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Understanding Islamophobia in Human Rights Context: a Conceptual Analysis of the OIC Initiatives against Hate Speech

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ABSTRACT

In the past several decades, Islamophobia has emerged as a significant term in both popular and technical discourse. This term, regardless of its original meaning, is a construct that involves a variety of concepts such as “discrimination against Muslims” and “hostility toward Islam”. This article attempts to explore various aspects and manifestations of Islamophobia in the framework of human rights. The first part of this paper examines the historical background of the term as it was developed in the Human Rights agenda of the Organization of Islamic Cooperation (OIC) to comprehend the legal aspects of Islamophobia. The second part focuses on the conceptual analysis of Islamophobia, distinguishing between two distinct forms of the term in the context of human rights. Defining Islamophobia and demarcating its manifestations in a human rights framework would facilitate a better understanding of both the term and its conceptual boundaries in relation to similar terms and concepts. The author concludes that the United Nations resolutions, OIC standards, and European Union initiatives recognize the importance of responsible expression and realize the need for legal frameworks to combat all forms of Islamophobia. In comparison to other associated terms employed in UN and OIC human rights instruments, Islamophobia represents an inclusive term that can provide a acceptable legal framework for all stakeholders.

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Introduction

In recent decades, Islamophobia has become a significant term in both common and technical usage. Too frequently, the term is used loosely in mass media to indicate the notion of irrational fear and prejudice towards Islam and Muslims.[1] However, the original meaning of the term has transformed into a construct with multiple meanings across various disciplines and fields of study. Thus, regardless of its original meaning, *Islamophobia* is a terminological construct that involves a range of concepts, including "*discrimination against Muslims", "hatred of Islam",*[2] and the colonial expansionism that gave rise to more *"geographically- and politically-oriented forms of Orientalism; anti-Muslim discourse*".[3] To avoid confusion between the common usage and the technical meanings of the term in various fields of research such as international relations, political science, psychology, religion and sociology, it is advisable to make a distinction between these various meanings, particularly in the context of human rights discourse.

This article attempts to explore various aspects and manifestations of Islamophobia in the context of human rights. The first part of this paper examines the historical background of the term as it has been incorporated into the Organization of Islamic Cooperation (OIC) Human Rights agenda. It will be demonstrated that the Cairo Declaration of Human Rights in Islam (CDHRI) introduced the "sanctities and the dignity of Prophets" as a limitation on freedom of expression, a provision not found in the preceding human rights instruments.[4] Furthermore, in accordance with the limitation clause of International Covenant on Civil and Political Rights (ICCPR),[5] the CDHRI emphasizes that it is prohibited "to excite nationalistic or doctrinal ha-tred or to do anything that may be an incitement to any form of racial discrimination".[6]

Understanding the legal aspects of Islamophobia requires reference to the background in

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1 . For more information, see: Humaira Riaz, Unfolding Islamophobic Racism in American Fiction (Lexington Books 2023) 3; Neil Chakraborti, Jon Garlan, Hate Crime: Impact, Causes and Responses (SAGE Publication 2015) 161; Douglas Pratt , Rachel Woodlock, Fear of Muslims? International Perspectives on Islamophobia (Springer 2016) vi.

2 . Islamophobia: A Challenge for Us All, Commission on British Muslims and Islamophobia (Runnymede Trust, 1997) 1.

3 . Kate Zebir, 'The Redeployment of Orientalist Themes in Contemporary Islamophobia' (2008) 10 Studies in Contemporary Islam 8.

4 . Cairo Declaration on Human Rights in Islam (CDHRI), Adopted at the Nineteenth Islamic Conference of Foreign Ministers, 31 July to 5 August 1990, Article 22.

5 . International Covenant on Civil and Political Rights, UNGA res. 2200 A (XXI), 23 Mar. 1976, Articles 19 and 20.

6 . CDHRI, op. cit. Article 22.

which the term developed. This background knowledge would also help us better understand the provisions of the OIC Declaration of Human Rights (ODHR), adopted in November 2020,[1] and the resolutions addressing the vilification of religions that have been adopted by a variety of human rights forums in an attempt to address the roots causes of the controversy. This background will explicate the conceptual framework of the terms which are inherently linked to Islamophobia.

The second part of the paper focuses on the conceptual analysis of Islamophobia, distinguishing between two distinct forms of the term in human rights context. It will be explained that, regardless of its original meaning, this term has developed into an inclusive legal concept, demonstrated in various forms such as intolerance, discrimination, persecution, and hatred. Thus, Islamophobia intersects with freedom of religion, hate speech and racial discrimination. Defining Islamophobia and its various forms within the context of human rights is crucial in order to limit the scope of this study and to demarcate its conceptual boundaries from other closely associated terms and concepts.

The author concludes that the UN resolutions, the OIC standards and the EU recognize the importance of responsible expression, and realize the necessity of legal frameworks to combat all forms of systemic and non-systemic discrimination against Muslims. Islamophobia when analyzed in comparison with other associated terms that were used in the UN and the OIC human rights instruments, is an inclusive term that can provide a legal framework which is acceptable by all concerned entities.

1. Conceptual Analysis of the OIC Agenda against Hate Speech

This section aims to explain the OIC's strategies for comprehending and addressing various forms of Islamophobia and hate speech. The term Islamophobia was infrequent in political literature of the OIC prior to the adoption of the CDHRI. Historically, freedom of expression was not a contentious matter between the Muslim states and their Western counterparts following the adoption of Universal Declaration of Human Rights (UDHR)[2] and the ICCPR. However, the publication of Salman Rushdie's novel, The Satanic Verses, in 1988 triggered an intense dispute that suddenly disturbed Muslim-Western relations concerning the freedom of expression. It was imperative for Muslim States to address the issue in the course of the adoption of the CDHRI in 1990. In the following section, the OIC initiatives against "nationalistic or doctrinal hatred" or "any form of racial discrimination" will be illuminated.

1.1. Sanctity of Religions

Despite the fact that the publication of *The Satanic Verses* and other defamatory publications in Western media had already triggered an intense dispute, the CDHRI did not explicitly incorporate the term *Islamophobia* in its provisions. Instead, Article 22 of the CDHRI focuses on freedom of expression, highlighting the "*sanctity of religions*" in general. The OIC introduced a protective principle in Article 22(c) of CDHRI to prevent the misuse of this fundamental right in a manner

1 . Report of the IPHRC on the participation in the 47th Session of OIC Conference of Foreign Ministers in Niger, available at https://oic-iphrc.org/web/index.php/site/view_news/?id=472. (accessed on 15 December 2020)
2 . Universal Declaration of Human Rights, UNGA Res. 217 A (III), December 10, 1948.

that "may violate sanctities and the dignity of Prophets":"Information is a vital necessity to society. It may not be exploited or misused in such a way as may violate sanctities and the dignity of Prophets, undermine moral and ethical values or disintegrate, corrupt or harm society or weaken its faith."

Moreover, in accordance with the corresponding article in the ICCPR, Article 22(d) of the CDHRI underlines that "[i]t is not permitted to excite nationalistic or doctrinal hatred or to do anything that may be an incitement to any form of racial discrimination." It seems that these provisions have attempted to comply with the terminological constructs used in Articles 19 and 20 of the ICCPR. However, despite the above provisions, this study suggests that in subsequent years, the OIC shifted its focus from "sanctity of religions" and "hate speech" to new terminological constructs such as the "prohibition of defamation of religions" and "Islamophobia".

The OIC was determined to establish generally accepted standards that explicitly prohibit the exploitation of freedom of expression for the denigration of religions and incitement to violence, which, they contend, lead to systemic discrimination against Muslims. However, the controversy over freedom of expression frequently continued to resurface until the late 1990s when it evolved into a new frontline between Western and Muslim delegations at the UN. The subsequent section will delve into the process through which the OIC succeeded in exporting the concept of "sanctities and the dignity of Prophets" into the UN Human Rights resolutions under the new terminology of "defamation of religions".

In summary, while the CDHRI recognizes the right to express opinions, its limitations clause introduces significant constraints aimed at protecting the sanctities of religions and the dignity of Prophets, rather than the rights of others. However, Muslim states assume that the aim of UN resolutions on "defamation of religions" is to protect religious communities from prejudicial attitudes demonstrated in hate speech, resulting in systemic discrimination. It was implied that insulting the sanctities of religions and the dignity of Prophets is an indication of intolerance toward other cultures which is incompatible with the UN Charter. The Preamble of the Charter calls on member states "to practice tolerance and live together in peace with one another as good neighbors."[1] While respecting freedom of expression, these provisions are indeed in line with the broader international efforts to prevent hate speech. Consequently, any expression deemed to contravene these principles may be subject to restriction or prohibition.

