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Oksidelfa Yanto

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Menyambut baik kontribusi dari para ilmuwan, sarjana, profesional, dan peneliti dalam disiplin ilmu hukum untuk dipublikasi dan disebarluaskan setelah melalui mekanisme seleksi naskah, telaah mitra bebestari, dan proses penyuntingan yang ketat.

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“Scope of State Responsibility Against Terrorism In International Law Perspective; Indonesian Cases”*

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Abstrak: *Lingkup Pertanggungjawaban Negara Terhadap Terorisme dalam Perspektif Hukum Internasional pada Kasus Indonesia.* Munculnya kasus tindakan terorisme global ditandai dengan tragedi 9 September Salah satu isu yang berkembang adalah sejauh mana tanggung jawab negara terhadap aksi terorisme yang terjadi di wilayah kedaulatannya, yang menyebabkan timbulnya korban, baik warga negaranya sendiri atau warga negara asing. Dalam konteks Indonesia, pertanggungjawaban negara diimplementasikan berdasarkan Konvensi Internasional yang telah diratifikasi dan pembedaan bagi pelaku tindak pidana terorisme berdasarkan peraturan yang terkait. Hukum Internasional telah berevolusi dengan menerapkan Prinsip Tanggung Jawab untuk melindungi, selain adanya keharusan setiap negara untuk menjaga keamanan dan Hak Asasi Manusia.

Kata kunci: Terorisme, Tanggung Jawab Negara, Kewajiban Internasional, HAM.

Abstract: *State Responsibility Towards terrorist Act In International Law Perspective: Case study in Indonesia.* The rise of terrorist act globally has been signed by the World Trade Center (WTC) Building Bombing in the United State of America (9/11 Tragedy). One of the issues raised is to what extent state responsibility towards terrorist acts that was happening in territorial of a state which causes victims of its citizens and foreigners. In Indonesian context, the implementation of state responsibility is subject to international conventions ratified and related national instrument. International law has recognised *responsibility to protect principle* as well as state responsibility to maintain its security and human rights.

Keywords: *Terrorism, State Responsibility, International Obligations, Human Rights.*

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Introduction

All too often we are reminded that terrorism continues to inflict pain and suffering on people's lives all over the world. Almost no week goes by without an act of terrorism taking place somewhere in the world, indiscriminately affecting innocent people who just happened to be in the wrong place at the wrong time. Countering this scourge is in the interest of all nations and the issue has been on the agenda of the United Nations for decades. Eighteen universal instruments (fourteen instruments and four amendments),¹ against international terrorism have been elaborated within the framework of the United Nations system relating to specific terrorist activities. Member States through the General Assembly have been increasingly coordinating their counter-terrorism efforts and continuing their legal norm-setting work. The Security Council has also been active in countering terrorism through resolutions and by establishing several subsidiary bodies. At the same time a number of programs, offices and agencies of the United Nations system have been engaged in specific activities against terrorism, further assisting Member States in their counter-terrorism efforts.²

Terrorism activity is not a new thing. Terrorism has been performed throughout the world's history was recorded. Greece historian Xenophon, who lived in the year 431-350 BC, wrote about the effectiveness of the psychological weapon in the fight against the enemy, as well as propaganda, which of course is often used by the terrorism of today. Some ancient Roman emperors, such as Tiberius (the reign years 14-37 AC) and Kaligula (reign in 37-41 AC) also use mass destruction methods, destruction of property, and execution as a tool to intimidate political opponents. Terrorism practices openly supported by Robespierre as a tool to build revolutionary fervor during the revolution of France up to it in writing, then his rule is often known as the Reign of Terror (year 1793-1794).³

¹ United Nations (fourteen instruments and four amendments): 1). Convention on Offences and Certain Other Acts Committed On Board Aircraft 1963. 2). Convention for the Suppression of Unlawful Seizure of Aircraft 1970. 3). Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons 1973. 4). International Convention against the Taking of Hostages 1979. 5). Convention on the Physical Protection of Nuclear Material 1980 (Amendments to the Convention on the Physical Protection of Nuclear Material). 6). Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1988 (Extends and supplements the Montreal Convention on Air Safety). 7). Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988 (Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 2005). 8). Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf 1988 (Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf 2005). 9). Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991..

