs is the main point for the implementation of the clauses in investment contracts. While some IIAs use the language so that to be applied to any obligations, other investment treaties seem to keep the circumference of the umbrella quite specific. In this regard, although the wording of the ECT *prima facie* covers all obligations of contracting parties, the determinative expression of *"entered into"* restricts its

see also, Constituency of the Energy Charter Conference, http://www.energycharter.org/who-we-are/members-observers/ (last visited: 30 October, 2017).

[27] Ə. İ. Sadıqov, Beynəlxalq Enerji Hüququ 158 (2013).

[28] Hober, *supra note* 23, 325.

[29] To some extent, this treaty is not accounted as a "pure" investment treaty in the legal doctrine, because it also includes other issues, such as trade in goods and further economic and environmental activities. *See also*, Richard Happ, *Dispute Settlement under the Energy Charter Treaty*, 45 German Y.B. Int'l L. 331, 335 (2002).

[30] To compare, the ECT contains right to resort to diplomatic tools for environmental and power engineering disputes, instead of arbitration mechanisms, *see*, Sadıqov, *supra note* 26, 293.

[31] One explanation of this Article was made in the doctrine that no government is entitled to repeal an investment agreement or force an investor to renegotiate by using its sovereign powers. A. Konoplyanik & T. Wälde, *Energy Charter Treaty and Its Role in International Energy*, 24 J. Energy & Nat. Resources L.523, 535 (2006).

subject matter with contractual obligations.[32] However, it should not be denied that this provision protects foreign investors against political risks, in particular, governmental breaches of investment contracts which can either occur in legislative or administrative interventions.[33] The author does not notice any problem regarding such unfair measures, because Article 10 provides different standards of treatment for the investors of the contracting parties, any breach of which will, to a large extent, enable the investors to invoke the treaty protection.

Here the question arises if the words *"any obligations"* cover states' commercial obligations in front of foreign investors as well as governmental breaches. In *Eureko B.V. v. Poland case* as described above, the Tribunal dealt with the case rather pragmatically and emphasized the perceptibility of the 'umbrella clause' contained in the BIT concluded between the Netherlands and Poland by explaining the plain wording of the provision.[34] Most of the wordings of 'umbrella clauses' would be interpreted extensively if the interpretation was limited to the ordinary meaning of texts. But sometimes wording of 'umbrella clauses' *per se* can support restrictive interpretation as it did in the case of *Salini v. Jordan*.[35] Although, the author supports to broaden the horizon of interpretation instruments and go beyond the simple wording.

In addition to this question, the types of breach to be elevated to the international responsibility of states and the scope of Article 10(1) of the ECT in this respect will be analyzed in next sub-paragraphs.

2. Ratione Materiae: Governmental Breaches or Commercial Disputes?

At the first sight, it seems quite unreasonable to hold contracting parties of the ECT responsible for each commercial breach of investment disputes occurred in their territories. However, this debate is going even further and reaching the threshold of holding state parties responsible also for unilateral obligations and commitments under the protective umbrella of the IIAs. This

[32] *The Energy Charter Treaty: A Reader's Guide*, 26, available at https://is.muni.cz/el/1422/jaro2016/MVV2368K/um/ECT_Guide_ENG.pdf (last visited: 6 November 2017); For the same ground, *see also, Plama Consortium Limited v. The Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, ¶187 (27 August 2008), *see at:* https://www.italaw.com/cases/857

[33] Happ, *supra note* 28, 345.

[34] *Eureko B.V. v. The Republic of Poland*, ICSID, Decision of Partial Award, ¶246 (19 August 2005), see at: https://www.italaw.com/cases/412, accessed on October 30, 2017.

[35] The expressions *"[c]reate and maintain a legal framework apt to guarantee the compliance of undertakings"* (emphasis added) led to the dismissal of the Salini's argument by the Tribunal who stated that Jordan did not undertake anything with regard to the observation of undertakings, but only to create a legal framework. *See, Salini Construttori S.p.A. v. The Hashemite Kingdom of Jordan*,, ICSID Case No. ARB/02/13, Decision on Jurisdiction, ¶126 (9 November 2004), see at: https://www.italaw.com/cases/954, (last visited: 6 November 2017).

sub-paragraph will, without being limited to the wording of the Article 10(1) of the ECT, connote the restrictive and extensive interpretations of this clause.

2.1. Restrictive Approach

This approach is reasoned by referring to the fact that 'umbrella clauses', being a ground for derogation from one of the main principles of customary international law, should not be interpreted extensively.[36]

Two tendencies with regard to the restrictive legal nature of 'umbrella clauses' must be distinguished. The first tendency explains the 'umbrella clauses' without touching their function of bringing domestic claims before the international arbitration that is recognized by IIAs concluded between home and host states. This narrow approach was followed by doctrinal views[37] and a couple of arbitration awards[38]. In *SGS v. Pakistan case*, in order to interpret the BIT between Switzerland and Pakistan extensively, the Tribunal asked the claimant for *"[c]lear and convincing evidence…that such was indeed the shared intent of Contracting Parties…"*[39] (emphasis added), however, failed to get any of them at the end of the day. In *Joy Mining case*, the Tribunal reiterated that the 'umbrella clause' was ill-placed and refused the extensive implementation as previously it did in *SGS v. Pakistan case.*[40]

On the other hand, the second tendency within the narrow approach to the *ratione materiae* of 'umbrella clauses' exempts governmental breaches from all contractual violations and only, in this case, recognizes the attribution of treaty breaches to contractual violations under the shelter of 'umbrella clauses'.[41] This view was reflected in *El Paso case*[42], in which the Tribunal, despite commenting on the hot debate about whether 'umbrella clauses' should be interpreted broadly[43], decided that 'umbrella clauses' shall be

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[36] *SGS v. Pakistan*, *supra note* 2, ¶167; A. Reinisch, Umbrella Clauses: Seminar on International Investment Protection, Winter Semester 5. 2006-2007, cited in G. Salatino, *Overview of Umbrella Clauses*, 13 Bus. L. Int'l 51, 56 (2012).

[37] Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 Am. U. Int'l L. Rev. 466, 473 (2005).

[38] *See, SGS v. Pakistan*, *supra note* 2; For an award repudiating the reference of all contractual claims to the breach of treaty but leaving a space for the cases in which the dispute arises not only from a breach of a contract but a breach of treaty rights and obligations, *see also, Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, ¶81 (6 August 2004), *see at:* https://www.italaw.com/cases/590, (last visited: 6 November2017).

[39] *SGS v. Pakistan*, *supra note* 2, ¶167.

[40] Jonathan B. Potts, *Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance, and Internationalization*, 51 Va. J. Int'l L. 1006, 1016 (2011).

[41] Köşgeroğlu, *supra note* 13, 317.

[42] *El Paso Energy International Company v. The Argentine Republic*, , ICSID Case No. ARB/03/15, Decision on Jurisdiction, ¶70, 80, 82 (27 April 2006), *see at:* https://www.italaw.com/cases/382, (last visited: 6 November 2017).

[43] *Ibid*, ¶70.

interpreted narrowly. Without getting stuck on the arguments supporting the wording of 'umbrella clauses' in international investment treaties, the Tribunal expressed that it should be distinguished in each case whether an investment contract was breached by a sovereign or merchant state[44]. If a breach results from acts of sovereign states[45], such as indirect expropriations, foreign investors will be able to invoke IIAs. Such a distinction would prevent foreign investors' attempt to invoke international treaties for trivial issues such as delay in payments by state parties.[46]

To summarize the restrictive approach towards the implementation of 'umbrella clauses', arbitration tribunals are prone to assess the wording of 'umbrella clauses' on the case-to-case basis and use different techniques such as sovereignty issues, in order to restrict the scope of application of 'umbrella clauses'.[47]

2.2. Extensive Approach

Extensive implementations of 'umbrella clauses' take their inception from *SGS v. the Philippines case*, in which the Tribunal held that if the intention of parties was to exclude specific agreements between the host state and the investor and interpret the protection broadly, it could have been expressed in the following article.[48] The author considers it unnecessary to deepen the analysis of this case, but instead, in order to display the contradiction in case law of the ICSID, finds it useful to point out the view of the Tribunal six months before, in the *SGS v. Pakistan case*, in which the Tribunal looked for the intention of parties for a broad interpretation. In contrast, in this case, the absence of intention did not result in the restrictive implementation of the 'umbrella clause'.

Pursuant to the pioneer case brought against the Philippines, the case law of the ICSID was improving case by case so that in the case of *CMS v. The Argentine Republic*,[49] the Tribunal stated the possibility of commercial disputes

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[44] *Ibid*, ¶80.

[45] In order to reach a conclusion about whether 'umbrella clauses' should be applied to a sovereign or merchant state's obligation, the Tribunal interpreted the 'umbrella clause' mentioned in Argentine-US BIT as *"[a]ll disputes resulting from a violation of a commitment given by the State as a sovereign State, either through an agreement, an authorisation, or the BIT."*(emphasis added) *Ibid*, ¶81; For the similar view, *see also*, Köşgeroğlu, *supra note* 13, 331.

[46] *El Paso Energy v. The Argentine supra note 41*, ¶81-2; *See also*, *Pan American Energy LLC, and BP Argentina Exploration Company v. The Argentine Republic*, ICSID Case No. ARB/04/8, Decision on Preliminary Objections, ¶109 (27 July 2006), *see at*: https://www.italaw.com/cases/808 (last visited: 6 November 2017).

[47] E. Whitsitt & N. Bankes, *The Evolution of International Investment Law and Its Application to the Energy Sector*, 51 Alta. L. Rev. 207, 235-6 (2013).

[48] *SGS v. The Philippines*, *supra note* 18, ¶118.

[49] *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, ¶299 (12 May 2005), see at: https://www.italaw.com/cases/288, (last visited: 6 November 2017); For similar views, *see also*, *Bureau Veritas, Inspection, Valuation, Assessment and Control,*

to be elevated with the help of 'umbrella clauses' if there had been a significant interference by public authorities. Another tribunal in *Noble Ventures v. Romania case*,[50] built up its standpoint on a view that the practical content (*'effet utile'*) of the 'umbrella clause' should not get hurt by a limited interpretation,[51] thereby chose the plain implementation of the clause. Setting out the principle of *'effet utile'*, different Tribunals reached similar conclusions and found a firm nexus between investment contracts and treaties which reinforced contractual claims in turn.[52]

The legal doctrine and as a result of the reciprocal influence, the arbitration tribunals today support the extensive approach in the interpretation of 'umbrella clauses',[53] as well as state that if there is a breach of contract, the parties need not prove the breach of an international investment treaty additionally.[54] Though, such breaches are not, in the case law, accepted as equivalent to any breach of public international law or relevant IIA, but should be dealt with to the same effect.[55] The developing route of the understanding of 'umbrella clauses' was combined in the *SGS v. Paraguay case*[56], in which the Tribunal gave a preference to the *SGS v. the Philippines case,* in terms of the extensive implementation and interpreted the disputed clause,

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BIVAC B.V. v. The Republic of Paraguay, ICSID Case No. ARB/07/9, Decision of the Tribunal on Objections to Jurisdiction, ¶141 (29 May 2009), *see at:* https://www.italaw.com/cases/179, (last visited: 7 November, 2017); For a recent similar approach, *see also, Bosh International, Inc and B&P Ltd Foreign Investments Enterprise v. Ukraine,* ICSID Case No. ARB/08/11, Award, ¶252 (25 October 2012) *see at:* https://www.italaw.com/cases/documents/1564, (last visited: 8 November 2017).

[50] *Noble Ventures, Inc v. Romania*, ICSID Case No. ARB/01/11, Award, ¶51-6 (12 October 2005), *see at:* https://www.italaw.com/cases/documents/748, (last visited: 7 November, 2017).

[51] Köşgeroğlu, *supra note* 13, 319-20; For the similar approach, *see also*, Patrick Dumberry, et al, International Investment Law: The Sources of Rights and Obligations,' in International Investment Contracts, ed. Tarcisio Gazzini, et al. 238. (2012).

[52] *See, Sempra Energy International v. The Republic of Argentine*, , ICSID Case No. ARB/02/16, Decision on Objections to Jurisdictions, ¶101 (11 May 2005), see at: https://www.italaw.com/cases/1002, (last visited: 7 November 2017); For an original nature of an extensive implementation of 'umbrella clauses', *see also, Eureko v. Poland*, *supra note* 33, ¶248-9; To look through the list of other related case law of the ICSID, *see also*, Köşgeroğlu, *supra note* 13, 321, n. 1211.

[53] Katherine Jonckheere, 'Practical *Implications from an Expansive Interpretation of Umbrella Clauses in International Investment Law*, 11 S.C. J. Int'l L. & Bus. 143, 151 (2015).

[54] Schreuer, *supra note* 4, 255.

[55] *SGS v. The Philippines*, *supra note* 18, ¶126, 128. The Tribunal in this case, however, also gave a reference to 1988 the United Nations Conference on Trade and Development (UNCTAD) Study in order to substantiate its argument, *see*, J. Honlet & G. Borg, *The Decision of the ICSID Ad Hoc Committee in CMS v. Argentina Regarding the Conditions of Application of an Umbrella Clause: SGS v. Philippines Revisited*, 7 The Law and Practice of International Courts and Tribunals: A Practitioners' Journal 1, 13 (2008).

[56] *SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay*, ICSID Case No. ARB/07/29, Decision on Jurisdiction, ¶176 (12 February 2010), see at: https://www.italaw.com/cases/1016, (last visited: 7 November, 2017).

once again as an additional protection the contracting parties agreed upon for the foreign investor. From our point of view, too much extensive implementation of 'umbrella clauses' can also harm the heartbeat of this clause, its *'effet utile.'* The more obligation and commitments contracting states undertake, the more risks accompany their undertakings, especially, the unilateral ones.