The Charter of the Islamic Conference (Charter-1972) was amended in 2008 and therein, promotion of human rights and protection of fundamental freedoms were incorporated into its objectives.[2] This laid the ground for further major reforms including the revision of CDHRI. The revised declaration, the OIC Declaration of Human Rights (ODHR) attempted to align with UN human rights standards.[3] The subsequent section elaborates on the impact of these developments on the controversy over freedom of expression.In spite of the reconciliations made in the revised declaration, the provisions on freedom of expression in the ODHR preserved the spirit and rhetoric of CDHRI. The compromise is well reflected in Article 21 of the ODHR which fol-

1 . Preamble, Charter of the United Nations.

2 . Charter of the Islamic Conference. Adopted by the Third Islamic Conference of Foreign Ministers at Djidda, on 4 March 1972.

3 . Report of the IPHRC on the participation in the 47th Session of OIC Conference of Foreign Ministers in Niger, retrieved from https://oic-iphrc.org/web/index.php/site/view_news/?id=472, accessed on 15/12/2020.

lows the pattern adopted by the ICCPR with regard to limitation clause. Article 21(b) stipulates that "Everyone shall have the right to freedom of expression. The exercise of this right carries with it special duties and responsibilities". Moreover, the ODHR introduces a new pattern by incorporating Article 20 of ICCPR into the remainder of Article 21(b), thereby clearly defining the limitation categories.

It is worth noting that Article 21(a) and Article 21(b) of ODHR merged the texts of Articles 19 and 20 of ICCPR into a single clause.[1] Nonetheless, Article 21(c) of ODHR not only retained the spirit of CDHRI on freedom of expression, but also reinforced its tone in the following terms:

> *Freedom of expression should not be used for denigration of religions and prophets or to violate the sanctities of religious symbols or to undermine the moral and ethical values of society.*

The new pattern used in Articles 21(b) serves as an important development in human rights instruments, as it merges freedom of expression and its limitation clause in a single article. As Article 20 of the ICCPR does not stipulate human rights in a separate article but rather indicates a justifying reason for restricting freedom of expression, it is properly incorporated into Article 21 of the ODHR.

1.2. Defamation of Religions

Although *Islamophobia* is prevalent in public discourse, the European delegations to the United Nations did not accept it as a legal terminology. In 1999 the delegation of Pakistan, on behalf of the OIC, submitted a draft resolution on the prohibition of defamation of religion to the Human Rights Commission under the title of 'Combating Racial Discrimination' rather than 'Islamophobia' to remove the uncertainty surrounding the term.[2] The draft resolution was adopted under the title of "Racism, Racial Discrimination and Xenophobia" within the scope of the "International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)."[3] Although, the

1 . Articles 21 on the Right to Freedom of Opinion and Expression:
a. Everyone shall have the right to hold opinions without interference.
b. Everyone shall have the right to freedom of expression. The exercise of this right carries with it special duties and responsibilities. The State has the obligation to protect and facilitate the exercise of this right while also protecting its legitimate national integrity and interests, as well as promoting harmony, welfare, justice and equity within society. Any restrictions on the exercise of this right, to be clearly defined in the law, and shall be limited to the following categories:
i. Propaganda for war.
ii. Advocacy of hatred, discrimination or violence on grounds of religion, belief, national origin, race, ethnicity, color, language, sex or socio-economic status.
iii. Respect for the human rights or reputation of others.
iv. Matters relating to national security and public order.
v. Measures required for the protection of public health or morals.
c. The State and society shall endeavor to disseminate and promote the principles of tolerance, justice and peaceful coexistence among other noble principles and values, and to discourage hatred, prejudice, violence and terrorism. Freedom of expression should not be used for denigration of religions and prophets or to violate the sanctities of religious symbols or to undermine the moral and ethical values of society.
2 . Commission on Human Rights, Draft Resolution on Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, 56th Sess. U.N. Doc. E/CN.4/1999/L.40 (April 20, 1999).
3 . International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965 UN General Assembly resolution 2106 (XX).

term '*defamation of religions*' neither appeared in the preamble, nor in the operative provisions of the Resolution, it was incorporated into the title of a resolution of Human Rights Council. However, the concept of "intolerance and discrimination towards Islam and any other religion" was expressly elaborated in paragraph 3 of the operative provisions:

> *Expresses its concern at any role in which the print, audio-visual or electronic media or any other means is used to incite acts of violence, xenophobia or related intolerance and discrimination towards Islam and any other religion.*[1]

As noted above, the OIC delegates were of the opinion that "intolerance and discrimination towards Islam and any other religion" may lead to incitement to violence and systemic discrimination against Muslims and other religious communities. This resolution remained on the agenda of the Human Rights Commission and subsequently its successor, the Human Rights Council for several years.[2] The first and second resolutions of the Commission on Human Rights were adopted by consensus.[3] The Commission adopted the resolutions by consensus in spite of the objections from European nations.[4] The new terminology of 'defamation of religions' was frequently incorporated into the resolutions of the Human Rights Council:

> *However, the consideration of 'defamation of religions' indicates the recognition that 'growing intolerance, discrimination against Muslims, insults against Islam and growing trends of defamation of religions have become pervasive and often condoned in certain countries and communities'.*[5]

The escalation of Islamophobia in some Western societies after 2005 compelled the OIC delegations to take further actions, whereby the representative of Yemen, on behalf of the OIC, submitted a resolution to the UN General Assembly.[6] While most human rights resolutions were focused on discrimination against Muslims and minorities in general, this one shifted its focus from discrimination against Muslims to "the negative projection of Islam in the media" and "hostility towards Islam" that "is frequently and wrongly associated with human rights violations and terrorism". The resolution also expressed concern about "agendas pursued by extremist organizations and groups aimed at the defamation of religions" and the use of media "to incite acts of violence, xenophobia or related intolerance and discrimination towards Islam or any other religion." Western delegations, however, considered the resolution in contradiction with freedom of expression and an attempt to introduce anti-apostasy laws into human rights

1. Commission on Human Rights, Draft Resolution on Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, op. cit.
2. UN Doc. E/CN.4/2000/SR.67 (December 1, 2000); U.N. Doc. E/CN./2001/L.7 (Apr. 11, 2001); Commission on Human Rights, 57th Sess. 67st mtg. at: 4-6.
3. Commission on Human Rights, Res. 1999/82, at: 281. Commission on Human Rights, Res. 2000/84, 2001/4, 2002/9, 2003/4, 2004/6.
4. Commission on Human Rights, 56th Sess. 67th mtg. at: 72-73; U.N. Doc. E/CN.4/2000/SR.67 (December 1, 2000); UN Doc. E/CN./2001/L.7 (April 11, 2001).
5. Human Rights Council, Ad Hoc Committee on the Elaboration of Complementary Standards, Outcome referred to in paragraph 2(D) of the Road Map on the Elaboration of Complementary Standards, October 2009, A/HRC/AC.1/2/2 at: 67
6. G.A. Res. 60/150, 61/164, 62/154, U.N. Doc. A/Res/60/150, A/Res/61/164, A/Res/62/154.

resolutions. The European Union, therefore, in 2006, made critical remarks about the adoption of the UNGA resolution on combating defamation of religions:

> *The European Union does not regard the concept of defamation of religion as an accepted and valid concept in human rights discourse. From a human rights perspective, members of a faith or religious communities should not be considered members of a homogeneous identity. The rules of the international human rights basically protect the rights of individuals to practice their religion or belief freely, not religion itself.*[1]

The language used in the above resolutions clearly rejects the argument presented by Western delegations about the concept of defamation of religion, claiming that human rights protect the rights of individuals, rather than protecting religions. It underscores that *defamation of religions* contributes to "*the denial of fundamental rights and freedoms of target groups*" and "*their economic and social exclusion*" which "*need to effectively combat defamation of all religions, Islam and Muslims in particular especially in human rights forums*".[2]

In comparison to Article 22(c) of CDHRI, which sets forth a protecting principle to safeguard the *"sanctities and the dignity of Prophets",* the Resolution has even gone a step further to prevent "*intolerance and discrimination towards Islam and any other religion*". It has been taken for granted that while violation of the former may incite religious hatred, the latter would result in racial intolerance and discrimination. This is because the resolution was adopted within a framework of *racial discrimination* in order to include *defamation of religions* under the scope of article 4 of the ICERD, which concerns hate speech. It calls on States Parties to "*declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination*".