² United Nations, UN Action To Counter Terrorism, viewed 1 March 2013, <<http://www.un.org/terrorism/index.shtml>> .

³ Irene Hadiprayitno, *Terorisme dan Teori Konspirasi: Tinjauan Terhadap Peran PBB*, Jurnal Politik Internasional Global, Vol. 5, No. 2, (Depok: Departemen Ilmu Hubungan Internasional Fisip UI, Mei 2003), pp. 49.

Given the relatively large impact, the issue of terrorism is not only restricted as the point of attention of every country's Government in protecting its sovereignty. These issues are also of concern to the United Nations who turns out to have to spend a special conventions regarding terrorism. On 15 December 1997, the General Assembly of the United Nations adopted without voting process, the International Convention for the Suppression of Terrorist Bombing through Resolution A/RES/52/164. In this Convention, which was intended by the terrorists is:⁴

"...person unlawfully and intentionally delivers, places, discharges or detonates an explosive or other lethal device in, into or against a place or public use, a State or government facility, a public transportation system or an infrastructure facility:

- a). with the intent to cause death or serious bodily injury, or*
- b). with the intent to cause extensive destruction of such a place, facility or system, where such destruction results in or is likely to result in major economic loss"*⁵

In Indonesia, there has been a series of terror events that had gripped the country and society, and which led to the tragedy of loss of life or property. Terrorism in Indonesia was declared by the authorities, that was done by a group of Jamaah Islamiyah militants which associated with al-Qaeda or militant groups that use similar ideology with them. Since year 2002, several "Western Nations" have been attacked. Casualty is foreign tourists and natives of Indonesia. Terrorism in Indonesia began in year 2000 with the Jakarta Stock Exchange bombing, followed by other major attacks, and the most deadly was in the year 2002 (Bali bombing).

Indonesia is a sovereign State in accordance with Article 1 of the Montevideo Convention 1933,⁶ has the authority within its jurisdiction. Every independent State and sovereign in resolving the problem in the region was not affected by the opinion that the country respects the rights of other States, but International Law has established a set of rules to guarantee and respect the foreign citizen, ownership of other countries, and so on. Now the international attention to the human rights issue in some ways has led to the rule of law, even in the relationship of the country with its own citizens.

So we could have addressed two issues in the deliberations of this writing whether the local State where the occurrence of acts of terrorism (in this case Indonesia) is required to fully responsible in protecting civil society both its own citizens or foreigners who have become victims and their rights violated ?. As well as referring to whether other countries can also impose themselves to participate in the handling of acts of terrorism that occurred in a country (especially Indonesia) as a form of one International Obligations which is Stated as the Principle of State

⁴ *Ibid*, pp. 50.

⁵ *Ibid*. See also United Nations, International Convention for The Suppression of Terrorist Bombings, (Signed in New York: January 12th '1998), Article 2.

⁶ The 7th International Conference of American States, Montevideo Convention on Rights and Duties of States, (Signed in Montevideo: December 26th 1933), Article 1: The State as a person of International Law should possess the following qualifications: (a) a Permanent population; (b) a Defined territory; (c) Government; and (d) Capacity to enter into relations with the other States.

Responsibility for the maintenance of international peace and security that have been mandated in the Charter of the United Nations ?.