3. Unilateral Commitments: How Big Is the Shelter that the Article 10(1) of the Energy Charter Treaty Ensures?

The question whether 'umbrella clauses' protect or exclude each commitment of states is hitherto open to a hot debate. Investors' legitimate expectations become an issue, in this regard. As we have discussed in the previous paragraphs of this research, the wording of 'umbrella clauses' sometimes can be too broad, by saying for example, "contracting parties shall observe all obligations with regard to investments", and sometimes, relatively broad, "contracting parties shall observe all obligations it may have entered into with regard to investments." These two wordings differ from each other, as the shelter the 'umbrella clause' provides in the latter example is not very large. The latter example stems from the *CMS v. Argentina case*, in which the Tribunal concentrated on the consensual obligations by taking into account the wording *"entered into."*[57] If the former formulation is accepted, it will influence the *ratione personae* of 'umbrella clauses' as well, which is out of the topic of our research. However, the author cannot help but state that such a broad interpretation would even enable foreign investors who are actually an indirect party of investment contracts, and in addition, shareholders of an injured company, in which they own an interest,[58] to invoke 'umbrella clauses' of IIAs against contracting parties.[59]

Opinions of different Tribunals and the case law, in general, seem to be in a mess. While some cases were concluded without any tolerance for the unilateral promises, some of them were willing to include. To illustrate, the tribunals in the *SGS v. The Philippines* and *El Paso v. Argentina* excluded unilateral commitments and regulatory measures because of their general character.[60] On the other hand, in the cases of *Sempra v. The Argentine Republic*,

[57] Honlet& Borg, *supra note* 54, 18; For an opposite view extending the wording "entered into" to investment authorizations and permissions, *see also*, E. Gaillard and M. McNeill, The Energy Charter Treaty, in Arbitration under International Investment Agreements: A Guide to the Key Issues, ed. K. Yannaca-Small 48. (2010).

[58] In the legal doctrine, one solution for discarding indirect parties of investment contracts made with host states is sought in the formulation of 'umbrella clauses' by inserting "obligations assumed with respect to investors." Shotaro Hamamoto, *Parties to the 'Obligations' in Obligations Observance ('Umbrella') Clause*, 30 ICSID Review 449, 464 (2015).

[59] For the study of *ratione personae* in this regard, and unilateral commitments, *see*, Köşgeroğlu, *supra note* 13, 334-7.

[60] Jonckheere, *supra note* 52, 159.

LG&E Energy Corp. v. The Argentine Republic and *Enron Corp. v. The Argentine Republic,* the decisions of the Tribunals were more or less similar as they all recognized unilateral undertakings under the 'umbrella clause' protection.[61] Finally, the decision of the Tribunal in the case of *SGS v. Paraguay*[62] can be categorized as an improvisation among these decision, concerned by the fact that the Tribunal was hesitant when it referred oral and written commitments of the state to the 'umbrella clause' at the preliminary review but did not in its final decision.

Bearing in mind that the case law is inclined to include unilateral commitments in the shelter of 'umbrella clause' protection, it is not straightforward to draw an exclusive conclusion, rather than inclusive. However, in the author's opinion, they should be excluded. The consensus of parties to investment contract should be a clue to mark the boundaries of the term *"any obligations."* When the tribunals are almost unanimously exclude purely commercial disputes from the shelter of the protective umbrella, the author, relying on *'argumentum a fortiori',* does not perceive it reasonable to include unilateral regulatory commitments in which a consensus is not a constructive element. In this plethora of cases in favour of more extensive interpretations, the author is seeking an explanation for such kind of implementation of the tribunals' in the wording of 'umbrella clauses' in IIAs.

C. Opt-Out: Article 26(3)(C) of Energy Charter Treaty

The 'umbrella clause' comprised in Article 10(1) of the ECT is not absolute, and its effect can be restricted by contracting states. Article 26(3)(c) of the ECT entitles its contracting parties to derogate from the effect of the last sentence of Article 10(1). While the first sentence of Article 26(3)(b) provides a general derogation rule and enables the members listed in Annex ID to decline their consent to the dispute settlement system with a condition that the investor previously files the application to another dispute settlement procedure, Article 26(3)(c) which is read as follows, is directly related to Article 10(1):

> "[A] Contracting Party listed in Annex IA do not give their unconditional consent to international arbitration in regard to

[61] *Sempra v. The Republic of Argentine, supra note* 51, ¶314; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic,* , ICSID Case No. ARB 02/1, Decision on Liability, ¶174-5 (3 October 2006), see at: https://www.italaw.com/cases/documents/623, (last visited: 12 November 2017); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic,* ICSID Case No. ARB/01/3, Award, ¶277 (22 May 2007), *see at:* https://www.italaw.com/cases/401, (last visited: 12 November 2017).

[62] The Tribunal did not examine this question on merits because even if there was such a breach, *"[t]he breach would not result in any additional liability on behalf of the Respondent,"* (emphasis added) *see, SGS Société Générale de Surveillance S.A. v. The Republic of Paraguay,* ICSID Case No. ARB/07/29, Award, ¶158 (February 10 2012), see at: (last visited: November 8, 2017).

disputes arising out of the alleged breaches of the obligation of the last sentence of Article 10(1)."

In principle, foreign investors do not need to bring their case before domestic courts in order to benefit from international arbitration.[63] In energy-related *Petrobart v. The Kyrgyz Republic case*[64], while applying Article 26 of the ECT to the case, the Tribunal expressed the same view that the submission of the dispute to local courts cannot prevent the investor's right to bring the case before international arbitration. However, as indicated in Article 26(3)(c), the contracting parties can obviously shut the doors of international arbitration to foreign investors as far as they wish, by simply derogating from the effect of 'umbrella clause' in the ECT. The countries which derogated from this clause are Australia, Canada (although did not sign the ECT), Hungary and Norway.[65]

As it is clear from the wording of the Article 26(3)(c), although 'umbrella clauses' provides a wide protection for investors in terms of the breaches of contractual obligations, this additional protection can be opted out by contracting parties. The author comprehends these provisions to the effect that contracting parties should have known about their right to derogate from the effect of the 'umbrella clause' comprised in the ECT, thus if they did not, it would be considered an implicit consent for the contractual breaches to be disputed against them within the international arbitration mechanisms of the ECT.

Conclusion

Due to the discrepancies between the decisions of tribunals with regard to the interpretation of 'umbrella clauses', it is strenuous to reach a uniform conclusion. Too much extensive interpretation would cause an excessive workload of arbitration tribunals. It would be contrary to the intention of contracting parties while drafting IIAs and to the nature of 'umbrella clauses'. Because this clause is an exception to the rule of customary international law that delineates the difference between public international law and private law, despite it is not absolute.

The author supports the view that 'umbrella clauses' should at least be applied to some obligations, in order to preserve its *'effet utile.'* The last sentence of Article 10(1) of the ECT applies only to contractual obligations of

[63] Kamal Gadiyev, *Arbitration of Energy-Related Disputes under the Energy Charter Treaty*, 8 Global Jurist 1, 8 (2008).

[64] Petrobart Limited v. The Kyrgyz Republic, SCC Case No. 126/2003, Arbitral Award, 55 (29 March 2005), *see at:* https://www.italaw.com/cases/documents/826, (last visited: 11 November 2017).

[65] K. Yannaca-Small, *Interpretation of the Umbrella Clause in Investment Agreements*, OECD Working Papers on International Investment, 5 (2006), *see at:* http://dx.doi.org/10.1787/415453814578, (last visited: 6 November 2017).

contracting states that we exclude unilateral commitments. To the meaning of the ECT, these contractual obligations must be made with investors and in relation with the investments which in turn need to consider the definitions of the ECT regarding the "investor" and "investments". The right to file the dispute to the arbitration tribunal under ECT does not affect the investor's right to domestic remedies. However, if an investor's host state has derogated from the last sentence of Article 10(1) under Article 26(3)(c), the investor will only be able to invoke contractual remedies – either domestic courts or arbitration agreed in the investment contract.

In any case, the wording in investment treaties in regard to 'umbrella clauses' deserves a specific attention. Main objectives of IIAs can be attached an importance regarding that if they aim to protect foreign investors or demonstrate a balanced protection. Although we do not support the excessively extensive interpretation of 'umbrella clauses,' with a single signature, states are still free to bind themselves with each commitment they assume with regard to investments. Hence, pursuant to the inclusion of the 'umbrella clause,' investors may be able to benefit from its 'elevator effect', however, it is always important to press the correct button that will elevate your investment contract to the treaty level.

Nihad Hüseynov[*]

NƏYƏ GÖRƏ KOSMOS MÜQAVİLƏSİNİN 2-Cİ MADDƏSİ YENİDƏN NƏZƏRDƏN KEÇİRİLMƏLİDİR?

Annotasiya

Dünyanın təbii ehtiyatlarının limitli olması və artan əhali sayı dünya xaricindəki ethiyatlara olan ehtiyacı qaçılmaz edir. Baxmayaraq ki, bütün dünyada kosmos mədənçiliyi təşəbbüsləri getdikcə çoxalır, hazırki kosmos hüququ bu fəaliyyət üçün effektiv hüquqi tənzimləmə təklif etmir. Xüsusilə, "Kosmos" müqaviləsinin II maddəsində nəzərdə tutulan mənimsəməmə prinsipi kosmos mədənçiliyi ilə bağlı hüquqi qeyri-müəyyənliklər yaradır. Bu məqalə II maddənin qeyri-müəyyən xarakterinin kosmosun təbii ehtiyatlarının çıxarılmasının və istifadəsinin qanuniliyinə necə təsir etdiyini göstərməyə çalışır. Eyni zamanda, kosmos hüququnun 1950-ci illərdən bəri necə inkişaf etdiyi göstərilir. Məqalədə kosmos mədənçiliyinin önəmi və bu sahədəki təşəbbüslər də müzakirə olunur.

Abstract

The limited character of natural resources of the earth and growth of human population makes the need for resources outside the earth inevitable. Although space mining ventures is getting increased all over the world current space law does not offer effective legal regulation for this human activity. In particular, non-appropriation principle enshrined in the article II of the "Outer Space Treaty" creates legal uncertainties with regard to space mining. This article seeks to show how vague character of article II affects the legality of the extraction and use of natural resources of the outer space. At the same time it is showed that how space law evolved since the 1950s. The importance of space mining and new ventures in this area are also discussed.

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Giriş

Kosmos fəaliyyətlərinin böyük önəm qazandığı bir dövrdə kosmos hüququnun bu fəaliyyətlər üçün aydın bir hüquqi çərçivə yaratmaması bu sahədə bir çox hüquqi qeyri-müəyyənliklərə yol açır. Bu qeyri-müəyyənliklərin başlıca səbəbi isə kosmos hüququnun mənbələri sayılan və dövlətlərin kosmosun tədqiqində və istifadəsində fəaliyyətlərini tənzimləyən beynəlxalq müqavilələrin tamamilə fərqli siyasi mühitdə və kompleks şəkildə bağlanması ilə əlaqəlidir. Sözügedən müqavilələr bağlandığı zaman kosmos fəaliyyətlərinin iştirakçıları başda ABŞ və SSRİ olmaqla dövlətlər idilərsə, 1980-ci illərdən bu vəziyyət dəyişməyə başladı. Belə ki, məhz bu tarixdən kosmosun kommersiya xarakterli məqsədlər üçün istifadəsi gündəmə gəldi və qeyri-hökumət müəssisələri kosmos fəaliyyətlərinin əsas iştirakçılarına çevrilməyə başladılar. Dünyanın enerji ehtiyatlarının artan əhali sayına kifayət etməməsi və yeni xammal mənbələrinə ehtiyac yaranması dünyanın diqqətini kosmosa, xüsusilə aya və enerji ehtiyatlarının bol olduğu asteroidlərə yönəltdi.

Bu cür ehtiyacların mövcudluğuna baxmayaraq, kosmos hüququ kosmosda mədənçilik fəaliyyəti üçün aydın hüquqi çərçivə yaratmır. 1967-ci ildə qəbul olunan və kosmos hüququnun əsas mənbəyi sayılan "Kosmik Fəzanın Tədqiqində və İstifadəsində Dövlətlərin Fəaliyyət Prinsipləri haqqında" müqavilə (bundan sonra "Kosmos müqaviləsi") kosmos mədənçiliyi ilə bağlı mübahisələr yaradan bir çox maddəni özündə ehtiva edir. Belə ki, müqavilənin 2-ci maddəsinə görə, Ay və digər səma cismləri də daxil olmaqla, kosmik fəza onlar üzərində suverenlik elan etmək, istifadə, işğal və ya hər hansı digər vasitələrlə milli mənimsəmə predmeti ola bilməz.[1] Qeyd etdiyimiz kimi, "Kosmos" müqaviləsi tamamilə fərqli bir siyasi mühitdə bağlanmışdı və həmin dövrdə dövlətlərin əsas məqsədi bir-birlərini kosmosda yeni ərazilər əldə etməkdən çəkindirməkdən ibarət idi.

Məqsəd nə olursa olsun II maddə kosmos mədənçiliyinin hüquqi statusu ilə bağlı bir neçə sualı ehtiva edir. Bunlardan ən önəmliləri kosmosun təbii ehtiyatlarının istifadəsinin mənimsəmə qadağasını pozub-pozmaması və həmin maddənin qeyri-hökumət müəssisələrinə aid edilib-edilməməsi ilə bağlıdır. Bu məqalədə kosmos hüququnun anlayışına və tarixi inkişafına aydınlıq gətirilir, kosmos mədənçiliyinin anlayışı, nə üçün önəmli olduğu və bu sahədəki son illərdəki təşəbbüslər araşdırılır, "Kosmos" müqaviləsinin II

[1] Ay və digər səma cismləri də daxil olmaqla, kosmik fəzanın tədqiqi və istifadəsi üzrə dövlətlərin fəaliyyət prinsipləri haqqında Müqavilə mad. 2, 27 Yanv. 1967, 610 BMTMS 8843.

maddəsinin kosmos mədənçiliyi baxımından yaratdığı problemlər, müəlliflər arasındakı fikir ayrılıqları təhlil olunur və kosmos mədənçiliyinin tənzimlənməsi üçün yeni beynəlxalq müqaviləyə ehtiyac olduğu qeyd olunur. Müqavilədə dövlətlərin və qeyri-hökumət müəssisələrinin mədənçiliklə məşğul olmaq hüququnun tanınmalı olması və onların fəaliyyətini tənzimləyən beynəlxalq təşkilatın yaradılmasının önəmi vurğulanır.