The OIC delegations, in resolutions submitted to the UNGA, constantly insisted on the urgency of addressing the problem, since vilification of the Islamic faith often results in discrimination against Muslim minorities in Western countries.[3] Thus, the dispute over on a highly complex terminology continued for several years, despite agreement on many fundamental aspects such as combating hate speech and discrimination against Muslims. The dispute is whether respecting the sanctity of religions and addressing the defamation of religions is the most effective means of eliminating discrimination and hate speech, or the terminology is alien to human rights language.

To narrow the gap, a convincing argument for reconciliation might suggest the use of 'Islamophobia' instead of 'defamation of religions.' While it is important to respect the beliefs and practices of all religions, 'Islamophobia' can be used as an inclusive term that implies both of prejudices towards Muslims and hostility toward Islam. In his final report to the Human Rights

1. Statement by Portugal on behalf of the European Union to the December 18, 2007 session of the UNGA, found in: Statement by the International Humanist and Ethical Union to the Human Rights Council (February 24, 2008), available at http://www.iheu.org/node/2949.
2. Commission on Human Rights, 44th meeting 12 April 2005 [Adopted by a recorded vote of 31 to 16, with 5 abstentions.
3. Diène, Doudou, 'Report of the former Special Rapporteur to the 9th session of the Human Rights Council: A/HRC/9/12.'

Council on "*the manifestations of defamation of religions and in particular on the serious implications of Islamophobia on the enjoyment of all rights*", Doudou Diène argued that the defamation of religions should be addressed under the provisions relating to incitement to national, racial or religious hatred.[1] It is, therefore, necessary to shift from the sociological concept of the defamation of religions to the human rights concept of incitement to racial and religious hatred.[2] Consequently, in 2011 the OIC reached a compromise with Western delegations in Resolution 18/16, ceasing to insist on the adoption of resolutions on defamation of religions.[3] The language of this resolution shifted from defamation of religion to religious discrimination and the combat against hate speech.

2. Defining Islamophobia in Human Rights Language

The conceptual analysis of the terms used in the OIC Human Rights instruments provided the necessary background knowledge to understand the new terminology of *Islamophobia* in human rights context. *Islamophobia* was originally used to refer to the irrational fear, hatred, and prejudice towards Islam and Muslims. It might be demonstrated in various spheres of social activity and realized in different cultural forms. Although the term was first used by the mass media, it has quickly gained prominence in public discourse and in the political and legal literature. While it is said to have first emerged in France in the 1980s, it was Edward Said who used the term *Islamophobia* in his article "Orientalism Reconsidered" in English literature.[4] However, it was not taken seriously until the publication of the Runnymede Trust Report under the title: "*Islamophobia: A Challenge for Us All*" in 1998.[5]

Following the horrific attacks of September 11, 2001, the use of the term became widee spread in the mass media worldwide. In 2004, the British Muslim Commission published a report on Islamophobia, attempting to define the term in human rights language, and declared that Islamophobia in the sense of discrimination and persecution of Muslims has become one of the challenge of Western societies.[6] Thus, the crux of the discussion among scholars is whether Islamophobia should be understood as discrimination against Muslims as noted above, or whether it should be construed as a terminological construct that also involves hostility towards Islam.

Moreover, as the technical usage of the term is a contemporary development in human rights context, it was not mentioned in the core human rights instruments. This is why some scholars have suggested the use of xenophobia instead of Islamophobia as Cheng argues that "*there is currently no clarity on what Islamophobia covers: Does it relate to hostility towards Islam, hostility towards Muslims or racism against Muslims*?"[7] It is, therefore, important to define the

1. A/HRC/9/12.
2. Commission on Human Rights, Racism, Racial Discrimination, Xenophobia and All Forms of Discrimination, at: 2, U.N. Doc. E/CN.4/2003/23 (Jan. 3, 2003).
3. Human Rights Council, Resolution 16/18 on Combating Intolerance, Discrimination and Violence against Individuals on the basis of Religion or Belief; A/HRC/RES/16/18.
4. For details about background information on the term, see Zafar Iqbal, Islamophobia: History, Context and Deconstruction (SAGE Publications 2019) 38.
5. Islamophobia: a challenge for us all, op. cit.
6. Muslims in the European Union Discrimination and Islamophobia, European Monitoring Centre on Racism and Xenophobia, 2006, 13.
7. Jennifer E Cheng, 'Islamophobia, Muslimophobia or Racism? Parliamentary Discourses on Islam and Muslims

term meticulously in the context of human rights to avoid ambiguity or uncertainty. Although there had been previous individual arguments in favor of an exclusive approach, the developments after September 2001 provided compelling arguments in favor of the opposite approach. The following sections examine the arguments for and against both competing approaches to find the best achievable solution for contemporary forms of human rights violations.

2.1. Discrimination against Muslims

It is worth noting that on March 15, 2022, the UNGA Adopted a resolution on Combating Islamophobia, proclaiming March 15 as the "*International Day to Combat Islamophobia*".[1] This resolution was adopted unanimously in spite of the critical remarks that directed by the representative of France. It was pointed out that "*Islamophobia has no agreed definition in international law*" and "*the creation of an international day does not respond to concerns to counter all forms of discrimination*".[2]

This indicates that the representative of France strongly disagrees with the use of this terminology and argues that it "*has no agreed definition in international law*". However, apart from extensive scholarship and research conducted over more than three decades in this specific area, the term is used by the European Union for several years. As early as 2006, European Union released a report on "*Muslims in the European Union: Discrimination and Islamophobia,*"[3] which investigates the discrimination against Muslims in the area of employment, education and housing.[4] Nonetheless, equating Islamophobia with discrimination against Muslims represents the restrictive approach that attempts to define it in terms of racial discrimination. They argue that the term should be understood as hostility directed at Muslims as individuals, rather than towards Islam as a religion. As indicated above, in 2006 the European delegations in the UNGA expressed the same concerns regarding the concept of "*defamation of religions*" in human rights discourse.[5]

The argument that Islamophobia has two different meanings is based on the idea that discrimination against Muslims is rooted in prejudices and biases against individuals who are perceived as being Muslim, while hostility towards Islam is based on negative perceptions and stereotypes of the religion itself. Discrimination against Muslims can take the form of social exclusion, verbal abuse, or physical violence, while hostility towards Islam can manifest as hate speech, biased media representation, or political scapegoating, which has a long history in European colonialism. Therefore, to confront Islamophobia in all its forms, it is essential to take into account both the subjective and objective aspects of Islamophobia. Subjective aspects of Islamophobia refer to personal attitudes held by individuals which can manifest in various ways, ranging from verbal abuse to physical violence, while objective aspects refer to systemic discrimination implemented by institutions and governments.

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in debates on the minaret ban in Switzerland' (2015) 26 Discourse & Society 562.

1. United Nations General Assembly, 76th Sess. 61ST meeting (AM), March, 15, 2022.
2. Ibid.
3. Muslims in the European Union: Discrimination and Islamophobia (2006), Retrieved from https://www.ssoar.info/ssoar/bitstream/handle/document/31588/ssoar-2006-Muslims_in_the_European_Union.pdf?sequence=1, accessed 18 November 2023
4. Muslims in the European Union: Discrimination and Islamophobia, Retrieved from https://fra.europa.eu/en/publication/2012/muslims-european-union-discrimination-and-islamophobia, accessed November 18, 2023.
5. Statement by Portugal on behalf of the European Union to the December 18, 2007, session of the GA.

The distinction between the two forms of Islamophobia can facilitate a proper examination of the systemic and structural dimensions of anti-Muslim racism and discrimination. In summary, while there is debate about whether Islamophobia should be understood as discrimination against Muslims or hostility towards Islam, it is clear that both forms of Islamophobia are harmful and have negative impacts on Muslim individuals and communities. It is important to recognize and address Islamophobia in all its forms and to work towards promoting tolerance, respect, and inclusion for all individuals, regardless of their religion, race, nationality, ethnicity, or cultural background.

From an opposing perspective, it might be argued that in the absence of agreement on a more inclusive definition of Islamophobia, it may be reasonable to agree on its narrow definition. This is because, in the era of the United Nations, the principle of equality and the principle of non-discrimination, shaped the two main pillars of international human rights standards. Accordingly, if there were no other choice but to use the term Islamophobia, it must be construed in its restrictive sense, which entails discrimination against Muslims. The concept of discrimination is clearly defined both in domestic and international law. For instance, Article 26 of the ICCPR stipulates:

> *In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

It is noteworthy that a similar line of argument, that had been proposed against differentiating between the two different forms of Islamophobia, had already been deployed and eventually failed in the years following the adoption of a resolution by the UNGA in 1962 to draft a declaration and an international convention on the elimination of all forms of intolerance and discrimination based on religion or belief.[1] However, as will be explicated in the the subsequent discussion, the same arguments that have been put forth in favor of distinguishing between intolerance and discrimination can be applied to differentiate between the two different forms Islamophobia.