The Principle of Responsibility to Protect as a State Responsibility in Tackling Acts of Terrorism in its Territory

The responsibility of the State is one of the important issues that are always discussed in International Law. This is because the country is the subject of a major legal in International Law. That's the reason why the International Law Commission (ILC) tried to do the study and codification of State responsibility matters. These efforts eventually bear only a draft of the Convention, namely the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted in 2001. In International Law, the responsibility of the State is defined as an obligation that must be carried out by the State to the other countries on the basis of the international legal order. Simply put, if a State does not comply with the obligations based on International Law attributable to him so he can be requested of responsibility. But the fact of the matter is not as easy as it is difficult to assess whether the country has neglected or not carrying out its obligations.⁷

Today one can regard responsibility as a general principle of International Law, a concomitant of substantive rules and of the supposition that acts and omissions may be categorized as illegal by reference to the rules establishing rights and duties. Shortly, the law of responsibility is concerned with the incidence and consequences of illegal acts, and particularly the payment of compensation for loss caused. However, this, and many other generalizations offered to the subject, must not be treated as dogma, or allowed to prejudice the discussion which follows.⁸

A State has certain obligations according to International Law and the responsibility of the State of international obligations is a legal responsibility, because a country cannot be abolished or created the International Law as well as creating or its national law. The responsibility of the State is a fundamental principle of International Law and the issue arises because of the nature of the international legal system itself and the existence of the doctrine of the sovereignty and equality of States. The responsibility of the State that occurs when a country acts in violation of International Law against another country. If there is a breach of international obligations against then it could lead to demands for compensation: a). The essential characteristics of responsibility hinge upon certain basic factors: b). The existence of an international legal obligation in force as between two particular State: c). That there has occurred an act or omission which violates obligation and which is imputable to the State responsible: d). The loss or damage has resulted from unlawful act or omission.⁹

⁷ Tanggung Jawab Negara Terhadap Tindak Pidana Internasional, viewed 1 Maret 2013, http://senandikahukum.com/tanggung-jawab-negara-terhadap-tindak-pidanan-internasional/#_ftn4

⁸ Ian Brownlie, *Principles of Public International Law*, (Oxford: Clarendon Press, 1966), pp. 353-354.

⁹ Malcolm N. Shaw, *International Law*, 5th edition, (Cambridge: Cambridge University Press, 2003), pp. 696.

In accordance with International Law in general has approved that foreigners residing in the country should be given the same rights (equal rights) and given to the inhabitants themselves. It is the responsibility of the State to protect those rights. However, it is the responsibility of the State can only arise if there are actions or omissions committed by the agencies, agencies or its officers. The actions carried out by individuals either individually or in groups that results in harm to foreign nationals, that responsibility would arise over the omission from the country through the agencies, institutions or its officers and to take steps in that situation which usually has made prevention, punitive damages or provide penalties for crimes that resulted in losses of actions.

The State cannot be a guarantor (insurer) for someone's life as well as his own. The country also cannot be held responsible for crimes committed by the acts of insurgents or people who commit a violation of the country's power although it blamed (imputable) because no matter to crack down on the opposition. The actions of those individuals who performed in the territory of a country can not be blamed to the State and therefore the State has never been directly responsible for the acts. However, State responsibility arises because of the negligence of Government officials in dealing with such actions, so these errors are then submitted to the State.

If the State is treated as directly responsible for the very private terrorist activity that it supports or fails to prevent, special prominence is given to the role of the State in making private terrorism possible. State sponsorship or toleration of private acts of terrorism is thus regarded as a key factor in the terrorist phenomenon to which the rules of State responsibility must respond. In addition, the State and the private terrorist group are more readily viewed as functioning on the same plane, as capable of operating in some kind of partnership without necessitating a principal-agent relationship. By contrast, restricting State responsibility under conceptions of agency tends to de-emphasize the influence of the State on purely private terrorist activity. It highlights the role of the sub-State terrorist group as the driving force behind terrorist atrocities and views the State as shouldering less responsibility unless it directs, controls or espouses the private action. This approach treats terrorism as a phenomenon that operates essentially on the private plane and it limits the ways in which the State may be regarded as party to it.