I. Kosmos Hüququnun Anlayışı

A. Kosmos hüququ nədir?

Kosmos hüququnu pozitiv hüquq çərçivəsində düşündükdə, nəzərə çarpan ilk xüsus, normalarının ümumi olaraq beynəlxalq müqavilələrə əsaslanmasıdır.[2] Buna görə mövcud halı ilə kosmos hüququ əsas olaraq beynəlxalq hüquq normalarına görə idarə olunur və onun bir alt sahəsidir.[3] Yəni, kosmos hüququ bir çox hüquq sahəsinin əksinə olaraq beynəlxalq hüquq çərçivəsində yaranmış, inkişaf etmiş, daha sonra milli qanunvericiliklərə daxil edilmişdir. Bəs kosmos hüququ beynəlxalq hüquq daxilində necə bir yer tutur? Ən geniş mənada kosmos hüququ, kosmik fəzanı, həmçinin kosmik fəzada olan və ya onunla bağlı fəaliyyətləri tənzimləyə biləcək və ya onlara tətbiq oluna biləcək bütün hüququ əhatə edir.[4]

"Kosmos hüququ" kosmosun hüququdur və müəyyən kosmik uçuşla bağlı sığorta müqaviləsinin şərtlərindən, dövlətlərin kosmik fəzada davranışını tənzimləyən prinsiplərə qədər dəyişə bilər.[5] Kosmos hüququ "yeni hüquq"dur. Son 140 ildə baş verən texnoloji inkişaf, hüquqdan bu yeniliklərə cavab verməyi tələb etmişdir.[6] Qeyd edildiyi kimi, hüquq heç vaxt texnologiyanı tənzimləməyə çalışmır, daha ziyadə, texnologiyadan yaranan, rəqabətdə olan insan maraqlarını nizama salmağı hədəfləyir.[7] Kosmos hüququ da kosmik fəzanın istifadəsi və tədqiqi ilə bağlı praktiki problemləri həll etmək üçün inkişaf etmişdir.[8]

B. Kosmos hüququnun tarixi inkişafı

İnsan ağlı, elm və elmi fantaziyanın ilkin nümunələri öz diqqətlərini kosmosa yönəldəndə bu sahə üçün hüquqi ölçü yox idi.[9] Yeni

[2] Reşat Volkan Günel, Uluslararası Hukuk Açısından Uzay Madenciliği 5-6 (2016).

[3] Yenə orada.

[4] Francis Lyall & Paul B. Larsen, Space Law: A Treatise 2 (2009).

[5] Yenə orada.

[6] Yenə orada.

[7] Michel Bourbonniere, *National-Security Law In Outer Space: The Interface Of Exploration And Security,* 70 J. Air l. & Com. 3, 3 (2005).

[8] Lyall & Larsen, yuxarıda istinad 4.

[9] Frans von der Dunk & Fabio Tronchetti, Handbook of Space Law 1 (2015).

texnologiyaların ortaya çıxması, xüsusilə, roket texnologiyasının nəzəri başlanğıclarından II Dünya müharibəsi ərzində müharibə aləti kimi ilkin istifadəsinə qədər olan inkişafı ilə birlikdə, bu cür yeni insan fəaliyyətinin mümkün hüquqi aspektləri bu sahədə hüquqi düşüncəni stimullaşdırmağa başladı.[10] Kosmos hüququ sahəsində ilk monoqrafiyanın müəllifi olan Vladimir Mandl 1932-ci ildə Almaniyada çap olunan əsərində qeyd edirdi ki, roketlər vasitəsilə kosmosa çatmaq hava hüququ ilə tənzimlənməyən müxtəlif yeni problemlər yaradacaq və buna görə yeni hüquq sahəsinin yaradılmasına ehtiyac var.[11] Vladimir Mandl dəniz və hava hüququndakı bir çox konsepsiyadan kosmosda aşkar oluna biləcək problemlərə analogiya vasitəsilə istifadə etməkdə istəkli olsa da, o, kosmos hüququnu bu sahələrdən ayrı və fərqli bir şey kimi təsəvvür edirdi.[12] Nəhayət, bu cür yeni beynəlxalq hüquq sahəsinin yaradılmasına doğru ən güclü impuls geosiyasi düşüncələrdən, yəni kosmosda həmin dönəmin iki supergücü – ABŞ və SSRİ arasında yeni rəqabət, bəlkə də, qarşıdurma sahəsinin yaranması ilə gəldi.[13] 1957-ci ilin oktyabr ayında SSRİ-nin ilk dəfə bir süni peyki – *Sputnik 1*-i kosmosa göndərməsi artıq bu yarışın başlanmasının elanı idi. Ancaq bu iki güc kosmosa nüvə silahlarının və digər dağıdıcı təsirə malik silahların yerləşdirilməsi kimi bir siyasət izləməyərək, tamamilə başqa cür yarışa üstünlük verdi: kosmosa ilk insanın göndərilməsi, ilk dəfə aya gedilməsi və s. Sputniklə başlayan, insan tərəfindən hazırlanmış ilk obyektlərin kosmosa uçması daha əvvəl akademik dünya tərəfindən tələb olunan hüquqi prinsiplərin inkişaf etdirilməsinə təcili ehtiyac yaratdı.[14]

Bundan sonra kosmos hüququnun tarixi inkişafı 4 mərhələdə açıqlana bilər:[15]

1950-ci illərin sonlarından 1960-cı illərin ortalarına qədər davam edən *birinci dövr*, "hazırlıq" dövrü olaraq adlandırıla bilər.[16] Bu zaman zərfində kosmosdakı fəaliyyətlərin idarə olunması ilə bağlı hüquqi çərçivənin təməlləri atılmışdır.[17] Bu xüsusda ən önəmli hadisə kimi 13 dekabr 1963-cü ildə BMT Baş Məclisi tərəfindən qəbul olunan "Dövlətlərin Kosmosun Tədqiqində və İstifadəsində Fəaliyyətlərini Tənzimləyən Prinsiplərin Bəyannaməsi haqqında" qərarı göstərmək olar.[18] Bu qərarda kosmos hüququnun əsas prinsipləri təsbit olunmuş və qərar gələcək beynəlxalq

[10] Yenə orada.
[11] Vladimir Mandl, Das Weltraum-Recht: Ein Problem der Raumfahrt 48 (1932)
[12] Lyall & Larsen, yuxarıda istinad 4, 6.
[13] Dunk & Tronchetti, yuxarıda istinad 9, 2.
[14] Yenə orada, 4.
[15] Reşat Volkan Günel, yuxarıda istinad 2, 8.
[16] Yenə orada.
[17] Yenə orada.
[18] Bax: http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/travaux-preparatoires/declaration-of-legal-principles.html (Son baxış tarixi: 26 Noyabr 2017-ci il).

müqavilələr üçün bir növ təməl rolunu oynamışdır. Burada nəzərdə tutulan bir çox prinsiplər 1967-ci il Kosmos Müqaviləsində də öz əksini tapmışdır.

1960-cı illərin sonlarından 1980-ci illərin əvvəllərinə qədər olan dövrü əhatə edən *ikinci dövr* isə "hüquqi tənzimetmə dövrü" olaraq adlandırıla bilər.[19] Kosmos hüququnun tarixi inkişafı ərzində ən önəmli dövr hesab edə biləcəyimiz bu dövr ərzində BMT nəzdində müasir kosmos hüququnun əsas mənbələri sayılan 5 beynəlxalq müqavilə qəbul olunmuşdur. Bunlardan birincisi və ən önəmlisi olan "Kosmos" müqaviləsi 10 Oktyabr 1967-ci ildə, "Xilasetmə" müqaviləsi 3 Dekabr 1968-ci ildə, "Məsuliyyət" müqaviləsi 1 Sentyabr 1972-ci ildə, "Qeydiyyat" müqaviləsi 15 Sentyabr 1976-cı ildə, ən son "Ay" müqaviləsi isə 11 İyul 1984-cü ildə qüvvəyə minmişdir.[20] "Kosmos" müqaviləsi, kosmos fəaliyyətləri ilə bağlı ən önəmli mövzuları ələ alan təməl prinsipləri müəyyən edərkən, digər 4 müqavilə isə "Kosmos" müqaviləsi çərçivəsində tənzim olunmuş, lakin daha xüsusi xarakterli mövzulara fokuslanmışdır.[21]

1980-ci illərin əvvəllərindən 1990-cı illərin ortasına qədər davam edən *üçüncü dövr* isə "bağlayıcı olmayan hüquq" dövrü olaraq adlandırıla bilər.[22] Bu dövrün əsas xüsusiyyəti BMT Baş Məclisi tərəfindən kosmosa dair bəzi xüsusi məsələləri tənzimləyən, bağlayıcı olmayan 4 prinsipin qəbul olunması oldu.[23]

Dördüncü dövr isə 1990-cı illərin sonlarından 2010-cu illərə qədər davam etmişdir. Bu dövr mövcud hüquqi rejimin dəyərləndirilməsi və kosmosla bağlı müqavilələrdə müəyyən olunan hüquqlar və öhdəliklər əsasında bağlayıcı olmayan sənədlərin hazırlanması ilə xarakterizə olunmaqdadır.[24] Xüsusilə, BMT Kosmik Fəzanın Sülh Məqsədləri ilə İstifadəsi üzrə Komitənin Hüquq Alt Komitəsi kosmosa dair müqavilələrin daha geniş miqyasda qəbul edilməsini təmin etmək və bunların tətbiq olunmasını dəyərləndirmək məqsədilə işlər aparmaqdadır.[25]

İçində olduğumuz və *beşinci dövr* olaraq adlandıra biləcəyimiz mərhələ isə xüsusi təşəbbüslərin kosmos fəaliyyətlərinə daxil olması ilə birlikdə milli hüquq vasitəsilə mövcud kosmos hüququnun aşılmağa çalışıldığı dəyişiklik

[19] Reşat Volkan Günel, yuxarıda istinad 2, 8.

[20] Bax: http://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties.html (Son baxış tarixi: 26 Noyabr 2017-ci il).

[21] Reşat Volkan Günel, yuxarıda istinad 2, 8.

[22] Yenə orada, 9.

[23] Həmin prinsiplərin məqalənin mövzusu ilə bağlı xüsusi əhəmiyyəti olmadığından, burada tək-tək qeyd etməyi lazım bilmədik.

[24] Reşat Volkan Günel, yuxarıda istinad 2, 9.

[25] Yenə orada.

dövrü olaraq qeyd edilə bilər.[26] Bu dövr milli kosmos tənzimləmələrinin ön plana çıxdığı bir dövr olaraq davam etməkdədir.[27]

II. Kosmos Mədənçiliyi

Dünyada mövcud olan təbii ehtiyatların sürətli bir şəkildə tükənməsi dünya xaricində olan ehtiyatların istifadə olunmasını qaçınılmaz edir. Elm adamlarının araşdırmaları dünya xaricindəki göy cisimlərində də olduqca yüksək dəyərdə və bol miqdarda mədənin mövcud olduğunu bildirməkdədir.[28] Bu xüsusda kosmosda mədənçilik fəaliyyəti dünya xaricində qalan və kosmos olaraq təsvir olunan sahədə xüsusilə də göy cisimlərində mövcud olan təbii ehtiyatların kommersiya məqsədli işlədilməsi mənasına gəlir.[29] Kosmos mədənçiliyi üçün bütün texniki və iqtisadi faktorları nəzərə almaqla, bu fəaliyyətlə məşğul olmaq üçün şirkətlər Yaxın Dünya Asteroidləri adlanan asteroidlərdə mədənçiliklə məşğul olmağı hədəfləyirlər. Avropa Kosmos Agentliyinə görə, təxminən bilinən 10.000 asteroid Yaxın Dünya Asteroidləridir.[30]

A. Kosmos mədənçiliyi nəyə görə lazımdır?

Asteroid mədənçiliyi üçün əsas motivasiya yeni və gəlirli kosmos sənayesini ticariləşdirmək, dünyada daha çox resursa olan tələbatı qarşılamaq və dünya xaricində resurslar axtarmaqla dünyanın ətraf-mühitinin qorunmasına kömək etməkdən ibarətdir.[31] XXI əsrdə dünya əhalisinin sayının 10-12 milyarda çatacağını nəzərə alsaq, bu səviyyədə təbii ehtiyatlara olan tələbat, iqlim dəyişikliyi, qida və enerji ehtiyatları ilə bağlı problemlər yaranacaqdır.[32]

Kosmos mədənçiliyinin həyata keçirilməsi üçün səbəblərdən biri də davamlı enerji mənbələrinə keçidlə bağlıdır.[33] XXI əsr enerji sistemləri qalıq yanacaqlarından təmizlənəcək və günəş, külək, geotermal, hidroelekrik, qabarma və çəkilmə və nüvə birləşmə əsaslı enerji sistemlərinə davamlı keçid olacaqdır.[34] Bu keçidi reallaşdırarkən, enerji təchizatlarını mərkəzsizləşdirmək üçün olan cəhdlər şəhər cəmiyyətinin davamlılığına və qalıcılığına kömək edə bilər.[35] Kosmos mədənçiliyi üçün göstərilən səbəblərdən biri də iqlim dəyişikliyinin stabilləşdirilməsi ilə bağlıdır.[36] İqlim dəyişikliyinin yalnız insanlığı təhdid etmədiyi, eyni zamanda geniş