Furthermore, there are compelling arguments that recognizing the two distinct forms of Islamophobia is important for understanding and addressing the different ways in which Muslim individuals and communities face marginalization and oppression. The distinction between the two forms of Islamophobia can properly address the systemic and structural dimensions of anti-Muslim racism and discrimination. It is, therefore, imperative to recognize and address both subjective and objective aspects of Islamophobia in order to promote tolerance, respect, and inclusivity for all individuals and communities.

2.2. Hostility towards Islam

As discussed above, the distinction between intolerance and discrimination based on religion or belief initially faced numerous challenges, with opponents arguing that intolerance is widely used

1. Angelo Vidal d'Almeida Ribero, Implementation of the Declaration on the Elimination of all forms of Intolerance and of Discrimination based on Religion or Belief, E/CN.4/1987/35, (1986) 4, at: 6.

in political literature but lacks a specific meaning in the legal context. A set of arguments have been deployed against the inclusion of intolerance in the field of human rights. While discrimination holds significant importance in core human rights instruments, religious intolerance is not a legal term and cannot be incorporated into these instruments.

Despite vehement arguments against the terminology, intolerance was included in a draft of a convention on discrimination based on religion in 1967.[1] At this point, it has been recognized that a distinction must be made between discrimination and intolerance based on religion or belief. In 1972, the UNGA prioritized the completion of the Declaration and the draft convention has suddenly disappeared from the agenda of the Human Rights Commission. Even though the draft convention was never adopted, the terminological construct was incorporated into human rights instruments. The Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief was adopted in 1981, and since then the term has gained increasing prominence in human rights literature.[2] Article 4(2) of the 1981 Declaration, not only distinguishes between the two concepts in legal terms, but also differentiates the strategies of addressing discrimination from those for combating religious intolerance:

> *All States shall make all efforts to enact or rescind legislation where necessary to prohibit any such discrimination, and to take all appropriate measures to combat intolerance on the grounds of religion or belief in this matter.*

The controversy, regardless of its justification, indicates that there is a debate among scholars and politicians on whether Islamophobia, even if accepted as a proper terminology to denote to discrimination against Muslims, should be expanded to include hostility towards Islam. However, it is especially noteworthy that intolerance, which bears much similarities to our current concept of Islamophobia, has been accepted as a legal term under similar circumstances, despite convincing arguments against its inclusion. It has immediately turned into a popular term in human rights scholarship.

Islamophobia is indeed the most inclusive term combining both discrimination against Muslims and hostility towards Islam. In summary, while there is an ongoing debate on whether Islamophobia should be understood as discrimination against Muslims or hostility towards Islam, it is clear that both forms of Islamophobia are detrimental and have negative impacts on Muslim individuals and communities. The distinction between discrimination against Muslims and hostility towards Islam can help states to develop innovative strategies for addressing every particular manifestation of Islamophobia. Because, while the commitment to ending discrimination against Muslims is an "obligation of conduct", the commitment to the eliminating hostility towards Islam is an "obligation of result". The distinction between obligations of conduct and obligations of result has its roots in the Civil Law tradition and has been extended to a multiple areas of law.

The obligation of conduct in human rights requires States to take certain measures to end

1. Elizabeth Odio Benito; Special Rapporteur; Study of the Current Dimensions of the Problems of Intolerance and of Discrimination on grounds of Religion or Belief, E/CN.4/Sub. 2/1987/26, (1986) 1.
2. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, General Assembly Resolution 36/55, November 1981.

discrimination, whereas an obligation of result grants states the liberty to select between various means and take appropriate measures to achieve certain goals, such as changing individuals' negative attitudes toward other cultures.[1] In the case of fighting against all forms of Islamophobia, for example, a State may fulfil its obligation of conduct by choosing and advocating to abolish discriminatory laws that perpetuate racial prejudice and religious intolerance and, if necessary, enacting laws to prohibit discrimination. On the other hand, in the case of an obligation of result, the States are required to achieve the results such as elimination of prejudices and intolerance through appropriate measures.[2]

Islamophobia can be defined as hostility, prejudice, or negative attitudes directed towards Islam as a religion, its teachings, practices, and its followers, Muslims. This hostility can manifest in various forms, including discrimination, stereotyping, hate speech, and even acts of violence targeting Muslims or Islamic institutions. It is important to note that hate speech represents the external manifestation of profound intolerance and prejudice. Therefore, a legal response is not sufficient to bring about real changes in mindsets and attitudes of intolerant societies. In addition to legal responses, the introduction of policy initiatives in the realm of intercultural dialogue and education towards tolerance and diversity is essential to eradicate the root causes of intolerance.

Conclusion

This article has examined various forms of Islamophobia, classifying them into two distinct categories: discrimination against Muslims and hostility towards Islam. It has been explicated that Islamophobia, regardless of its original meaning, has developed into an inclusive legal concept that can confront its various forms such as intolerance, discrimination, persecution, and hatred. Thus, Islamophobia stands at the intersection of freedom of religion, hate speech and racial discrimination.

Addressing Islamophobia in the framework of human rights seeks to reconcile the opposing realms of free speech and freedom from bias based on religion or ethnicity. The exercise of freedom of expression must come with the responsibility of abstaining from language that incites violence, hatred, or prejudice against any individual or religious group. Apparently, discrimination against Muslims can be addressed by enacting anti-discriminatory policies; yet, the complexity usually arises when there is an even greater concern of hostility towards Islam that result in systemic discrimination. Thus, addressing all forms of Islamophobia remains an ongoing challenge that requires international cooperation and commitment.

It appears that the member states of the Organization of Islamic Cooperation (OIC) were determined to incorporate "defamation of religions" into human rights resolutions to protect the sanctity of religions from offensive expression. They argue that defamation of religions and other forms of hate speech and xenophobia can contribute to the marginalization and discrimination of Muslim communities. The United Nations resolutions emphasize the need to combat

1. See Yearbook of the International Law Commission (United Nations International Law Commission 1977) 19; Bertrand G. Ramcharan, 'Violations of Economic, Social and Cultural Rights' in Bertie G Ramcharan (ed), Judicial Protection of Economic, Social and Cultural Rights (Brill 2005) 556.
2. Elizabeth odio Benito; op. cit., 193.

defamation of religions and Islamophobia, which result in systemic discrimination. The OIC initiatives and the UN resolutions, while respecting freedom of expression, are in line with the broader international efforts to combat hate speech and xenophobia.

Realizing the necessity to fight all kinds of Islamophobia, member states of the European Union hold the view that human rights resolutions which introduce “defamation of religions” aim to protect religious doctrines, rather than respecting the rights of individuals. Nevertheless, the term “Islamophobia” has been used by the European Monitoring Centre on Racism and Xenophobia, despite the opposition to the OIC and the UN terminological construct of “defamation of religions”.[1] In addition, the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance has also used the term “Islamophobia” in his reports to the Human Rights Council.

To narrow the existing gap between the UN resolutions, the OIC standards, and the EU’s understanding of defamation of religions, Islamophobia represents the common dominator that provides a common framework for combating all forms of systemic and non-systemic discrimination against Muslims. Perhaps, all stakeholders recognize the importance of responsible expression and acknowledge the necessity of legal frameworks to eliminate Islamophobia to create an environment where religious freedom is upheld, hate speech is minimized, and communities are treated with dignity and equality.

1. Muslims in the European Union: Discrimination and Islamophobia, Yearbook of the OSCE (Organization for Security and Co-operation in Europe, 2007) EUMC (since March 2007 the European Union Agency for Fundamental Rights/FRA), Vienna, December 18, 2006.

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Rohingya Muslims and IHL: Expanding the Basis For Responsibility to Protect in a NIAC with a Proactive Mechanism

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ABSTRACT

Rohingya Muslims have suffered persecution and genocide in the Republic of Myanmar (formerly Burma) and have been expelled from the country by the military junta who are in power. The evidence is incontrovertible of grave human rights abuses and that the refugees have lived in diaspora with no prospect of returning home. The UN human rights investigators have compiled reports that testify to the inhumanities that they have suffered prior to their expulsion. Despite this, there has been no efforts towards redressing this problem which falls within the remit of international human rights and humanitarian law. The actions of the Myanmar authorities in using force can be considered as Non-International Armed Conflict (NIAC) and the UN intervention under the Responsibility to Protect (R2P) measure, could be activated. This can serve as a basis for arresting the responsible officials in Myanmar and prosecuting them under an international tribunal. This has not been possible because of the lack of consensus in the international community and the exercise of the veto power by some members of the Security Council. This article argues that there should be intervention in this conflict under the existing precedent by broadening the scope of intervention and then by prosecution in a specially constituted tribunal. The R2P mechanism can be activated by prescribing the genocide of the Rohingyas within the framework of an NIAC and by constituting a tribunal under the Tadic principle[1] to try the members of the Myanmar's regime for their breaches of IHL.