These divergent perspectives dictate different strategies in confronting modern day terrorism. For one, emphasis may need to be placed not just on the private terrorist operatives but equally-if not more so-on the State facilitating or tolerating their activity. For the other, terrorism has become essentially a private phenomenon and, as a result, solutions must be directed primarily against the private actors while the State's contribution to their activity is relegated to a secondary status. These different approaches also produce discordant views about the relationship between the public and the private spheres. The more restrictive view of State responsibility regards these spheres as conceptually distinct, and evinces a concern about increased State control over the private sector. As a result, it imposes strict divisions between the public and the private, broken only by agency-type relationships. By contrast, a broader vision of responsibility emphasizes the more subtle ways in which the State

can operate through the private sphere. It embraces a wider conception of State action and is more willing to 'pierce the veil' between the State and non-State domains so as to ensure State accountability.¹⁰

International Obligation or Intervention?

The State as a subject of International Law has a special element which is not owned by subjects of International Law, the sovereignty of the other. Sovereignty is the main element that becomes a reference for the principle of non-intervention in the practice of International Law.¹¹ In International Law, along with the development of International Law, State sovereignty conflicts with humanitarian intervention raises a question about the legality of the involvement of other countries to intervene in a country's territorial area.¹²

The term 'responsibility' is occasionally used interchangeably with the notion of 'obligation'. In the field of International Law, however, it has a more precise meaning. When a State is held 'responsible' for an unlawful act or omission, it bears the legal consequences that flow from this breach of its legal duties. The State becomes the appropriate address for whatever remedial action is legally permissible in the circumstances.¹³

There are two kind of international treating the State in relation with its responsible for terrorist act. The State as directly responsible for a terrorist act and treating it as responsible only for violating its duty to prevent or abstain from supporting that act. At the level of principle, when the State's responsibility is restricted to a violation of the duty to prevent or abstain, attention is focussed away from the State and towards the private perpetrators. This kind of limitation on the scope of a State's responsibility promotes a discourse that 'privatizes' the problem of terrorism - encouraging solutions which are directed primarily against the private terrorists, while casting the State in a more minor, supporting role.¹⁴

In many history, State's responsibility for the acts of private individuals has been conceptually intertwined with the field of injury to aliens. Beginning with the earliest writers in International Law, attempts have been made to determine the responsibility of the State for the wrongful conduct of its subjects directed against non-nationals or foreign sovereigns. To trace the development of these principles is to trace a web of arbitral awards, codification efforts and academic projects that span several centuries.

¹⁰ Tal Becker, *Terrorism and The State: Rethinking The Rules of State Responsibility*, (Oxford: Hart, 2006), pp. 156-157.

¹¹In International Law, there is a general principle which is named with the 'Non Imperum Par Imparem Hebet': there is not a sovereign country can conquer any other sovereign State (this principle underlying similarities between countries sovereignty in International Law).

¹²Santa Marelda Saragih, *Responsibility To Protect Suatu Tanggung Jawab Dalam Kedaulatan Negara*, Jurnal Opini Juris, Vol. 2, (Jakarta: Kementerian Luar Negeri RI, Mei-Agustus 2011), pp. 33.

¹³Tal Becker, *Op. Cit*, pp. 3.

¹⁴*Ibid*.

There are theories of State responsibility for wrongfully of private act. In the middle ages, jurist known of collective responsibility that had their origins in the Roman *jus gentium*. In principle, collective responsibility declare that a group was automatically responsible for the acts committed by its members. In its formative stages, international legal practice recognized a doctrine of reprisals that allowed for retaliation against a foreign entity for the unfriendly act of one of its subjects. Under this approach, the act of the foreign subject was deemed automatically to be an act of the collective entity, justifying countermeasures against it. The second one is Complicity Theory. The theory firstly declared by Hugo Grotius. He said that the State would not normally be responsible for the wrongful conduct of its subjects. However, such responsibility would arise if the State was 'complicit' in the private act through the notions of *patientia* or *receptus*.¹⁵