[26] Yenə orada, 10.
[27] Yenə orada.
[28] Yenə orada, 110.
[29] Yenə orada.
[30] Bax: https://www.space.com/51-asteroids-formation-discovery-and-exploration.html (Son baxış tarixi: 14 Noyabr 2017-ci il).
[31] The 2010 Space Studies Program of the International Space University, Final Report on the Asteroid mining Technologies Roadmap and Applications 1 (2010).
[32] Ram S. Jakhu, Joseph N. Pelton & Yaw O.M. Nyampong, Space Mining And Its Regulation 11 (2017).
[33] Yenə orada, 12.
[34] Yenə orada.
[35] Yenə orada.
[36] Yenə orada.

həcmli bitki və heyvan həyatının qorunması ilə bağlı olduğu nəzərə alınarsa gələcək onilliklərdə kosmos əsaslı həll yollarına ehtiyac yarana bilər.[37]

B. Kosmos mədənçiliyi təşəbbüsləri

1. Amerika Birləşmiş Ştatları

ABŞ-da "yeni kosmos" sənayesinin son 15 ildəki inkişafı özəl və ictimai olaraq maliyyələşdirilən kosmos proqramlarının müvafiq rollarını yenidən müəyyən etmişdir.[38] Eyni zamanda, ABŞ-da özəl kosmos fəaliyyətlərinin geniş vüsət aldığı və təşəbbüskarların növbəti onillik ərzində kosmos mədənçiliyini həyata keçirmək məqsədilə yeni təşəbbüslər irəli sürdüyü[39] bir dövr yaşanır. Yeni təşəbbüskarlar özəl sektorun yeni kosmos təşəbbüslərində əsas rol oynayacağına inanır və bu sahədə hökumətin məhdud rolunu müdafiə edirlər.[40]

24 aprel 2012-ci ildə *Planetary Resources* özəl kosmos fəaliyyətinə daxil olan və birbaşa olaraq kosmosun təbii ehtiyatları məsələsi ilə məşğul olan ilk özəl müəssisə oldu.[41] Asteroid kəmərində mədənçiliklə məşğul olmağı hədəfləyən şirkətlərin başında gələn Planetary Resources şirkəti dünyanın ən varlı gənc nəsil investorları tərəfindən maliyyələşdirilir.[42] Şirkət Yaxın Dünya Asteroidlərinin aydan daha çatımlı olmasına, kosmosun tədqiqini sürətləndirəcək, kosmosda həyatı davam etdirə biləcək təbii ehtiyatlara malik olmasına görə məhz bu asteroidlərdə mədənçilik fəaliyyəti ilə məşğul olmağı hədəfləyir.[43] Təxminlərə görə, Yaxın Dünya Asteroidlərində insan həyatını davam etdirmək və kosmik gəmilərə yanacaq kimi istifadə etmək üçün istifadə oluna biləcək su miqdarı 2 trilyon tondur.[44] Planetary Resources şirkətin ilk tədqiqat missiyası üçün su ilə zəngin asteroidləri seçmişdir.[45]

22 yanvar 2013-cü ildə ikinci ABŞ əsaslı şirkət olan *Deep Space Industries* asteroid tədqiqatı və ehtiyatların çıxarılması yarışına daxil oldu.[46] Deep Space Industries öz fəaliyyətini mədənlərin axtarılması ilə başlayan, ehtiyatların yığılması ilə davam edən, daha sonra emal və nəhayət istehsalla başa çatan 4 pilləli inkişaf kimi təsvir edir.[47] Şirkətin iddiasına görə, onun kosmik gəmiləri tarixdə ilk dəfə olaraq asteroid mədənçiliyini iqtisadi baxımdan mümkün edir.[48] *Prospector-X* Deep Space Industries və Lüksemburq hökuməti arasındakı ortaqlığın ilk missiyasıdır.[49] Onlar birlikdə asteroidlərdə mədənçiliklə məşğul olmaq və kosmosun dəyərli ehtiyatlarının təchizat xarakterli zəncirini yaratmaq üçün ehtiyac olan texnologiyanın inkişaf

[37] Yenə orada.
[38] Yenə orada, 59.
[39] Yenə orada, 60.
[40] Yenə orada.
[41] Yenə orada, 64.
[42] Reşat Volkan Günel, yuxarıda istinad 2, 116.
[43] Bax: https://www.planetaryresources.com/why-asteroids/ (Son baxış tarixi: 7 Dekabr 2017-ci il).
[44] Yenə orada.
[45] Yenə orada.
[46] Jakhu, Pelton & Nyampong, yuxarıda istinad 32, 65-66.
[47] Yenə orada, 66.
[48] Bax: http://deepspaceindustries.com/missions/ (Son baxış tarixi: 7 Dekabr 2017-ci il).
[49] Bax: http://deepspaceindustries.com/prospector-x/ (Son baxış tarixi: 7 Dekabr 2017-ci il).

etdirilməsi üzərində çalışırlar.[50] Şirkət yaxın gələcəkdə hədəfin geotexniki ölçülərini və mədənçilik üçün uyğunluğunu dəyərləndirmək məqsədilə Yaxın Dünya Asteroidlərinə kiçik bir kosmik gəmi göndərməyi hədəfləyir.[51] Kosmos mədənçiliyini həyata keçirmək üçün güclü, çevik, yüksək performanslı və daha kiçik ölçülü peyk alt sistemləri şirkət tərəfindən hazırda inkişaf etdirilir.[52] Dünyanın ilk kommersiya xarakterli planetlərarası mədənçilik missiyası olan *Prospector-1* asteroidin kosmos ehtiyatı olaraq dəyərini müəyyən etmək üçün Yaxın Dünya Asteroidinə göndəriləcək.[53] Prospector-1 qiymət və performans arasında ideal balans yaradan kiçik bir kosmik gəmidir.[54]

Bundan savayı, ABŞ-da kosmos mədənçiliyi və bu kimi fəaliyyətlərlə məşğul olmağı hədəfləyən *Shackleton Energy Company*, *Moon Express* və s. kimi şirkətlər fəaliyyət göstərirlər.

2. Digər dövlətlər

Rusiyada isə özəl şirkətlər və milli hökumət kosmosdan mineralların yığılması üçün ehtiyac olan texnologiyanın və proqramlaşdırmanın inkişafı yolunda təzəlikcə uzun addımlar atmış olsa da, xüsusilə kommersiya məqsədli olmaq üzərə, bunun reallaşması üçün hələ də uzun yol var.[55]

Avropada, Kanadada və digər qərb dövlətlərində də bu sahədə bir sıra fəaliyyətlər var.[56] Avropa Kosmos Agentliyi Venera, Mars, Merkuri, Ay, Yupiter və onun ayları və kosmosun dərinliklərini tədqiq etmək üçün aktiv olaraq kosmik araşdırma proqramı ilə məşğul olub.[57] Bu tədqiqat fəaliyyəti elmi əhatə dairəsinə görə ətraflı olub və fiziki, kimyəvi və ətraf-mühitlə bağlı ölçmələri ehtiva edib.[58] Müxtəlif missiyalar gələcəkdə hər hansı kosmos mədənçiliyi fəaliyyəti üçün faydalı ola biləcək məlumatlar təmin etmişdir.[59] Avropada kosmos mədənçiliyi fəaliyyəti baxımından ən çox diqqət çəkən dövlət Lüksemburqdur. 3 mart 2016-cı ildə Lüksemburq hökuməti ölkənin "kosmos ehtiyatlarının tədqiqində və istifadəsinə Avropa mərkəzi" olması kimi bir təşəbbüs elan etdi.[60] Bu təşəbbüs elanı ilə birlikdə Lüksemburq "özəl təşəbbüskarların çıxardıqları ehtiyatlarla bağlı hüquqlarından əmin olmalarını təmin edəcək hüquqi çərçivə formalaşdırmaq məqsədini elan edən" ilk Avropa dövləti oldu.[61]

Bundan başqa Çin, Hindistan, Yaponiya kimi Asiya ölkələrində də kosmos mədənçiliyi ilə bağlı ciddi fəaliyyətlər mövcuddur.[62]

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[50] Yenə orada.
[51] Yenə orada.
[52] Yenə orada.
[53] Bax: http://deepspaceindustries.com/prospector-1/ (Son baxış tarixi: 7 Dekabr 2017-ci il)
[54] Yenə orada.
[55] Craig Foster, *Excuse Me, You're Mining My Asteroid: Space Property Rights And The U.S. Space Resource Exploration and Utilization Act Of 2015*, 2016 U. Ill. J.L. Tech. & Pol'y. 407, 416 (2016).
[56] Jakhu, Pelton & Nyampong, yuxarıda istinad 32, §8.
[57] Yenə orada, 92.
[58] Yenə orada.
[59] Yenə orada.
[60] Foster, yuxarıda istinad 55, 414.
[61] Yenə orada, 415.
[62] Jakhu, Pelton & Nyampong, yuxarıda istinad 32, §9.

III. Kosmos Müqaviləsinin II Maddəsi

"Kosmos" müqaviləsi özündə kosmos mədənçiliyinin hüquqi aspektinə təsir göstərə biləcək bir neçə müddəa ehtiva etsə də, bunlardan ən önəmlisi "Kosmos" müqaviləsinin II maddəsidir. "Kosmos" müqaviləsinin qəbul olunmasından 2 il sonra, yəni 1969-cu ildə Stephen Gorove yazırdı ki, bu müddəaya səthi baxış zamanı belə əgər insanlığın kosmosu kəşfi hüquq və nizam çərçivəsində və minimum çəkişmə ilə baş tutacaqsa, həll olunmalı olan bir neçə fundamental sualı ehtiva etdiyi görünür.[63] Bu maddə özlüyündə kosmos hüququ ilə bağlı bir çox hüquqi qeyri-müəyyənliyə yol açsa da, o, kosmos mədənçiliyi ilə bağlı 2 təməl sualı ortaya qoyur: II maddənin müddəaları qeyri-hökumət müəssisələrinə aid edilirmi və kosmosun təbii ehtiyatlarının çıxarılması və istifadəsi mənimsəmə qadağasının pozulmasıdırmı?

1. II maddənin müddəaları qeyri-hökumət müəssisələrinə aid edilirmi?

Bu sualın əsas məqsədi əgər kosmosun təbii ehtiyatlarının çıxarılması və istifadəsi mənimsəmə əmələ gətirirsə, qeyri-hökumət müəssisələrinin də bu cür fəaliyyətinin II maddəni pozub-pozmayacağını müəyyən etməkdir. Hazırda kosmos mədənçiliyi ilə bağlı əsas təşəbbüslər özəl şirkətlər tərəfindən ortaya qoyulduğundan bu maddənin müddəalarının özəl şirkətlərə və ya qeyri-hökumət müəssisələrinə aid edilib-edilmədiyini araşdırmaq lazımdır. Təəssüf ki, kosmos hüququnda bu sualın dəqiq bir cavabı yoxdur. Eyni zamanda, kosmos hüququ ədəbiyyatında da müəlliflər arasında bu barədə fikir ayrılıqları mövcuddur. Kosmos hüququ ədəbiyyatında bir neçə müəllif II maddənin yalnız milli mənimsəməni qadağan etdiyini və xüsusi mənimsəməyə icazə verdiyini irəli sürür. Gorove-a görə "Kosmos" müqaviləsinin fərdi mənimsəmə ilə bağlı hər hansı qadağa ehtiva etdiyi görünmür.[64] Beləliklə, hər hansı fərd, xüsusi birlik və ya beynəlxalq təşkilat göy cisimləri də daxil olmaqla kosmosun hər hansı hissəsini qanuni olaraq mənimsəyə bilər.[65]

Ancaq bir çox müəllif "Kosmos" müqaviləsinin xüsusi mənimsəməni üstüörtülü olaraq qadağan etdiyini iddia edir.[66] Məsələn, Bin Cheng-ə görə, kosmos açıq dənizlər kimi heç bir dövlətə məxsus deyil və heç bir dövlət və ya onun vətəndaşı tərəfindən mənimsənə bilməz.[67] Bu fikir üçün ən önəmli səbəb "Kosmos" müqaviləsinin VI maddəsində öz əksini tapır. Belə ki, VI

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[63] Stephen Gorove, *Interpreting Article II Of The Outer Space Treaty*, 37 Fordham L. Rev. 349, 349 (1969).

[64] Nicole Ng, *Fences In Outer Space: Recognising Property Rights In Celestial Bodies And Natural Resources*, 7 The Western Australian Jurist 143, 148 (2016).

[65] Yenə orada.

[66] Yenə orada.