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1 . Case No. IT-94-1-T, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995)

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Introduction

The victimization of ethnic minorities within nation states can lead to genocide when force is used to oppress and brutalize them, and when there are no constitutional safeguards or rule of law in place. In asymmetric conflicts, persecution often escalates to genocide, as seen in the case of the Rohingya Muslims who have been the victims of a military crackdown and forced exile from their home country of Myanmar. The persecution of the Rohingya people is extensively documented and attested by UN human rights agencies. The prime question is whether they can be protected under the principle of Responsibility to Protect (R2P) and whether the conflict can be regarded as a Non-International Armed Conflict (NIAC), thereby activating the norms of the international human rights law. This requires an examination of the mechanisms of International Humanitarian Law (IHL) to determine legal remedies and bring the perpetrators before an international tribunal to dispense justice. The R2P is an evolving concept in international law that has emanated from a consensus of the UN member states as an imperative for preventing international human rights abuse.[1]

However, in light of the diplomatic considerations within the UN Security Council, this concept has not been allowed to develop into a proactive and impactful principle of international law. This has resulted in tragedies such as the ethnic cleansing and expulsion of Rohingya Muslims from Myanmar to refugee camps in Bangladesh. The necessary step is to create a basis for intervention under the R2P and consider this as a test case for the exercise of this measure. This can be done after the grounds are established for the arraignment of the Myanmar's officials for infringing the IHL in a NIAC.[2] The definition of an NIAC applies to all armed conflicts not of an international character based on *the intensity of the fighting* and *the organization of*

1 . The World Summit Outcome Document (A/RES/60/1) produced by the General Assembly compels the Heads of State and Government to affirm their responsibility to protect their own populations from genocide, war crimes, ethnic cleansing and crimes against humanity and accepted a collective responsibility to encourage and help each other uphold this commitment. They also declared their preparedness to take timely and decisive action, in accordance with the United Nations Charter and in cooperation with relevant regional organizations, when national authorities manifestly fail to protect their populations. Available at: https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml., accessed on March 30, 2024.

2 . The General Assembly Resolution A 63/677 is pretext for the a RP2 measure "If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations ".

the non-State group.[1] Firstly, the hostilities between the parties "must reach a certain level of intensity, which may be indicated by, among other factors, the seriousness and frequency of attacks and military engagements, the extent of destruction, or the deployment of governmental armed forces".[2] Secondly, the non-State group "must have a minimum level of organization, indicators of which may include the presence of a command or leadership structure, the ability to determine a unified military strategy, the adherence to military discipline, and the capability to comply with IHL."[3]

The Genocide Convention can be invoked in the conflict in Myanmar between the government, both 'civilian' and military, and their attacks on the Rohingya Muslim population which have resulted in death and exile.[4] The arrival of Muslims can be traced to pre-British times in South East Asia, when Muslim settled in the Arakan State in the 1430s which is now part of Myanmar. This small independent kingdom was conquered by the Burmese Empire in 1784 the majority of whom practiced the Buddhist faith.[5] The origins of the conflict can be traced to the period when the British, under colonial authority, entered Burma in 1824 and imposed the colonial administration until 1948 as part of British India. In this period, other Muslims from Bengal entered Burma as migrant workers, tripling the country's Muslim population over a 40-year period.[6] The Muslims were never granted devolution in the form of an autonomous state, or a referendum to create a separate province. Furthermore, the Burmese authorities have refused to grant citizenship to the Rohingyas which could officially recognize them under the Citizenship Act of 1982. The Act states that citizens must belong to one of 135 'national races' whose ancestors settled in the country before 1823, as recognized in the Constitution.[7]

The reference to the R2P measure has to be placed on a coherent and substantive principle of jurisprudential rationale. This is because of the colossal mistake made in the Libyan intervention, where military action led to partitioning of country, civil war and national chaos. The UN Security Council Resolution 1973, which enforced the No-Fly Zone stated in its Paragraph 6, that it served "to protect civilians" in Libya rather than explicitly state that there was a responsibility to protect". This self-serving approach by NATO powers plunged the country into a civil war after the overthrow of the legitimate government in Libya.[8]

This paper has the following chapters: Section 1 considers the *jus cogens* principle of in-

1 . See also Prosecutor v Tadić (Trial Judgment) IT-94-1-T (7 May 1997) (noting that the two criteria distinguish "an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law"). [562]

2 . Prosecutor v Boškoski and Tarčulovski (Trial Judgment) IT-04-82-T (10 July 2008) [177].

3 . Prosecutor v Limaj, Bala and Musliu (Trial Judgment) IT-03-66-T (30 November 2005) [129]; Prosecutor v Boškoski and Tarčulovski (Trial Judgment) IT-04-82-T (10 July 2008) [199]–[203].

4 . Article II. In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group

5 . E Blackmore, National Geographic, 'The Rohingya people', Accessed: 4 April, 2019, https://www.nationalgeographic.co.uk/2019/02/the-rohingya-people.

6 . Ana Pantea, 'The role of state in the construction of otherness in Myanmar, The Case of Rohingya Muslims. Studia Europea' (2019) Vol. 64 Issue 1 Studia Universitatis Babes-Bolyai - Studia Europea 219-236. DOI:10.24193/subeuropea. Accessed 13 March 2019.

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8 . S/RES/1973 (2011) https://www.un.org/securitycouncil/s/res/1973-%282011%29

ternational customary law and the establishment of the R2P mechanism for its implementation. Section 2 examines the application of the Geneva Conventions that regulate the conduct of the Parties involved in the NIAC. Section 3 examines the basis for enforcing the R2P measures in the conflict in Myanmar to protect the Rohingya Muslims. Section 4 considers the precedents established in the IHL for prosecuting the responsible officials in a special tribunal constituted under the International Residual Mechanism for Criminal Tribunals. This could then dispense justice against the Myanmar officials who are responsible for perpetrating genocide in this conflict.

1. Jus Cogens in Customary International Law

The application of international law in conflicts can be considered in the context of the rules that bind states to civilized normative conduct. This preserve the *jus cogens* norms, which are peremptory norms whose breach is universally recognized as a crime.[1] They apply to all states and are recognized in the treaty framework of the UN, which will void any treaty that infringes their implementation.[2] The concept of *jus cogens* expresses the idea of the existence of an international *lex superior* and stipulated in UN documents.[3] The *jus cogens* norms possess an authority that exceeds the ordinary standards of international law, and are applicable without any limits as to either subject or circumstances., for example, a *jus cogens* status is conferred on the prohibition of torture as defined in the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[4]

This prohibition applies to all subjects of international law, including States, international organisations, insurrectional or national liberation movements, corporations or individuals.[5] The concept of *jus cogens* has also been invoked in proceedings before international judicial tribunals including the International Criminal Tribunals for the Former Yugoslavia and Rwanda,[6] the Special Tribunal for Lebanon,[7] the Special Court for Sierra Leone,[8] the Inter-American and European Courts for Human Rights,[9] the Court of Justice of the European Union,[10] and

1 . Marry Ellen O'Connell, 'Jus Cogens: International Law's Higher Ethical Norms. THE ROLE OF ETHICS IN INTERNATIONAL LAW', Donald Earl Childress, III, ed., (2012) Notre Dame Legal Studies Paper No. 11-19, Cambridge University Press, Available at SSRN: https://ssrn.com/abstract=1815155.

2 . Article 53 of the Vienna Convention on the Law of Treaties (VCLT)1969 states that, 'a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law'. Article 64 of the VCLT 1969 further enhances its importance by giving it retrospective effect by voiding a provision of an existing treaty which if in conflict becomes terminated.

3 . Draft Conclusion 2 of the ILC Special Rapporteur, Mr Dire Tladi: "Norms of jus cogens … are hierarchically superior to other norms of international law" (UN Doc A/71/10, p 299). See, similarly, Weil, p 423 ff; CarilloSalcedo, p 595; Mitchell, p 228; Wouters& Verhoeven, p 403; Sarkin, p 541; Ruiz Fabri, p 1050; Macdonald, 1987, 129 ff.

4 . Adopted by General Assembly resolution 3452 (XXX) of 9 December 1975. Compare the approach of the ICTY Trial Chamber in Prosecutor v Delalić and others, Judgment of 16 November 1998, para 457 ff.