Actually the principle that favour to be used by jurist is principle of non-attribution of private acts. This principle embodies a conception of the State, as distinct from its citizens, which has highly significant implications for the international legal system. It advances a strict division between the public and private domain. And it derives from a perception of States, operating through their officials and agents, as the primary bearers of rights and obligations on the international plane, while encouraging a State system that avoids undue regulation and control over the private sphere.¹⁶

The philosophical and policy implications of this agency-based approach to responsibility will be considered in greater detail later. For now, it is sufficient to note that this model of the State and its responsibility for the acts of its subjects was not always the prevailing one. When it was discovered a fact that countries responsible for actions taken private actor in acts of terrorism that interfere with the security of foreigners in the country. In International Law, a State's responsibility in terrorism act must be raised by other State. It is called intervention. Actually, intervention involves the first use or initiation of military force by one State against another in the absence of the latter's having committed aggression. There are two forms of intervention have come into prominence. They are humanitarian intervention and preventive intervention.

Humanitarian intervention is the use of military force to stop massive human rights violations in another State, while preventive intervention¹⁷ the use of military force in response not to actual or imminent attack, but to an expected future attack.

¹⁵ *Ibid*, pp. 4.

¹⁶ *Ibid*, pp. 16.

¹⁷ Preventive intervention may seem to be a form of self-defence, a kind of anticipatory or proactive self-defence, rather than aggression, given that it is undertaken to avoid aggression, albeit expected aggression. But the question is whether it is defensive in a morally relevant sense. To say that military action is defensive in this sense is to offer a *prima facie* moral justification for it, given the just cause criterion of *jus ad bellum*. It would be question begging at this point to regard preventive intervention as defence in this sense, because its moral status is precisely what is in question. One way to ask the question whether preventive intervention is ever morally justified is to ask whether it is sometimes an instance of defence in the morally relevant sense. See Steven P. Lee, *Intervention Terrorism and Contemporary Challenges to Just War Theory*, (Dordrecht: Springer, 2007), pp. 127.

For example, the 1999 Kosovo War was a humanitarian intervention, while the 2003 Iraq War was a preventive intervention. Both of these forms of intervention have a long history, but recent changes have brought them to the fore. The changes fostering humanitarian intervention include the growth in the international human rights movement and an increase in the number and severity of intra State ethnic conflicts, leading in some cases to genocide or ethnic cleansing. The changes fostering preventive intervention include the growth in international terrorism and the wider availability of destructive technologies. In addition, both forms of intervention have been given momentum by the decline of State sovereign.¹⁸

It is acknowledged that global nation, especially States from Southeast Asian are stay upon absolute State sovereignty and non-interference in neighbouring States internal affairs. A stronger regional grouping that possesses the potential to diminish sovereign integrity and personality especially in the area of security may be too radical for current political sentiment. If the declarations are merely non-binding political expressions, how does Southeast Asia actually combat terrorism ?.¹⁹

The coordination of legal initiatives for joint investigation, information exchange, and the setting up of legal mechanisms for extradition and prosecution require more cooperation and unity of purpose than what has been evidenced thus far. Despite the many political documents signed, ASEAN member States still refrain from actively pursuing the activation of such plans, preferring anti-terror operations in smaller bilateral or multilateral initiatives, especially where the US is involved.²⁰ It may even be said that there is implicit agreement that while declarations are signed, the actualization of plans will occur at the level of smaller groupings. This has been the longstanding mode of operation and it is unlikely that things will change, notwithstanding strong criticism.

With this norm and practice of 'non intervention', the prospects of effective cooperation against terrorism in Southeast Asia are pressured not only by capacity and political will; they are running up against strongly held norms of State practice. Even when there may be some recognition of the needs of cooperation, there are still quite narrow limits to that cooperation because of concerns over sovereignty. Conflict or contradiction principle of sovereignty of States with humanitarian intervention has created a condition full of dilemma in enforcing human rights. As described previously, humanitarian intervention to contain the meaning of an action other countries that engage in humanitarian affairs or human rights violations in the domestic environment, which took place in the territory of another country's sovereignty. This intervention measures on the one hand have a moral purpose to

¹⁸ *Ibid* 125.