[67] Bin Cheng, *The Commercial Development of Space: The Need for New Treaties*, 19 J. Space L. 17, 22 (1991)

maddəyə görə, dövlətlər, hökumət orqanları və ya qeyri-hökumət müəssisələri tərəfindən həyata keçirilməsindən asılı olmayaraq, Ay və digər səma cisimləri də daxil olmaqla, kosmik fəzadakı milli fəaliyyətlərinə görə beynəlxalq məsuliyyət daşıyırlar.[68] Eyni zamanda, həmin maddəyə görə Ay və digər səma cisimləri də daxil olmaqla, kosmik fəzada qeyri-hökumət müəssisələrinin fəaliyyəti müvafiq müqavilə tərəfi olan dövlətin icazəsi və daimi nəzarəti altında həyata keçirilir.[69] Əgər dövlət 6-cı maddəyə əsasən qeyri-hökumət müəssisəsinin mənimsəməsinə icazə verərsə, həmin mənimsəmə "hər hansı digər bir yolla" 2-ci maddəni pozaraq milli mənimsəmə əmələ gətirər.[70] VI maddədə nəzərdə tutulan müddəaların məqsədi "Beynəlxalq Hüquqa Zidd Əməllərə Görə Dövlətlərin Məsuliyyəti haqqında" maddələrin 11-ci maddəsində nəzərdə tutulan qaydada qeyri-hökumət müəssisələrinin hərəkətlərinin dövlətlərə aid edilməsidir.[71]

2. II maddə kosmosun təbii ehtiyatlarının çıxarılması və istifadəsinə icazə verirmi?

II maddənin kosmos mədənçiliyi baxımından yaratdığı ən önəmli problem kosmosun təbii ehtiyatlarının çıxarılması və istifadəsinin mənimsəmə qadağasını pozub-pozmaması ilə bağlıdır. Qeyd edildiyi kimi, mənimsəmə və resursların çıxarılması arasındakı əlaqə II maddə haqqında ədəbiyyatda olan mübahisənin əsas nöqtəsidir.[72] Kosmos hüququ ədəbiyyatındakı ümumi fikrə görə, II maddə "Kosmos" müqaviləsinin I maddəsi ilə birlikdə kosmik fəzanı *res communis* olaraq müəyyən edir. Müqavilə kosmosun sərbəst istifadəsi və tədqiqinə icazə versə də, onun üzərində hər hansı suverenlik tələbini qadağan edir. II maddə kosmosun istifadə və ya işğal yolu ilə mənimsənməsinə qadağa qoyur.[73] II maddənin bu dili milli mənimsəməyə predmet ola biləcək dünya ərazilərini kosmik fəzadan fərqləndirmək üçün seçilmişdir.[74]

Qeyd etdiyimiz kimi, kosmosun təbii ehtiyatlarının çıxarılması və istifadəsinin mənimsəməmə prinsipinə zidd olub-olmaması məsələsi barədə kosmos hüququ ədəbiyyatında vahid fikir yoxdur. Bəzi müəlliflər iddia edirlər ki, kosmik fəzada suverenlik tələbinə olan ümumi qadağa təbii ehtiyatların istifadə edilməsini də əhatə edir.[75] Məsələn, kosmos hüququ ədəbiyyatında önəmli müəlliflərdən sayılan Stephen Gorove qeyd edir ki, ""Kosmos" müqaviləsinin kosmos və onun təbii ehtiyatları arasında heç bir

[68] Yuxarıda istinad 1, mad. 6.

[69] Yenə orada.

[70] Ng, yuxarıda istinad 64, 148.

[71] P. J. Blount & Christian J. Robison, *One Small Step: The Impact Of The U.S. Commercial Space Launch Competitiveness Act Of 2015 On The Exploitation Of Resources In Outer Space*, 18 N.C. J.L. & Tech. 160, 167 (2016).

[72] Yenə orada, 168.

[73] Yenə orada, 164.

[74] Yenə orada.

[75] Yenə orada, 169.

fərq qoymamasına görə ... kosmos termini ehtiyatlar kimi başa düşülməlidir".[76] Bundan əlavə, təbii ehtiyatların istifadəçinin müstəsna xeyiri üçün mənimsənilməsinin I maddəyə zidd olduğu görünür.[77]

Bunun əksinə, digər müəlliflər irəli sürürlər ki, kosmosun sərbəst tədqiqi və istifadəsi hüququ açıq dənizlər kimi digər *res communis* rejimlərin təməlində olan normalarla eynidir.[78] *Res communis* ümumi razılıq istisna olmaqla, hər hansı dövlətin suverenliyinə tabe ola bilməz və dövlətlərin digər dövlətlər və ya onların vətəndaşları tərəfindən açıq dənizlərin istifadə edilməsinə mənfi təsir göstərə biləcək hərəkətləri etməkdən çəkinmək öhdəliyi vardır.[79] Hazırda kosmosun və göy cisimlərinin eyni ümumi xarakterə malik olması əsas olaraq qəbul olunur.[80] Qısa olaraq, bu müəlliflər iddia edirlər ki, dövlətlərin, onların fəaliyyətləri ehtiyatların mənimsəndiyi ərazilərin daimi olaraq mənimsənməsini ehtiva etmədiyi və digərlərinin eyni fəaliyyətlə məşğul olmasını əngəlləmədiyi müddətcə kosmosun təbii ehtiyatlarını mənimsəməyə hüquqları vardır.[81]

Kosmos hüququ ədəbiyyatında bəzi müəlliflər isə iddia edirlər ki, II maddə ərazi konsepsiyasına tətbiq olunur, əmlak yox.[82] II maddə kosmosu dövlətlərin ərazisindən xaric tutmaq funksiyasını yerinə yetirir, ona görə də mənimsəmə yalnız əmlak hüquqlarının ərazi iddialarından əmələ gəldiyi zaman baş tutur.[83] Beynəlxalq hüquqda kosmos kimi ərazilər *res communis* olaraq bilinir və beynəlxalq sistem tərəfindən *global commons* olaraq tanınır.[84] *Global commons* termini milli dövlətlərin suveren nəzarətindən kənarda olan və ərazi suverenliyi iddiasına predmet olmayan əraziləri bildirmək üçün istifadə olunur.[85] *Global commons* termininin yalnız ümumi bir hüquqi məzmunu var və hər bir *global commons* beynəlxalq hüquq çərçivəsində tətbiq etdiyi, özünün daxili *lex specialis*-nə sahibdir. Buna görə də açıq dənizlər, dənizdibi rayonu, Antarktida və kosmos dövlətlər üçün bənzəri olmayan hüquqlar və öhdəliklər yaradan fərqli hüquqi rejimlərə malikdirlər.[86] Bunun üçün də hər bir *global commons* üçün dövlətlər beynəlxalq sülh və təhlükəsizlik və öz maraqları arasında uyğun balans olaraq gördükləri *lex specialis*-i qəbul

[76] Yenə orada.
[77] Yenə orada.
[78] Yenə orada, 170.
[79] Ian Brownlie, Principles of Public International Law, 169 (2008).
[80] Yenə orada.
[81] Blount & Robison, yuxarıda istinad 7, 170.
[82] Yenə orada.
[83] Yenə orada.
[84] Yenə orada, 170-171.
[85] Yenə orada, 171.
[86] Yenə orada.

etməkdə azaddırlar.[87] Bu nöqteyi nəzərdən, dövlətlər bu ərazilər daxilində milli yurisdiksiyanın mövcudluğuna icazə verə bilərlər.[88]

IV. Mümkün Problemlərin Həlli

Kosmos mədənçiliyinin məqalədə qeyd olunan önəmini və reallığını nəzərə alsaq, bu fəaliyyət üçün effektiv hüquqi tənzimləmə şərtdir. Eyni zamanda, müasir beynəlxalq kosmos hüququnun da bu fəaliyyət üçün aydın hüquqi tənzimləmə təklif etmədiyi aşkardır. Artıq bir çox şirkətlərin və investorların diqqətini çəkən kosmos mədənçiliyinin gələcək inkişafı da məhz bu fəaliyyətin hüquqi vəziyyətindən asılı olacaqdır. Kosmos mədənçiliyi zamanı yarana biləcək hüquqi problemlər bu sahəyə olan marağı və sərmayəni də azaldacaqdır. Kosmos mədənçiliyinin isə insanlıq üçün yaratdığı yeni imkanları nəzərə alsaq, bu sahənin inkişafı olduqca vacibdir. Kosmos hüququ kosmos mədənçiliyinə təsir göstərə biləcək bir çox norma ehtiva etsə də, burada məqalənin mövzusundan dolayı yalnız II maddə ilə bağlı məsələlər üçün təkliflər veriləcəkdir.

Müasir beynəlxalq hüquqda ən effektiv tənzimləmənin beynəlxalq müqavilələr vasitəsilə həyata keçirildiyini nəzərə alsaq, kosmos mədənçiliyini tənzimləmək üçün də dövlətlər arasında yeni beynəlxalq müqavilənin bağlanması zəruridir. Müqavilədə kosmosun təbii ehtiyatlarının çıxarılması və istifadəsinin mənimsəmə prinsipinə zidd olmadığı qeyd olunaraq dövlətlərə və qeyri-hökumət müəssisələrinə kosmos mədənçiliyi ilə məşğul olmağa hüquqlar verilməlidir. Bu hüquqların reallaşdırılması üçün isə kosmosda mədənçilik fəaliyyəti ilə məşğul olmaq istəyən dövlətlərin və qeyri-hökumət təşkilatlarının fəaliyyətini tənzimləyən beynəlxalq təşkilatın yaradılması nəzərdə tutulmalıdır.

Kosmos mədənçiliyi ilə məşğul olmağı hədəfləyən dövlətlərə həmin beynəlxalq təşkilat tərəfindən icazə verilməli, təşkilat dövlətlərin bu sahədəki bütün fəaliyyətinə nəzarət etməli və dövlətlərin fəaliyyətinin beynəlxalq hüquqa uyğunluğunu təmin etməlidir. Kosmos mədənçiliyi ilə bağlı qeyri-hökumət müəssisələrinin fəaliyyəti üçün isə icazə yalnız müvafiq dövlət tərəfindən deyil, eyni zamanda kosmosda mədənçilik fəaliyyətini tənzimləyən beynəlxalq təşkilat tərəfindən verilməlidir. Bu müddəa eyni zamanda daimi nəzarət prinsipinə də aid edilməlidir. Belə ki, kosmosda mədənçiliklə məşğul olmağı hədəfləyən müəssisələrin fəaliyyətinə daimi nəzarət yalnızca müvafiq dövlət tərəfindən deyil, həmçinin beynəlxalq təşkilat tərəfindən də həyata keçirilməlidir.

Qeyd edildiyi kimi, dövlətlərin və qeyri-hökumət müəssisələrinin kosmosun təbii ehtiyatlarından istifadəsi hüququ açıqca qeyd olunmalı və onların bu hüquqları həyata keçirərkən bir-birləri arasında yarana biləcək

[87] Yenə orada.

[88] Yenə orada.

problemlərin həlli məhz kosmosda mədənçilik fəaliyyətini tənzimləyəcək olan beynəlxalq təşkilata həvalə olunmalıdır.

Nəticə

Görüldüyü kimi, hazırda insanlığın gələcəyi baxımından mühüm əhəmiyyət kəsb edən kosmos mədənçiliyi ilə bağlı kosmos hüququnda problemlər mövcuddur. Bu problemlərdən biri də "Kosmos" müqaviləsinin II maddəsi ilə bağlıdır. II maddədə nəzərdə tutulan mənimsəməmə prinsipinin kosmos mədənçiliyini qadağan edib-etmədiyi və onun qeyri-hökumət müəssisələrinə aid edilib-edilmədiyi kosmos hüququ ədəbiyyatında ən çox müzakirə olunan məsələlərdir. Nəticə olaraq, bu problemi effektiv olaraq həll etmək üçün kosmos mədənçiliyini tənzimləyəcək yeni beynəlxalq müqavilə qəbul olunmalı, müqavilədə dövlətlərə və qeyri-hökumət müəssisələrinə kosmosun təbii ehtiyatlarından istifadə etməyə hüquq verilməli və kosmos mədənçiliyi ilə bağlı onların fəaliyyətini tənzimləyəcək beynəlxalq təşkilatın yaradılması nəzərdə tutulmalıdır.

Günel Əlizadə[*]

BMT SİSTEMİNDƏ İSLAHATLAR MÜASİR TƏLƏBLƏR VƏ ÇAĞIRIŞLAR MÜSTƏVİSİNDƏ: TƏKLİF OLUNAN MODELLƏR VƏ KONSEPSİYALAR

Annotasiya

İkinci dünya müharibəsindən sonra BMT beynəlxalq hüququn inkişafında və siyasətdə mühüm rol oynamağa başladı. Dünyada baş verən verən yeniliklər, siyasi vəziyyətin dəyişməsi, ölkələrarası əlaqələrin genişlənməsi, eləcə də qurumun geniş səlahiyyətlərə və böyük ərazini əhatə etməsi ilə əlaqədar olaraq institutlara və orqanlara bölünməsi onun nizamnaməsində dəyişikliklərə ehtiyac yaratmışdır. Məqalədə məhz nizamnamə və BMT sistemində islahatlar aparılması üçün təklif olunan müxtəlif konsepsiyalar və təkliflərdən danışılacaq və BMT-nin fəaliyyətinə mane olan səbəblərdən bəhs ediləcəkdir. Məqalədə BMT modelində islahatların aparılmasının əhəmiyyətindən və islahatların aparılması üçün verilən təkliflərin bir-biri ilə ziddiyətindən danışılacaqdır.

Abstract

After World War II UN started to play an important role at the politics and the international law. Innovations, changing of political situation, development of interstate relations also division of the organization to the branches and institutes due to the broad scope of authority and encompassment of large territories have created the need to adjustments at the Charter of UN. Through the article, different conceptions and suggestions for the reformation of the Charter and the UN system and the reasons which obstruct the activity of UN will be discussed. The importance of reformations at the UN Model and the contradictions of suggestions for the reformation of UN Model will be mentioned in the article.