5 . A. Cassese, International Law (2005) Oxford University Press, 205.

6 . For the jurisprudence of the ICTY, see e.g. Prosecutor v Kupreškić, Judgment of 14 January 2000, paras 519–20; Prosecutor v Kunarac and others, Judgment of 22 February 2001, para 466; Prosecutor v Furundžija, Judgment of 10 December 1998, paras 153–54. For the jurisprudence of the ICTR, see e.g. Prosecutor v Kayishema and Ruzindana, Judgment of 21 May 1999, para 88.

7 . See e.g. Prosecutor v El Sayed, Order of 15 April 2009, para 29; Prosecutor v Ayyash, Decision of the Defence Appeals, 20 October 2012, para 68.

8 . See e.g. Prosecutor v Gbao, Appeals Chamber, Decision on Preliminary Motion, 25 May 2004, paras 9, 10; Prosecutor v Morris Kallon and BrimmaBazzy Kamara, Decision on Challenge to Jurisdiction, 13 March 2004, paras 60, 66–71.

9 . For the jurisprudence of the European Court, see e.g. Al-Adsani v UK, Judgment of 21 November 2001, paras 60–7; Othman (Abu Qatada) v UK, Judgment of 17 January 2012, para 266; Jones and Others v UK, Judgment of 14 January 2014, para 198; Naït-Liman v Switzerland, Judgment of 15 March 2018, para 129.

10 . See e.g. Kadi and Al-Barakaat International Foundation v Council and Commission of the European Union, Judgment of 3 September 2008, paras 280, 287.

numerous arbitration tribunals.[1] It has even permeated the rulings of the International Court of Justice, which had not previously incorporated this concept in its jurisprudence, but has now adopted its reasoning with arguments of *jus cogens*, and acknowledged its relevance.[2]

The consensus of the UN Member States that led to the adoption of the R2P principle stems from the need to prevent infringement of *jus cogence* norms. This consensus is based on the fact that "since the late 1990s and the beginning of the twenty-first century, there has been a remarkable increase in the use of *jus cogens* arguments in international legal discourse".[3] R2P has served as a mechanism for intervention when populations are at risk of genocide and crimes against humanity.

This concept of R2P postulates three pillars of responsibility as follows:

> *Pillar One: every state has the Responsibility to Protect its populations from four mass atrocity crimes: genocide, war crimes, crimes against humanity and ethnic cleansing; Pillar Two: the wider international community has the responsibility to encourage and assist individual states in meeting that responsibility; and Pillar Three: if a state is manifestly failing to protect its population, the international community must be prepared to take appropriate collective action, in a timely and decisive manner and in accordance with the UN Charter.*[4]

The R2P measures have a mandatory effect on how they are interpreted and enforced within the context of international human rights and IHL. The two most important provisions are framed in the document (A/63/677) that the UN General Assembly released as follows:

> *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 States to exercise this responsibility and support the United Nations in establishing an early warning capability.*
>
> *139. The international community, through the United Nations, also has the re-*

1 . See e.g. Delimitation of Maritime Boundary between Guinea-Bissau and Senegal, Award of 31 July 1989, UNRIAA, Vol 20, para 44; Methanex v United States, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, ILM, Vol 44, Part IV, Ch C, para 24; EDF v Argentina, Award of 11 June 2012, available at: https://arbitrationlaw.com/sites/default/files/free_pdfs/edf_international_v._argentina_award_jun_11_2012.pdf para 909.

2 . See e.g. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia), Merits, Judgment of 3 February 2015, paras 87–8; Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment of 20 July 2012, para 99; Jurisdictional Immunities of the State (Germany v Italy; Greece intervening), Judgment of 3 February 2012, paras 92–7; Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, para 81; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro), Merits, Judgment of 26 February 2007, para 161; Armed Activities on the Territory of the Congo, New Application (Democratic Republic of Congo v Rwanda), Jurisdiction and admissibility, Judgment of 3 February 2006, para 64.

3 . Ulf Linderfolk, Understanding Jus Cogens in International law and International Legal Discourse, (Edward Elgar publishing 2020) 1-39, Available at: https://www.e-elgar.com/shop/gbp/understanding-jus-cogens-in-international-law-and-international-legal-discourse-9781786439505.html.

4 . These principles originated in a 2001 report of the International Commission on Intervention and State Sovereignty and were endorsed by the United Nations General Assembly in the 2005 World Summit Outcome Document paragraphs 138, 139 and 140.

sponsibility 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 relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

The Office of Genocide Prevention and Responsibility at the UN has declared Sections 138 and 139 as an important step in the "political commitment by Member States". The Office has also asserted that the R2P, as defined in these instruments, has reinforced the "international legal obligations for States" that are progressing "through State practice and the case-law of international courts and tribunals".[1] The R2P has been invoked in over 80 UN Security Council Resolutions and over 50 Human Rights Council Resolutions. This statement has provided an impetus for the R2P to be recognised in the procedural framework of international law at the UN.[2] There is conjecture over whether this arises from consensus and 'meaningful support' for its implementation.[3]

Surprisingly, the response that triggers the R2P does not have to be military intervention and many other instruments exist which can provide a means for enforcement, including "using tools designed for the upstream prevention of atrocity crimes". Paragraph 138 of the 2005 World Summit Outcome document states that 'this responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means' including 'establishing early warning capability'.[4] The measures can be invoked as anticipatory responsibility to prevent the crimes and the States at the UN General Assembly agreed that when endorsing R2P that 'their commitment to the responsibility to protect is first and foremost a commitment to prevent and mitigate the risk of commission of atrocity crimes'.[5]

The concern for minorities who suffer from the acts of their national government provides a basis for intervention when genocide has taken place. This is an appropriate analogy given the human rights violations in Myanmar against the Rohingya Muslims in the hinterland of Southeast Asia.[6] The Muslim minority has historically been persecuted by the ultra-nationalist Buddhist monks who have targeted them to forcibly convert to restore "the ethno-religious balance."[7]

1 . 'Office of Genocide Prevention and Responsibility of Duty to Protect', https://www.un.org/en/genocideprevention/about-responsibility-to-protect.shtml.
2 . Jess Gifkins, 'R2P in The UN Security Council: Darfur, Libya and Beyond' (2016) Vol. 51 No.2 Cooperation and Conflict 148-165.
3 Aidan Hehir, Hollow Norms and the Responsibility to Protect (Palgrave Macmillan 2018) 8.
4 . UN General Assembly, 2005 World Summit Outcome A/60/L.1, p. 30.
5 . UN General Assembly, 2020, Report of the UN Secretary-General: Prioritizing Prevention and Strengthening Response: Women and the Responsibility to Protect, A/74/964, 23 July, para 9.
6 . Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Myanmar since 1 February 2021 (A/HRC/49/72, March 2022)
7 . Francis Wade, Myanmar's Enemy Within: Buddhist Violence and the Making of a Muslim Other (Zed books 2017) 8.

The consequences of this state policy have largely been ignored by the international community.[1] The case for protection of the Rohingya communities in Myanmar falls under the R2P Pillar III that provides for international assistance after establishing grounds to intervene under this mechanism and promote collaboration between concerned States and the international community. This concept of a diminished State Sovereignty cannot preclude foreign interference if the government has committed crimes against humanity against its people, as enshrined in Article 1 of the Genocide Convention 1989 and defined as a crime in international law.[2] The implementation of measure under Pillar III requires a referral to the Security Council, followed by a resolution that authorizes the intervention to terminate the genocide. The most referred example is the Libyan civil war in 2011, which under UNSC Resolution 1973 prohibited the state's forces from attacking the 'rebel' base in Benghazi.[3] This was affected by means of enforcing a no-fly zone and by restricting the scope of Libyan government's military operations in the western sector of the country. Resolution1973 is framed as a "Demand*" in Article 3 that states "the Libyan authorities comply with their obligations under international law, including international humanitarian, human rights and refugee law and take all measures to protect civilians and meet their basic needs, and to ensure the rapid and unimpeded passage of humanitarian assistance*."

However, Western nations placed conditions that meant an active withdrawal of the Libyan government's forces, which then led to an escalation and triggered a military intervention in which the regime change became part of the NATO agenda. It is argued that this was against the presumed attention of Article 1, that did not provide a basis for military intervention by the Western powers acting under the auspices of the Security Council and facilitating the rebel National Transitional Council to seize power.[4]

The definition of Pillar III needs special attention and it should be noted that any UNSC Resolution for an intervention under RP2 is not blocked by member states who have the right to exercise veto.[5] The five veto wielding powers at the UN have their separate interests, and while principles identified by the UN General Assembly in A/63/677 are valid, these states have their own regional influence which leads to them offering protection from any measures that are initiated under the RP2 mechanism.