¹⁹ Simon S.C. Tay and Tan Hsien Li, *Southeast Asian Cooperation on Anti-Terrorism: The Dynamics And Limits of Regional Responses*. See in Victor V. Ramraj, et.al, *Global Anti-Terrorism Law and Policy*, (Cambridge: Cambridge University Press, 2005), pp. 410.

²⁰ Indonesia suffers from a long-standing and often violent secessionist movement in Aceh, Thailand from a similar problem in its southern provinces and the Philippines from separatists in Mindanao, there is no concerted and open cooperation on these issues among ASEAN as a whole. *Ibid*, pp. 420.

protect civil society, on the other hand, however, violating the fundamental principle of the sovereignty in international law.

In the 2005 World Summit, the concept of Responsibility to Protect is included in the document as the result of this meeting. The concept of Responsibility to Protect are listed in:

Paragraph 138:

“Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility, and will act in accordance with it. The international community should, as appropriate, encourage and help State to exercise this responsibility and support the United Nations in establishing an early warning capacity”.

Paragraph 139:

“The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian, and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with the relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their population from genocide, war crimes, ethnic cleansing and crimes against humanity, and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their population from genocide, war crimes, ethnic cleansing and crimes against humanity, and to assisting those which are under stress before crisis and conflict break out”.

In April 2006, the Security Council of the United Nations reaffirmed the provisions in the above paragraphs into Resolutions S/Res/1674 as a form of formal support for the norms of Responsibility to Protect. In January of 2009, Secretary General of the United Nations, Ban-Ki-Moon issued a report which referred to as the ‘Implementing the Responsibility to Protect’. This report describes the debates and also list of the three principles of the Responsibility to Protect, the principles are as follows: a). The first principle, emphasizing that States have the primary responsibility to protect its citizens from genocide, war crimes, ethnic cleansing, and mass atrocities. b). The second principle, giving the international community's commitment to provide assistance to States in capacity building to protect its individual citizens or population in its territory from the crimes against humanity (mass atrocities) and help and protection efforts focused on the period before the crisis and conflicts occurred. c). The third principle, focusing on the responsibility of the international community to take responsibility for the international community to take appropriate measures in time to prevent and stop the crimes against humanity when a country fails to provide protection.

In principle the Responsibility to Protect consists of three responsibilities: a). The responsibility to prevent, is responsible for addressing the root causes of the internal conflicts and crises caused by human actions, resulting in a risk to the population. b). The responsibility to react, a responsibility to respond to situations that

force it does proper measures in the interest of humanity, which can be either a forced effort like sanctions or international prosecution. c). The responsibility for recovery (to rebuild), is the responsibility to give a help in the reconciliation process undertaken after military intervention.²¹

Conclusions

From the discussion that has been described above, we can infer a few things as follows that the exposure of the responsibility to protect concept has provided a response to the new challenges in international law. The paradigm of State sovereignty has undergone a change of an item that is both absolute and incontestable to be an absolute responsibility to protect its citizens. The State and the citizens have a legal relationship is reciprocal in the form of 'citizenship'. Citizenship raises an obligation and a right to obtain a balanced State with its citizens. The sovereignty of the State contains a basic responsibility to protect its population in the territory of that country's sovereignty.

Conflict or contradiction between the principle of the sovereignty or a foreign intervention on behalf of the humanity has created a condition that is full of dilemmas in the enforcement of human rights. This conflict is a challenge for new protective measures for civilians and needed a new concept that connects the country's sovereignty can with foreign intervention. When the civilians in a country is in danger, in this case is or has been exposed to radical acts of terrorism and the State is in unwilling or unable condition to stop or prevent it. The principle of non-intervention justify the international responsibility to protect.

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²¹ Santa Marelda Saragih, *Op. Cit*, pp. 40-41.

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