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Giriş

Müasir beynəlxalq hüququn konstitusiyası adlandırılan BMT Nizamnaməsi özündə beynəlxalq hüquq qaydasının əsas məqsəd və prinsiplərini təsbit etməklə yanaşı, onlara imperativ *(jus cogens)* qüvvə də vermişdir. Məqsəd baxımından BMT-nin yaradılması sülhün və təhlükəsizliyin təmin olunması ilə bağlı olmuşdur. Bu məqsəd indi də öz aktuallığını qoruyub saxlamaqda davam edir. XX əsrin sonları XXI əsrin əvvəllərində beynəlxalq münasibətlər sistemində köklü dəyişikliklərin baş verməsi, geopolitik vəziyyətin dəyişməsi və dövlətlərarası münasibətlərdə baş verən yeniliklər, qloballaşma və getdikcə dərinləşən inteqrasiya prosesləri beynəlxalq sülh və təhlükəsizliyin təmin olunması prosesinə yenidən nəzər salmağı gündəmə gətirmişdir. Təbii ki, bu kontekstdə ümumi sülhün və təhlükəsizliyin təmin olunmasının universal mexanizmi kimi çıxış edən Birləşmiş Millətlər Təşkilatının rolu və fəaliyyəti diqqət mərkəzindən kənarda qala bilməz. BMT-nin fəaliyyətinə xüsusi təsir onun nizamnəmisinin məzmunu və ona edilən düzəlişlərlə bağlıdır. Məqalədə, BMT sistemində islahatlar, onların zəruriliyi, mövcud modellər və konsepsiyaların məzmunu haqqında məsələlərə aydınlıq gətirilməsinə cəhd edilmişdir

I. BMT qlobal problemlərin həllində əsas aktor kimi

Bəşəriyyət bizim eranın üçüncü minilliyinin tarixi səhifələrini yazmaqda davam edir. Belə bir şəraitdə gələcəyə nəzər salmaq, onun necə olacağını izah etmək arzusu hiss olunacaq dərəcədə xüsusi əhəmiyyət kəsb edir. XXI əsr özünün gözlənilməyən hadisələri ilə keçən tarixi proseslərdən əhəmiyyətli dərəcədə fərqlənir. Bunu beynəlxalq həyat hadisələri bir daha təsdiq edir. Belə ki, sənaye əsrini informasiya əsri əvəz etmiş, bir növ yeni minillik qloballaşma mərhələsinə daxil olmuşdur. Lakin o, keçən yüzilliklərin əbədi problemlərindən heç də azad ola bilməmişdir. XXI əsr beynəlxalq təhlükəsizliyə «*köhnə təhdidlərlə*» yanaşı, keyfiyyət baxımından «*yeni təhdidlər*» paketini də təqdim etmişdir. Sovetlər Birliyinin dağılması, dünyanın siyasi mübarizə səhnəsində iki qütblüyün qismən də olsa zəifləməsi, Qərb və Şərq arasında ideoloji mübarizənin sona yetməsi, bununla belə dondurulmuş bir sıra problemlərin ön plana çıxmasına zəmin yaratdı. Bu gün belə "yeni təhdidlər" sırasına: kütləvi qırğın silahlarının yayılması, separatizm meyillərinə əsaslanan milli-etnik münaqişə ocaqlarının sayının artması, beynəlxalq terrorizm, müəyyən coğrafi regionların təbii resurslarına (xüsusən, neft və qazla zəngin olan ərazilərə münasibətdə) nəzarət uğrunda

mübarizə və s. böhranlı hadisələr daxildir.[1] Təbii ki, belə qlobal problemlərin qarşısının alınması, onların müəyyən nizam-tərəziyə salınması, hesab edirik ki, bu gün beynəlxalq birliyin qarşısında duran ən prioritet məsələlərdən biridir.

Qarşıya belə bir sual çıxır: hansı beynəlxalq təşkilat və ya hərbi-siyasi qurum yuxarıda qeyd olunan təhlükələrin qarşısını almaq qabiliyyətinə malikdir və eyni zamanda bu məqsədə xidmət edəcək yeni bir xüsusi hüququn (məsələn, dövlətüstü hüququn) yaradılmasına ehtiyac varmı? Əslində bu sualı birmənalı şəkildə cavablandırmaq qeyri-mümkündür. Ona görə ki, beynəlxalq təhlükəsizlik üçün qorxu törədən köhnə təhdidlərdən yeni təhdidlər həm münasibətlərin xarakteri və məzmununa görə, həm də münaqişə iştirakçılarına görə fərqlənir. Bir növ belə xarakterli münaqişələrin tərəfi qismində qeyri-dövlət aktorları, məsələn: ekstrimist dini cərəyanlar, cinayətkar qruplar, ən müxtəlif strukturlara nüfuz etmiş transmilli cinayətkar şəbəkələr, motivi məlum olmayan terror birləşmələri, etnomədəni klanlar və s. çıxış edir. Başqa sözlə desək, belə münaqişələrdə mübarizə motivi məlum olmayan və ya motivi çətin dərk edilən «yeni döyüşçülərə» qarşı aparılır.[2] Təbii ki, belə bir vəziyyətdə təhlükəsiz dünya haqqında danışmaq olduqca çətin və məsuliyyətli bir fəaliyyət tələb edir. Müasir beynəlxalq münasibətlərin real mənzərəsi göstərir ki, bir növ dövlətlər bəşəriyyətin min illər boyu əldə etdiyi maddi və mənəvi dəyərlərin, daimi sülhün və təhlükəsizliyin üstündən xətt çəkərək gücə, müharibə hüququna qayıtmağa cəhd göstərirlər. Başqa sözlə, milli maraqlar beynəlxalq dəyərləri üstələməyə cəhd edərək beynəlxalq qanunlara hörmətsizlik edirlər, baxmayaraq ki, müasir beynəlxalq hüquq sülhün və təhlükəsizliyin təmin olunmasını ən qiymətli dəyər hesab edir və onun qorunub saxlanılmasını BMT Nizamnaməsi də daxil olmaqla, bütün beynəlxalq razılaşmaların ümdə vəzifəsi hesab edir.

Biz yuxarıda verilən suala BMT-nin praktiki rolu və onun Nizamnaməsinin müddəaları kontekstində cavab verməyə çalışacağıq. BMT bütün dünyada sülhün və təhlükəsizliyin qorunub saxlanması və dövlətlər arasında əməkdaşlığın inkişaf etdirilməsi məqsədi ilə yaradılmış universal beynəlxalq təşkilatdır. Professor Lətif Hüseynovun dili ilə desək, BMT-nin özünün xüsusi

[1] Rahim K. Məmmədov, *Şimali Atlantika Müqaviləsi Təşkilatının (NATO) əsas məqsəd və istiqamətlərinin daxili transformasiyası XXI əsrin yeni təhlükələri kontekstində*, 8 Diplomatiya və hüquq 1, 7-11 (2007).

[2] Theodor Schweisfurth, *Breschnew-Doktrin als Norm des Volkerrechts?*, 21 Aussen-politik 523, 523–38 (1970).

statusunu, siyasi çəkisini və beynəlxalq həyatdakı rolunu, Nizamnamənin xüsusi növ *(sui generis)* beynəlxalq müqavilə olduğunu və onun hüquqi qüvvəsini nəzərə alaraq, Nizamnaməni beynəlxalq birliyin Konstitusiyası adlandırmaq olar.[3]

II. BMT Nizamnaməsi və onun islahatların aparılmasında əhəmiyyəti

BMT Nizamnaməsi ilk beynəlxalq hüquqi aktdır ki, o, beynəlxalq hüquq qaydasının əsas məqsəd və prinsiplərini təsbit etməklə yanaşı, onlara imperativ *(jus cogens)* qüvvə də vermişdir. Təbii ki, bu kontekstdə ümumi sülhün və təhlükəsizliyin təmin olunmasının universal mexanizmi kimi çıxış edən BMT-nin rolu və fəaliyyəti diqqət mərkəzindən kənarda qalmaya bilməz.

Etiraf edək ki, müasir dövrdə bir sıra güc mərkəzlərinin qeyri-kostruktiv fəaliyyəti nəticəsində BMT kimi nüfuzlu təşkilatın mövqeyinə və roluna dair skeptik baxışlara və yanaşmalara rəvac verilmişdir. Obrazlı desək, biz bu araşdırmada BMT-nin roluna və mövqeyinə pozitiv və neqativ baxışlar müstəvisindən münasibət bildirməyə cəhd göstərəcəyik. BMT Nizamnaməsi ilə tanış olan istənilən şəxs həmin sənəddə demokratik, sabit və stabil bir beynəlxalq birliyin formalaşmasını arzu edən və onu şərtləndirən müddəaların şahidi olur. Deməli, bu dəyərlər indi də qüvvədə qalmaqda davam edir, lakin bu dəyərlərin təminatı mexanizmində zəruri islahatların aparılmasına ehtiyac var, amma bütün dövlətlərin maraqlarına cavab verilən müstəvidə.

Məsələn, BMT Baş Assambleyasının 2010-cu ildə keçirilən 65-ci sessiyasında Azərbaycan Respublikasının Prezidenti İlham Əliyev çıxış edərək qeyd etmişdir ki, Azərbaycan dünyada ardıcıl inkişafda, əsas insan hüquqları və azadlıqlarının, beynəlxalq sülhün və təhlükəsizliyin təmin olunmasında BMT-nin mərkəzi rolunu qəbul edir. BMT güclü və dünyanın istənilən yerində mürəkkəb qlobal problemləri həll etməyə qadir olmalıdır. Azərbaycan dağıdıcı müharibə və işğaldan əziyyət çəkən ölkə kimi hesab edir ki, beynəlxalq normalar və mehriban qonşuluq, dostluq və əməkdaşlıq siyasətini yürütmək zəruridir. Prezident İ. Əliyev qeyd etmişdir ki, Azərbaycan və Ermənistan arasında silahlı münaqişənin əvvəlki kimi davam etməsi beynəlxalq və regional təhlükəsizliyə ciddi təhlükə yaradır. Şübhəsiz ki, bu

[3] Lətif H. Hüseynov, Beynəlxalq hüquq 125 (2012).

problemin həllində BMT müstəsna rol oynaya bilər.[4] Belə bir oxşar fikir BMT-nin keçmiş Baş Katibi Pan Gi Mun tərəfindən də bir neçə il bundan öncə səsləndirilmişdir. O, öz çıxışında qeyd etmişdir ki, bu Təşkilatda zəruri islahatların keçirilməsinin vaxtı çatmışdır, lakin bu işdə hələ ki, konsensus əldə etmək mümkün olmamışdır. Xüsusən, o, Təhlükəsizlik Şurasının (TŞ) və digər orqanların islahatı ilə bağlı mürəkkəb məsələlərin olmasını etiraf etmiş, lakin bununla belə, islahatların aparılmasının heç kimdə şübhə doğurmamasına əminlik ifadə etmişdir, çünki BMT-nin yaranmasından artıq 60 ildən çox bir vaxt keçmişdir.[5] 27 iyun 2005-ci il tarixində Moskvada "Qələbənin 60 illiyi, Birləşmiş Millətlər Təşkilatının yaradılması və beynəlxalq hüquq"-a həsr olnumuş Beynəlxalq konfransda Rusiya Federasiyasının Xarici işlər naziri S.V.Lavrov öz çıxışında haqlı olaraq qeyd etmişdir ki, BMT dövlətlərin daha təhlükəsiz və demokratik dünya səylərini birləşdirməyə qabil olan əsas forumdur və onun inkişafı özünün dinamikliyi ilə şərtlənməli və müasir beynəlxalq münasibətlər sistemində baş verən əhəmiyyətli dəyişikliklərə *(yeni çağırışlara)* çevik şəkildə adaptasiya olunmalıdır. Ən əsası ona görə ki, BMT indinin özündə də müasir beynəlxalq hüququn formalaşmasında və inkişafında mühüm rol oynayan nüfuzlu bir təşkilatdır.[6] Beynəlxalq hüquq qaydasının əsasını formalaşdırmış BMT Nizamnaməsində nəzərdə tutulan dəyərlərin və müddəaların müasir dövrün dəyişən şəraitinə uyğunlaşdırılması və daha da təkmilləşdirilməsi tələbi digər hüquq və beynəlxalq münasibətlərə həsr olunan ədəbiyyatlarında da müdafiə olunur.[7] Qeyd olunan bu əsərlərin hər birində BMT Nizamnaməsi beynəlxalq birliyin əsas qanunu, yəni onun konstitusiyası qismində nəzərdən keçirilir. Məhz bu Nizamnamə beynəlxalq münasibətlər tarixində ilk dəfə olaraq müasir beynəlxalq hüququn və xarici siyasətin əsas məqsəd və prinsiplərini möhkəmləndirmiş oldu.[8] Bu gün vaxtı çatmış vəzifə ondan ibarətdir ki, BMT-nin və onun əsas orqanlarının səmərəliliyi maksimum dərəcədə artırılsın, bu

[4] BMT BA, 65-ci sess., 1-ci plen., 11-12-ci görüşlər, BMT Sənəd. A/65/PV.1 (23 sent., 2010). Ətraflı bax: http://www.president.az/articles/762/print.

[5] 1820 saylı Qətnamə əsasında BMT baş katibinin məruzəsi, BMT Sənəd. S/2009/362 (15 İyul, 2009).

[66] Sergey V. Lavrov (2005), *Şimal kontekstində Brüsseldə Nazirlərin Görüşü (21 Noyabr, 2005);* Tuomas Forsberg, Hiski Haukkala, The European Union and Russia 288 (2016).

[7] Stephen Gill, Power and Resistance in the New World Order, 12-17 (2003); Anne-Marie Slaughter, *International Law and International Relations Theory: A Dual Agenda*, 87 The American Journal of International Law 205, 235-239 (1993); Robert O. Keohane, *The Promise of Institutionalist Theory*, 20 International Security 39, 39-51.

[8] Laurence Peters, The United Nations History and Core Ideas 59 (2015).