2. R2P and Mechanism for Intervention

The forced removal from Myanmar of the Rohingya community began with the arrival of military rule in 1962, when the authorities launched the first of their operations that led to genocide of the people. This was with the intention of pacification of the Muslim minority and was conducted

1 . T Karman, 'The Rohingyan tragedy shows human solidarity is a lie', Al Jazeera, Available at: https://www.aljazeera.com/opinions/2017/12/1/the-rohingya-tragedy-shows-human-solidarity-is-a-lie. Accessed 1 Dec 2023.

2 . International Convention Against Genocide, Article I: The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

3 . 'Libya and the Future of the Responsibility to Protect – African and European Perspectives Matthias Dembinski/Theresa Reinold P', PRIF Report no 107, Available at: https://www.hsfk.de/fileadmin/HSFK/hsfk_downloads/prif107.pdf. Accessed 1 Dec 2023.

4 . Article 1 Demands the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians.

5 . Zifcak Spencer, 'The Responsibility to Protect after Libya and Syria, Melbourne Journal of International Law' (2012) Vol. 13 No. 1 Melbourne Journal of International Law 7-14; See also The Ethics of Humanitarian Intervention in Libya', Ethics and International Affairs, 25, no 3 (2011) 273-74.

by mass arrests and incarcerations.[1] The 'ethnic cleansing' operation in 1978 led to Rohingya refugees fleeing to nearby Bangladesh in large numbers,[2] followed by the "Operation Clean and Beautiful Nation, that led to the exodus of another 200,000 people from the country".[3]

The exclusionary policy of the Myanmar government is based on the denial of citizenship to the Rohingya and the process has been aggravated by preventing their ability to register as temporary residents with identification cards. These are known as 'white cards', which the military began issuing to Muslims, both Rohingya and non-Rohingya, in the 1990s. The white cards conferred limited rights but were not recognized as proof of citizenship.[4] In 2014 the civilian authority held a UN-backed national census where the Muslim minority was initially permitted to identify as Rohingya.

However, after Buddhist ultra-nationalists threatened to boycott the census, the government decided the Rohingya could only register if they identified as ethnically Bengali instead. The pressure from the ultra-nationalist led to the Rohingya people's right to vote in a 2015 constitutional referendum to be annulled and the temporary identity cards that were issued in February 2015 were withdrawn. This effectively revoked their newly gained right to vote (white card holders were allowed to vote in Myanmar's 2008 constitutional referendum and 2010 general elections.) The Parliamentary elections held in 2015 did not lead to any member of the Muslim community to be elected in the national assembly.[5]

The UN Human Rights Council (HRC) has been investigating the persecution of the Rohingya and its various bodies have issued reports condemning their treatment.[6] The HRC appointed an Independent Fact-Finding Mission (IIFFMM) that found evidence of genocide, crimes against humanity, and war crimes, and accordingly requested that the international community employ R2P to protect the Rohingya people. Their comprehensive 440-page account of their findings after its 15-month examination of the situation in Myanmar states:

> *"During their operations the Tatmadaw has systematically targeted civilians, including women and children, committed sexual violence, voiced and promoted exclusionary and discriminatory rhetoric against minorities, and established a climate of impunity for its soldiers".*[7]

1 . Transcript of the Current Affairs magazine discussions with Prime Minister's Private Secretary-2 U KhinNyunt, "Special Issue on Mayu," Current Affairs (or Khit Yay), Ministry of Defence, the Union of Burma, 12, 6 (July 18, 1961) 16-20.

2 . Personal Testimony delivered by U Ba Sein, a former Rohingya civil servant – now a refugee in London, UK - who lived through this King Dragon Operation in N. Rakhine, Permanent People's Tribunal on Myanmar, Queen Mary University of London. March 6-7, 2017, accessed April 3, 2019.

3 . M Myint, 'Ninety Percent of Rohingya Population Ejected from Rakhine', The Irrawaddy, 23 February 2018. https://www.irrawaddy.com/specials/ninety-percent-rohingya-population-ejected-rakhine.html. Accessed 9 April 2021.

4 E Albert, L Maizland, 'The Rohingya Crises, Council on Foreign Relations', Accessed 23 March 2024, https://www.cfr.org/backgrounder/rohingya-crisis.

5 . Ibid.

6 . The UN High Commissioner for Human Rights acknowledged a clearance operation that occurred on 25 August 2017 at the hands of the Myanmar military regime was a "textbook example of ethnic cleansing". OHCHR, October 2017; The UNHRC also document "widespread, unlawful killings by the security forces and vigilantes, including several massacres; rape and other forms of sexual violence against women and children; the widespread, systematic, pre-planned burning of tens of thousands of Rohingya homes and other structures by the military, BGP and vigilantes across northern Rakhine State from 25 August until at least October 2017; and severe, ongoing restrictions on humanitarian assistance for remaining Rohingya villagers". "Burma: New Satellite Images Confirm Mass Destruction", Human Rights Watch, 17 October 2017; "Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh, 13-24 September 2017".

7 . Myanmar: UN Fact –Finding Mission releases its full account of mass violations by military in Rakhine, Kachin, and

The report also recommends that the "*top generals should be investigated and prosecuted for genocide in Rakhine by crimes as horrendous and on such a scale as these*".[1] After the expiry of its mandate, the IIFFMM transferred its evidence to the Independent Investigative Mechanism for Myanmar (IIMM), that is instructed by the HRC and has been operational since 30 August 2019. The IIMM has the power "*to collect, consolidate, preserve and analyse evidence of the most serious international crimes and violations of international law committed in Myanmar since 2011. It is further mandated to prepare files in order to facilitate and expedite fair and independent criminal proceedings, in national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes*".[2]

However, the IIMM exclusively depends on civil society organizations' (CSO) documentation to assert their jurisdiction". This factor created the need for the IIMM to act as a "*legal bridge between documentation and States' investigatory and prosecutorial duties: the concerns about the reliability of CSOs' documentation and the impediments in its direct admissibility in criminal trials.*"[3]

It can be argued that despite these reports, the international community has taken no effective measures to protect the Rohingya, and that there are possible strategic reasons for why the R2P measures have not been instituted to protect them. This lack of intervention can be ascribed to the "*ASEAN's non-interference strategy, the OIC's dependency on diplomacy, the EU's priority for the hybrid democratic transition of Myanmar, the UN's political dialogue strategy, and the UN Security Council's structural weaknesses are obstacles to the international community preventing genocide in Myanmar.*"[4]

3. Precedence and Avoidance of 'False Flag' Operations

There needs to be an examination of the previous interventions under the R2P umbrella in conflict zones in order to evaluate if these interventions can serve as a precedent for the intervention in Myanmar. In formative period of the R2P the government of Canada had initiated the debate in 2002 on the Responsibility to Protect under the auspices of the International Commission on Intervention and State Sovereignty (ICISS), which drafted the principles of' humanitarian intervention. This was the first indication of an international consensus to intervene when there was no scope for "redrawing the boundaries of the state or to support the self-determination claims of any particular belligerent party."[5] The document stated that the only reason for intervention is "the protection of civilians, therefore any military campaign must be strictly confined to this goal, and should not be used as a pretext for pursuing regime change."[6] The ICISS report

Stan States, 18/9/18. UNHR https://www.ohchr.org/en/press-releases/2018/09/myanmar-un-fact-finding-mission-releases-its-full-account-massive-violations?LangID=E&NewsID=23575.

1 . Ibid.

2 'What is the Independent Investigative Mechanism for Myanmar?', https://iimm.un.org/what-is-the-independent-investigative-mechanism-for-myanmar/. Accessed 19 Feb 2024.

3 . Konstantna Stavrou, 'Civil Society and the IIMM in the Investigation and Prosecution of the Crimes Committed Against the Rohingya' (2021) 36(1) Utrecht Journal of International and European Law 95–113.

4 . Uddin Md Zahed, 'Responsibility to Protect, The International Community's Failure to Protect the Rohingya' (2021) Vol. 52, Issue. 4, Asian Affairs 947.

5 . International Commission on Intervention and State Sovereignty (ICISS) 2001: The Responsibility to Protect, Ottawa: IDRC.