Təşkilatın 60 ildən çox fəaliyyəti zamanı həyata keçirdiyi işlər, proqramlar təhlil edilsin, BMT Nizamnaməsinin müddəalarının tam və istisnasız həyata keçirilməsi, müasir reallıqlar, dünyanın artmaqda olan qarşılıqlı asılılığı və müxtəlifliyi nəzərə alınmaqla, sonda onun yeni səmərəli fəaliyyətinin istiqamətləri üçün təkliflər irəli sürülüb müzakirə edilsin. Etiraf etmək lazımdır ki, BMT 1945-ci ildə yaranmasından etibarən ciddi dəyişikliklər edilmişdir.[9] Lakin onun Nizamnaməsi bu müddət ərzində, demək olar ki, dəyişikliyə məruz qalmamışdır.[10]

Burada ən maraqlı məqam BMT Nizamnaməsinə ediləcək düzəlişlərin və əlavələrin prosedur qaydaların mürəkkəbliyi ilə bağlıdır. Belə ki, Nizamnamənin XVIII fəslində ona dəyişikliklərin edilməsinin iki alternativ proseduru nəzərdə tutulur: ***birincisi,*** Baş Assambleya tərəfindən,[11] ***ikincisi*** isə ona yenidən baxılması üzrə konfrans vasitəsilə.[12] 108-ci maddənin qeydinə görə, Nizamnaməyə düzəlişlər Təşkilatın bütün üzvləri üçün Baş Assambleyanın üzvlərinin üçdə iki səs çoxluğu ilə qəbul edildikdən və TŞ-ın bütün daimi üzvləri daxil olmaqla, Təşkilatın üzvlərinin üçdə ikisi tərəfindən, onların müvafiq konstitusiya qaydalarına uyğun olaraq ratifikasiya edildikdən sonra qüvvəyə minir.[13] 109-cu maddədə isə göstərilir ki, bu Nizamnaməyə yenidən baxılması məqsədilə, Baş Assambleyanın üzvlərinin üçdə iki səs çoxluğu və Təhlükəsizlik Şurasının hər hansı doqquz üzvünün səsi ilə müəyyən edilməli olan vaxtda və yerdə BMT üzvlərinin Ümumi Konfransı çağırıla bilər. Təşkilatın hər bir üzvü konfransda bir səsə malik olacaqdır.

Hər iki maddənin dispozisiyasından göründüyü kimi heç bir düzəliş, yaxud dəyişiklik TŞ-ın bütün daimi üzvlərinin razılığı olmadan reallaşdırıla bilməz.[14] Nizamnamənin müvafiq maddələrinin təhlili belə bir reallığı əks etdirir ki, əsrlər boyu böyük dövlətlər beynəlxalq sistemdə aparıcı mövqeyə malik olmuş və indinin özündə də bu reallıq aktuallığını qoruyub saxlamaqda davam edir. Bir növ bu dövlətlər başqa dövlətlərin hüquqları və maraqları ilə hesablaşmayaraq istədikləri hüququ, o cümlədən beynəlxalq hüququ yaratmaqda və pozmaqda davam edirlər. Havay Universitetinin professoru M. Hassın dili ilə desək, BMT Nizamnaməsinin qəbul edilməsindən sonra bir

[9] Təbii ki, bu dəyişiklik nəzəriyyə və praktikada eyni cür qarşılanmır.
[10] Peters, yuxarıda istinad 8, 70.
[11] BMT Nizamnaməsi və Beynəlxalq Ədalət Məhkəməsinin statutu, mad. 108.
[12] Yenə orada, mad. 109, bənd 1.
[13] Yenə orada, bənd 2.
[14] Yenə orada.

sıra qüdrətli dövlətlər özlərini hüquq yaradıcı və hüquq pozucu kimi aparmağa başlamışlar. Beynəlxalq münasibətlər sistemində böyük dövlətlərin «*güc amilinə*» xüsusi önəm vermələrini xatırladaraq tanınmış britan hüquqşünası Corc Şvarçenberqer qeyd edir ki, «güc beynəlxalq aristokratiyanın iyerarxiyasında suveren dövlətlərin yerini müəyyən edən mühüm faktordur».[15]

Olduqca maraqlı bir məsələdir ki, BMT-nin fəaliyyətə başlamasından indinin özünə kimi onun müxtəlif istiqamətləri üzrə fəaliyyətinin dəyişdirilməsi ilə bağlı müəyyən təkliflər və konsepsiyalar irəli sürülmüş və belə demək mümkünsə, onlardan yalnız Nizamnamənin müddəalarının mahiyyətinə və əsas mənasına toxunmayan prosedur dəyişikliklər Təşkilatın üzvləri tərəfindən maneəsiz olaraq qəbul edilmişdir. Məsələn, Nizamnamənin 23-cü (TŞ-ın tərkibi), 27-ci (TŞ-da səsvermə) və 61-ci (ECOCOK-un tərkibi) maddələrinə düzəlişlər 1963-cü il dekabrın 17-də Baş Assambleya tərəfindən qəbul edilmiş və 1965-ci il avqustun 31-də qüvvəyə minmişdir. 61-ci maddəyə yeni bir düzəliş 1971-ci il dekabrın 20-də Baş Assambleya tərəfindən qəbul edilmiş və 1973-cü il sentyabrın 24-də qüvvəyə minmişdir. Baş Assambleyanın 1965-ci il dekabrın 20-də 109-cu maddəyə qəbul etdiyi düzəliş 1968-ci il iyunun 12-də qüvvəyə minmişdir. 23-cü maddəyə edilmiş düzəlişlə TŞ-ın üzvlərinin sayı 11-dən (on birdən) 15-ə (on beşə) qədər artırılmışdır. 27-ci maddədə nəzərdə tutulur ki, TŞ-ın prosedur məsələlər üzrə qərarları doqquz üzvün (əvvəllər yeddi üzvün) lehinə səs verməsi ilə və bütün digər məsələlər üzrə qərarları, TŞ-ın beş daimi üzvünün uyğun gələn səsləri də daxil olmaqla, doqquz üzvün (əvvəllər yeddi üzvün) lehinə səs verməsi ilə qəbul olunur. 61-ci maddəyə edilmiş və 1965-ci il avqustun 31-də qüvvəyə minmiş düzəlişlə İqtisadi və Sosial Şura üzvlərinin sayı on səkkizdən iyirmi yeddiyə qədər artırılır. Həmin maddəyə sonradan edilmiş və 1973-cü il sentyabrın 24-də qüvvəyə minmiş düzəliş Şuranın tərkibini iyirmi yeddidən əlli dördə qədər genişləndirmişdir. 109-cu maddəyə edilmiş və həmin maddənin birinci bəndinə aid düzəlişdə göstərilir ki, Nizamnaməyə yenidən baxmaq məqsədilə üzv dövlətlərin Ümumi Konfransı Baş Assambleyanın üzvlərinin üçdə iki səs çoxluğu və TŞ-ın hər hansı doqquz (əvvəllər yeddi) üzvünün səsi ilə müəyyən edilmiş vaxtda və yerdə çağırıla bilər. Baş Assambleyanın növbəti onuncu sessiyasında Nizamnaməyə yenidən baxılması ilə bağlı konfransın çağırılması mümkünlüyünü nəzərdə

[15] Georg Schwarzenberger, The Frontiers of International law 302 (1962).

tutan 109-cu maddənin 3-cü bəndi göstərilən sessiya zamanı nəzərdən keçirilmiş və həmin bənddə olan TŞ-nın hər hansı «yeddi üzvünün» səsi ifadəsi öz ilkin redaksiyasında saxlanılmışdır.

Bilavasitə mövcud müddəaların kökündən dəyişdirilməsini, onlara yenidən baxılmasını və onların təkmilləşdirilməsini şərtləndirən təkliflərə gəlincə, burada məsələnin nə vaxtsa parlament dinləmələrinə çatması ehtimalı aşağıdır, ona görə ki, belə həyati əhəmiyyətli məsələlərin müzakirə edilməsi və onların əsas norma kimi Nizamnaməyə daxil edilməsi ziddiyyətli baxışların yaranmasına gətirib çıxarır.[16] Belə ziddiyyətli məqamlara ABŞ, Rusiya Federasiyası, Böyük Britaniya, Fransa və başqa dövlətlərin mövqelərində daha tez-tez rast gəlinir.[17] Xüsusən bu məsələ XX əsrin 90-cı illərində bəşər tarixində baş verən iki mühüm kompleks dəyişikliklər fonunda daha da aktuallaşmağa başlamışdı.[18] Birinci mühüm kompleks hadisə: sosializm sisteminin ləğv edilməsi (Varşava Müqaviləsi Təşkilatının buraxılması, SSRİ-nin, Çexoslovakiyanın və Yuqoslaviyanın dağılması, ABŞ-ın raket əleyhinə müdafiə üzrə 1972-ci il Müqaviləsindən çıxması və s.) ilə müşayiət olunmuşdursa, ikinci mühüm kompleks hadisə isə AFR-ın və ADR-ın vahid Alman dövlətində birləşməsi, ABŞ-ın hərbi-iqtisadi gücünün daha da artması, NATO-nun fəaliyyət sferasının coğrafi region dairəsindən kənara şıxması və s. hadisələrlə bağlı olmuşdur.[19] Baş vermiş bu tarixi proseslər sonda BMT kimi nüfuzlu bir beynəlxalq təşkilatın öz fəaliyyətinə, məqsəd və məramına yenidən baxmağı şərtləndirir. Maraqlı məsələ isə necə və hansı kontekstdə? Yuxarıda vurğulandığı kimi BMT sistemində müasir reallıqlar və çağırışlar kontekstində islahatların aparılması yolunda həm hüquqi, həm siyasi və geopolitik maneələr mövcuddur. Bunu hal-hazırda dünyanın müxtəlif coğrafi regionlarında baş verən silahlı münaqişələr, terror təhlükəsi, iqtisadi böhran vəziyyəti, enerji resursları və nəqliyyat dəhlizləri uğrunda gedən eksponsionist siyasət bir daha sübut edir. Obrazlı şəkildə ifadə etsək, beynəlxalq hüququn, onun universal hüquqi əsası olan BMT Nizamnaməsinin hüquqi məcburilik qüvvəsinin səmərəliliyinin azalmasına, BMT-nin özünün beynəlxalq məsələlərin həllində nüfuzunun

[16] Jochen A. Frowein Riidiger Wolfrum, 3 Max Planck Yearbook of United Nations Law 42 (1999).

[17] Alexandra Xanthaki, Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land 104 (2007).

[18] Yuxarıda istinad 16, 144.

[19] Yuxarıda istinad 1, 9.

aşağalanmasına edilən cəhd, hesab edirik ki, düşünülmüş bir siyasətin gələcəyə köklənmiş konseptual strategiyasıdır.

Hətta bu məsələ ilə bağlı bir sıra ədəbiyyatlarda belə bir fikir səslənir ki, BMT-nin özü, həmçinin onun Nizamnaməsində nəzərdə tutulan əsas prinsip və normalar ilə bağlı olan istənilən beynəlxalq təşkilatın fəaliyyəti və beynəlxalq müqavilənin müəyyən etdiyi öhdəlik heç də məcburi və məqbul sayıla bilməz. Bu mövqeyin tərəfdarları BMT-nin fəaliyyətini və onun Nizamnaməsini *«tabuta qoyulan ölüyə»* bənzədirlər.[20]

Beynəlxalq hüququn beynəlxalq münasibətlərə təsiredici qüvvəsində yaradılan süni böhranın əsas proyekti XXI ilk tarixi dönəmində qoyulmuşdu.[21] 2005-ci ilin sonunda Nyu Yorkda «1968-ci il Nüvə silahının yayılmaması haaqında» Müqaviləyə dair keçirilmiş icmal Konfrans bütün dünya dövlətlərinə göstərdi ki, ABŞ açıqca ikili standartları əldə rəhbər tuturaq beynəlxalq hüquqa belə məhəl qoymadan təhdid siyasəti yürüdür. Belə ki, ABŞ ən güclü silahlı qüvvələrə və nüvə silahına malik olmaqla, istənilən hər hansı dövləti silahlı müdaxilə ilə hədələyə bilər, hansı ki, onun siyasəti «*Amerikanın milli maraqlarına cavab vermir*» və ya həmin dövlətdə «*demokratiyanın vəziyyəti*» «*Amerika demokratiyası*» anlayışı ilə üst-üstə düşmür və nüvə silahına malik olmayan başqa dövlətlər isə 1968-ci il Müqaviləsinə əməl etməli və nüvə silahı yaratmaq hüququndan vaz keçməlidirlər.[22] Bu isə o deməkdir ki, ABŞ özünün milli maraqlarını heç də BMT sisteminə daxil olan dövlətlərin ümumi maraqları ilə eyniləşdirmək fikrində deyildir və əlbətdə ki, burada əsas səbəb BMT-nin öz əvvəlki nüfuzunu itirməsi ilə bağlıdır.

ABŞ bu günkü, yaranmış vəziyyətdən istifadə edərək, (təbii ki, BMT və onun səlahiyyətli strukturlarının kifayət qədər işlək olmaması da buna stimul verir) beynəlxalq terrorizmə müharibə elan etmiş, lakin əslində isə zəngin təbii resurslara malik olan ərazilər üzərində özünün nüfuzunu möhkəmləndirmək kimi geostrateji maraqlarını reallaşdırmaqla məşğuldur.

[20] Andrew J. Bacevich, Washington Rules: America's Path to Permanent War 67-98 (2010); Richard K. Betts, *The Political Support System for American Primacy*, 81 International Affairs 1, 1-14 (2005).

[21] Yuxarıda istinad 17, 210.

[22] Геннадий Михайлович Мелков, Международное право 324-325 (2009).

III. BMT sistemində islahatlarla bağlı model və konsepsiyalar

Qeyd olunan strateji maraqların və beynəlxalq təhlükəsizliyin təmin olunmasında əsas rol məsələsinə gəldikdə, burada əsas rol heç də BMT-yə aid edilmir. Qarşılıqlı təhlükəsizlik konsepsiyasının tərəfdarları, xüsusən onun «*Kant qolu*» beynəlxalq sülhün və təhlükəsizliyin təmin olunmasında BMT-nin fəaliyyətinin səmərəli olmadığını qeyd edir və təhlükəsizliyin dəyişən mühitində beynəlxalq hüquqi norma və prinsiplərin deyil, humanitar dəyər və ideallar əsasında fəaliyyət zərurəti dayandığını iddia edirlər. Bu modelin tərəfdarları təhlükəsizliyə nail olunmasının əsas vasitəsi qismində NATO-un xüsusi rolunu qiymətləndirirlər.[23] Bu da bir danılmaz reallıqdır ki, bu gün BMT özünün qarşısında duran vəzifələrinin yerinə yetirilməsində o qədər də səmərəli mövqey nümayiş etdirmir. Eyni zamanda, beynəlxalq təhlükəsizlik üçün real qorxu törədən təhlükələrin qarşısının alınmasına və onlarla səmərəli mübarizə aparmağa qadir ola biləcək yeni xüsusi universal qurumun yaradılmasına isə heç lahiyə üzərində də cəhd göstərilmir.

Məhz buna görə də, təhlükəsizlik məsələlərinə həsr olunmuş konsepsiyaların tərəfdarlarının əksəriyyəti NATO-nu müasir təhlükəsizliyin təmin olunmasının əsas qarantı hesab edirlər.[24]

1999-cu ildə NATO-un 50 illiyinin təntənəli surətdə qeyd olunması zamanı Alyansın XXI əsrdə əsas fəaliyyət istiqamətlərinə dair yeni strateji konsepsiyası qəbul edildi. Həmin konsepsiya NATO-un ənənəvi məsuliyyət zonası hüdudlarından kənara nüfuz etməsinə, xüsusən sülhyaradıcılıq fəaliyyətinə, kütləvi qırğın silahlarının yayılmamasına qarşı əks tədbirlər görülməsinə, beynəlxalq terrorizmlə mübarizəyə və s. bu kimi dünyada baş verən proseslərə müdaxilə etməsinə əlverişli imkan yaratdı.[25] Konsepsiya NATO-ya BMT Təhlükəsizlik Şurasının qərarı olmadan belə hərbi qüvvələrdən istifadə etmək hüququ vermişdir. Bu məsələ ilə bağlı London strateji tədqiqatlar İnstitutunun direktoru Corc Çipmen qeyd edir ki, BMT Təhlükəsizlik Şurasının razılığı olmadan belə bir sıra xüsusi hallarda daxili işlərə müdaxilə olunma imkanları mövcuddur. Əgər tutarlı əsas var ki, BMT Təhlükəsizlik Şurası siyasi fikir ayrılığı üzündən qərar qəbul edə bilmir, lakin

[23] Əmir Əliyev, *Beynəlxalq təhlükəsizlik və insan hüquqlarının təminatı məsələləri*, 8 Diplomatiya və hüquq 1, 4 (2007).
[24] Marco Rimanelli, The A to Z of NATO and other International Security Organizations 12 (2009).
[25] Yenə orada, 19.

reallıq bunu tələb etdiyi üçün BMT-dən yan keçməklə bu hərəkəti etmək olar. Sözün həqiqi mənasında BMT çərçivəsindən kənar sülhün və beynəlxalq təhlükəsizliyin qorunub saxlanılmasında NATO-ya birtərəfli qaydada xüsusi səlahiyyətlərin verilməsi, hesab edirik ki, heç də mövcud problemin pozitiv həlli kimi qəbul edilə bilməz. Səbəb isə bu gün dünyanın bir sıra münaqişə ocaqlarında sülh və beynəlxalq təhlükəsizliyin təmin edilməsi, qorunması adı altında NATO qüvvələri tərəfindən coxsaylı müharibə cinayətlərinin, insanlıq əleyhinə cinayətlərin törədilməsi faktları buna misal ola bilər. Əslində NATO sülhün və beynəlxalq təhlükəsizliyin qorunub saxlanılmasında deyil, ABŞ və onun müttəfiqlərinin geosiyasi maraqlarının təmin olunmasında daha çox maraqlıdır. NATO-un geosiyasi strategiyasının intellektual atası hesab olunan admiral Alfred Mexenin dili ilə desək, silahlı qüvvələrin əsas məqsədi-planetar ticari maraqların təmin olunma vasitəsidir.[26]

Müasir dövrdə BMT-nin fəaliyyəti və onun Nizamnaməsinin vəziyyəti ilə bağlı mövcud olan model və ya konsepsiyalardan biri *"Dünya dövlətinin"* yaradılması kontekstində müasir beynəlxalq hüquqa və BMT Nizamnaməsinə yenidən baxmaq konsepsiyası çıxış edir. Bu konsepsiyanın əsas obyekti qismində xüsusi bir hüquq sisteminin "World law" yəni "Dünya hüququ" nun yaradılması çıxış edir. Həmin konsepsiyanın tərəfdarları beynəlxalq hüququn yaradılmasının əsas enerji mənbəsi hesab edilən, siyasi-hüquqi əhəmiyyətə malik olan dövlətlərin suverenliyinin rolunu azaldaraq beynəlxalq münasibətlərin tənzimlənməsinin yeganə və məqbul aləti qismində dövlətüstü (*supranational*) əlamətə malik olan və dünya dövlətinin hüquq sistemi kimi çıxış edən Dünya hüququnun yaradılmasında görürlər. Bu konsepsiyanın tərəfdarları (məsələn, M.Makduqal, Q.Lassvell, M.Berkan, C.Mur, S.Hofman və b.) beynəlxalq hüququ və onun universal mənbəsi hesab olunan BMT Nizamnaməsinin hüquqi məcburiliyini inkar edərək müəyyən xarici siyasət məqsədlərinə nail olunmasında dünya hüququnun özəyini təşkil edən "Rule of force" "Gücün hökmranlığı"-na istinad etməni daha məqsədəmüvafiq hesab edirlər.[27] Bu konsepsiyanın əsasında "güc hüquqdur" maksiması durur. İraq böhranı zamanı BMT-nin üzv-dövlətlərinin məsələyə hüquqi, siyasi, istərsə də geopolitik baxımdan laqeyd münasibət bəsləmələri və ziddiyyətli baxışlarının olması belə bir fikir söyləməyə əsas verir ki, onlar müəyyən mənada "yeni hüququn", demək

[26] Yenə orada, 20.

[27] *McDougal, International Law, Power, and Policy*: A Contemporary Conception, 82-I *Rec.* Des *Cours* 54, 76 (1953).

mümkün olarsa, yeni beynəlxalq hüququn yaranmasına etiraz etmirlər. Ona görə ki, anti-iraq koalisiyası adlanan ABŞ və onun müttəfiqləri öz hərəkətləri ilə müasir beynəlxalq hüquq qaydasını və hüququn hökmranlığını şübhə altına qoymuş oldular. Belə ki, ABŞ beynəlxalq hüququn rolunu heçə endirən və onu yalnız dövlətlər tərəfindən birgə məsələlərin həlli məqsədi ilə tətbiq etməklə məhdudlaşdırılan bir proses səviyyəsinə endirməyə çalışaraq, onu *quid pro qui (birini başqasına)* heç bir beynəlxalq təşkilatın (o cümlədən BMT-nin) ilkin razılığı olmadan hərbi sanksiya ilə müşayiət olunan preventiv tədbirlər də daxil olmaqla güc tətbiq etmək hüququna yol verən yeni təhlükəsizlik konsepsiyası ilə əvəz etməyə çalışır.[28]

Müasir siyasi-hüquqi baxışlarda BMT Nizamnaməsinin ən çox tənqidə məruz qalan maksimalarından biri əsas prinsiplər sistemində müəyyən şəkiyə? malik olan "dövlətlərin suveren bərabərliyi prinsipi" ilə bağlıdır. Bəzi hüquqşünas alimlər və diplomatlar qeyd edirlər ki, bu prinsip real olaraq beynəlxalq hüququn hegemonluğu fonunda bir maneədir. Bu konsepsiyanın tərəfdarları belə bir fikir irəli sürürlər ki, suveren bərabərlik hüquqi prinsip kimi bütövlükdə təkcə hakimiyyətin gücündən deyil, həmçinin onun hüquqi təbiətinin dərk olunmasından da asılıdır (məsələn, Cenis C, Zemanek K, MakDuqal M və b).Beynəlxalq hüquq suverenliyi hakimiyyətin mühüm elementi hesab etməklə, onu bütün dövlətlərin ayrılmaz və immanent atributu hesab edir. Lakin bununla belə, suverenlik heç vaxt beynəlxalq hüquq tərəfindən mütləq hal kimi tanınmamışdır. Onlar öz fikirlərini belə bir faktla əsaslandırmağa çalışırlar ki, BMT Nizamnaməsinin 25-ci maddəsində TŞ-ın qətnamələrinin məcburilik qüvvəsi ilə bağlı dövlətlərin bərabərliyi üçün müstəsna əhəmiyyətli hüquqi məhdudiyyət müəyyən edilmişdir və eyni zamanda, həmin maddədə TŞ-ın daimi üzvləri üçün bu və ya digər aspektdə imtiyazlara əl yeri qoyulmuşdur. Lakin bu konsepsiyanın əksinə olaraq bəzi tədqiqatçılar qeyd edirlər ki, BMT TŞ-da daimi üzvlərin müəyyən imtiyazlara və üstünlüklərə malik olması "dövlətlərin suveren bərabərliyi prinsipi"-nin bir fiksiya olması anlamına gəlməyə əsas vermir. Səbəb isə ondan ibarətdir ki, bu gün real olaraq heç bir qüvvə beynəlxalq hüquq qaydasının enerji mənbəsi olan suveren dövlətlərin beynəlxalq münasibətlərdə oynadığı rolu öz üzərinə götürüb təkbaşına hərəkətə gətirmək iqtidarına malik deyildir.[29]

[28] NATO office of international and press, The Alliances strategic concept (November 8, 1991). Daha ətraflı: https://www.nato.int/cps/ua/natohq/official_texts_23847.htm

[29] *Игорь Иванович Лукашук*, Международное право 50-51 (2005).

BMT-nin fəaliyyətinin təkmilləşdirilməsi işinin pozitiv istiqamətdə həyata keçirilməsinə dair mühüm konsepsiyalardan biri-beynəlxalq münasibətlərdə «*Rule of Law-Hüququn hökmranlığı*»-nın təsbit edilməsidir.[30] Hüququn hökmranlığı konsepsiyasının banisi Oksford Universitetinin professoru Albert Venn Daysidir. Beynəlxalq hüquqda qeyd olunan konsepsiyanın əsas məqsədini: beynəlxalq münasibətlərdə hüququn nüfuzunu təmin etmək; dövlətlərin fəaliyyətinin bütün aspektlərində beynəlxalq hüququn normalarının dönmədən əməl edilməsinə köməklik göstərmək təşkil edir. Beynəlxalq münasibətlərə hüququn hökmranlığı konsepsiyasının hansı komponentləri və real istiqamətləri daxil edilə bilər? *Birincisi*, beynəlxalq münasibətlərdə hüququn hökmranlığına nail olma ilk növbədə dövlətlərin öz üzərlərinə götürdükləri beynəlxalq öhdəlikləri nə dərəcədə riayət etmələrinə sözsüz hazır olmalarından asılıdır; *ikincisi,* dövlətlərarası səviyyədə, xüsusən, BMT çərçivəsində beynəlxalq hüquq qaydasının təkmilləşdirilməsi prosesinə stimul verən bir sıra tədbirlərdə: dövlətlərin hüquq yaradıcılığı və hüquq tətbiq etmə mərhələsində ədalətli iştiraklarına şərait yaratmaq, baş vermiş mübahisələrin və situasiyaların nizamlanmasında dinc vasitələrin rolunu artırmaq; *üçüncüsü*, BMT və onun əsas orqanları da daxil olmaqla, bütün beynəlxalq təşkilatların rolunun artırılması istiqamətində əhəmiyyətli inistitusional islahatların aparılması.[31]

Ədalət naminə qeyd edək ki, beynəlxalq hüquq normalarının qarşısında duran məqsədlərə, ümumi planda olsa da, nail olunur. Məsələn, BMT və onun Nizamnaməsinin yenidən təftiş edilməsinin əsas tərafdarlarından olan Amerikalı hüquqşünas L. Son bu Təşkilatın fəaliyyət göstərdiyi gündən indiyədək olan müqavilə təcrübəsini ümumiləşdirərək belə bir maraqlı fakta toxunur ki, 1945-ci ildən indiyə kimi BMT-nin himayəsi altında 20000 min müqavilə imzalanmış və qəbul edilmiş və onlardan 19900 dəqiq icra edilmişdir.

Nəticə

Yekun olaraq qeyd etmək istərdik ki, BMT-nin rolunun yüksəldilməsi beynəlxalq hüququn möhkəmləndirilməsinin və mütərəqqi inkişafının keyfiyyətcə yeni perspektivlərini açır. Təbii ki, bu gün BMT-nin fəaliyyəti 60 il bundan əvvəlki fəaliyyət deyildir. Bu nüfuzlu Təşkilat çərçivəsində yenidənqurma işlərinə start vermək üçün ilk növbədə onun keçmiş fəaliyyəti

[30] Heiko Meiertons, The Doctrines Of Us Security Policy An Evaluation Under International Law 8 (2010).

[31] Jeremy Matam Farrall, United Nations Sanctions and the Rule of Law 10 (2007).

diqqətlə araşdırılmalı, təsis aktında təsbit olunmuş normalara dövlətlər tərəfindən hansı qaydada əməl edib-etməmələri aydınlaşdırılmalıdır. BMT sistemində islahatlarla bağlı yuxarıda qeyd etdiyimiz konsepsiya və modellərin hər birisinin məğzində bir həqiqət durur: hansı dəyişiklilik olursa olsun, o mənim mənafeyimə cavab versin. BMT sisteminin təkmilləşdirilməsi ilə bağlı irəli sürülən və ya təklif edilən təkliflər, modellər və ya konsepsiyalar tamamilə bir-birilərinə ziddiyyət təşkil edir. Əgər bir model beynəlxalq hüququn özünün səmərəli olmamsını iddia edirsə və BMT-nin tamamilə ləğv edilməsinin tərafdarıdırsa, bir sıra konsepsiya və modellərin tərəfdarları isə onun fəaliyyətini öz məqsədlərinə müvafiq adaptasiya olunmasında maraqlıdırlar, digərləri isə özlərinin təminatlı təhlükəsizliklərini əldə etdikdən sonra onun Nizamnaməsinə yenidən baxmağı təklif edirlər. Vurğulamaq istərdik ki, söhbət burada ayrı-ayrı təkliflərdən gedir, onların paket formasında birləşdirilməsi çox güman ki, yaxın gələcəkdə mümkün olmayacaq.