6 . Ibid., 35

acknowledged that the protection of civilians "will often require disabling the target regime's capacity for hurting its own people, and what is necessary to achieve that disabling will vary from case to case."[1]

This concept was further developed by the International Coalition for the Responsibility to Protect (ICRP) and it was prefaced on the notion of a dual social contract between the sovereign government and its citizens, and between nation-states and the international community. Its stated purpose was: "*The sovereign state's responsibility and accountability to both domestic and external constituencies must be affirmed as interconnected principles of the national and international order. Such a normative code is anchored in the assumption that in order to be legitimate, sovereignty must demonstrate responsibility.*"[2] Hence, sovereignty should not merely be regarded as the right to be left alone, but as the responsibility to discharge governmental duties. "Normatively, to claim otherwise would be to lose sight of its purpose in the original context of the social contract, taking the means for the end."[3] It conveyed the burden of responsibility to the state and argued that "state sovereignty implies responsibility, and the primary responsibility for the protection of its people lies with the state itself."[4]

However, R2P has been deemed to be applied selectively in conflict zones and this is a reflection of strategic goals of members states of the UNSC, such as regime change, rather than the moral authority to protect international law. The intervention by NATO countries in Libya to overthrow the regime of Colonel Gaddafi on the pretext of the UN Security Council Resolutions 1970 also threatened International Criminal Court (ICC) prosecution for crimes against humanity.[5] The Libyan government was viewed as having failed to comply with UN demands, and in view of the rebellion in Benghazi, the Security Council passed Resolution 1973 on March 17, 2011. Neither Resolution 1970 nor Resolution 1973 specifically mention the term "responsibility to protect" although the term "in order to protect civilians" is used in paragraph 6.[6]

The resolution was a pretext for western intervention rather than a serviceable guideline for the UN sponsored action, because the NATO forces had one overriding aim which was regime change above all other considerations. Resolution 1973 authorized member States acting "nationally or through regional organizations or arrangements" to create a no-fly zone. This was a reference to the UN's self-identified Chapter VIII which was moved by the Organization of African States (OAS), later the African Union, which could have intervened on the grounds of the Resolution. The western powers acting through NATO rejected the overtures by Col Gaddafi to establish a ceasefire including a "willingness to accept international monitors, and to abdicate and exit the country."[7]

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1 . Ibid.
2 . International Coalition for the Responsibility to Protect, www.responsibilityto protect.org (9.11.2011) i.
3 . Ibid., xviii.
4 . Ibid., xi.
5 . C Doebbler, "The Use of Force against Libya: Another Illegal Use of Force" (Jurist 20 March 2011) accessed 26 March 2021.
6 . Ibid.
7 . A. Abbas, Assessing NATO's involvement in Libya. Accessed on February 26, 2018; GeirUlfstein and Hege Fosund Christiansen, "The Legality of the NATO Bombing in Libya" (2013) Vol 62 Issue 1 British Institute of International and Comparative Law 159; Stark et al. The Responsibility to Protect: Challenges & Opportunities in Light of the Libyan Intervention. New York: e-International Relations. (2011). at 28 http://responsibilitytoprotect.org/index.php/crises/190-crisis-in-libya/3747-e-international-relations-the-responsibility-to-protect-challenges-a-opportunities-in-light-of-the-libyan-intervention.

It emerges from the NATO intervention which served to devastate Libya was a 'false flag' operation in which the main object was 'regime change'. The outcome effectively ended the sovereignty of the country, partitioned it into two divisions and led to refugee crises.[1] The preservation of international law would have been effective if there was a more objective application of the R2P that was not aligned with western states military goals which were defined by NATO. This form of subjective enforcement is against the implementation of a concept that optimizes the 'citizen-centered' right to be protected as exists under the R2P.[2]

Teimouri and Subedi argue that the "*principle of R2P was violated in the case of Libya, because the violence had not been carried out from the government side, but was also systematic from the rebels' side*".[3] They cite the International Commission of Inquiry on Libya, which states that "*the violence carried out by different rebel militias, the so-called thuwar (revolutionaries), that was widespread and grave.*"[4] They quote this report which provides evidence that the "*conduct of both the government and the rebels in graphic detail, indicating the commission of war crimes (if occurring during the armed conflict) and crimes against humanity (if occurring in a widespread and systematic manner).*"[5]

The foreign intervention presents obstacles because of "*complexity that lies in the international community authorizing encroachment on a state's sovereignty when the nature of the conflict remains inherently domestic*" and the consequence of this is encouraging self-determination and seemingly being "biased in favor of non-state actors". This in practice would mean that instead of applying the RP2 mechanism the "*international community might be prone to shielding armed groups from charges with respect to their behavior in the course of armed conflict, which is tantamount to legalizing armed action against the state authorities and, in principle, to granting those unhappy with the state the right to take up arms.*"[6]

It can be argued that the conflict in Myanmar is different from Libya because the military government that expelled the Rohingya have not recognized them as citizens or as part of the ethnic composition of the country. Therefore, the argument cannot be sustained that there should be no military intervention because it may violate the principle of sovereignty, because in this instance there is not an international conflict but an 'ethnic' genocide which has been carried out by the authorities in Myanmar.

The R2P process is at an early stage of development and the mechanism to refer cases that arise from atrocities have not been sufficiently developed. There have been efforts to establish the instruments for enforcement and in 2014, the United Nations launched its *Framework of Analysis for Atrocity Crimes: A Tool for Prevention*, as a guide for assessing the risk of genocide, crimes against humanity and war crimes. This was to anticipate "crises, promote action

1 . E. A. Posner. Outside the Law: From Flawed Beginning to Bloody End, the NATO Intervention in Libya Made a Mockery of International Law. (2011), https://foreignpolicy.com/2011/10/25/outside-the-law.
2 . Timothy McNamara, 'International Law, NATO's Campaign to Kill Gaddafi and the Need for a New Jus Cogens' (2019) Vol. 9 Beijing Law Review 519.
3 . Heidar Ali Teimouri and Suria Subedi, 'Right to Protect and International Military Intervention in Libya. What went wrong and what lessons could be learnt from it?' (2018) Vol.23 Issue 1 Journal of Conflict and Security Law 11.
4 . UNHRC, 'Report of the International Commission of Inquiry on Libya' (8 March 2012) UN Doc A/HRC/19/68, 6-7.
5 . Ibid., 8-9, 12-13 ,15
6 . H Teimouri and SP Subedi, Right to Protect and International Military Intervention in Libya.

and improve monitoring, early warning and preventive action."[1] There were "*14 risk factors identified and 143 indicators, a process that was in accordance with the UN's commitment to placing the protection of populations and the prevention of atrocity crimes as a matter of priority of [UN] wor*k."[2] The toolkit emphasis that "each situation demands its own 'contextual analysis and tailored response" and the UN recommendations were that in order to be effective, "*assessments require the systematic collection of accurate and reliable information based on the risk factors and indicators that the framework identifies."*[3]

The interactive process of enforcement of RP2 will be formulated if there is a "*predominant role played by consent in international law, as well as by the non-reciprocal nature of human rights obligations. Second, definitional ambiguity and a lack of well-defined normative implications hamper the protection of those human rights that have gained special status, such as jus cogens and erga omnes. Third., the political nature of the Human Rights Council and the Security Council impacts the effectiveness of these bodies and their efforts to promote human rights.*"[4]

The mechanism to activate the R2P measure should be voted by the General Assembly and can be activated without the need for the Security Council resolution. The permanent members can frustrate collective action by their veto, but "classic texts of international relations remind us that the veto 'registered power; it did not confer it'."[5] The rationale for the transfer from the Security Council to the General Assembly to authorise the action under the R2P is the originating fact of the measure that was endorsed by the majority of states at the General Assembly at its inception. It will carry more weight in terms of granting the moral authority to trigger the intervention under the R2P. The Secretary General of the UN would be able to circumvent the approval of the Security Council and nullify their veto and order intervention under the extraordinary powers available under R2P.

This will provide the basis for intervention to stop human rights abuses on a such a scale as in Myanmar, and this is only possible when the juridical rule of international law based on human rights and IHL is recognized and preserved in asymmetric conflicts. The imperative is for the international law to be based on the formal equality of states, with a UN acting in a diffuse manner in order to arrest, detain and to prosecute the officials who have carried out genocide in the Non-International Armed Conflict (NIAC).

4. Characterization of the Conflict and Criminal Trials

The conflict between the Myanmar government and the Rohingya Muslims is a national dispute and its definition comes under the Non-International Armed Conflict (NIAC). This is because

1 . The Global Network of "R2P Focal Points" was launched in September 2010 in collaboration with the Global Centre for the Responsibility to Protect. The motivating idea behind the Focal Point position was that it would 'integrate atrocity prevention within both domestic and foreign policy'. To do this, it was anticipated that 'the R2P Focal Point should have sufficient influence and access across their national system to be able to promote R2P broadly and to meaningfully engage with relevant operation mechanisms for preventing and halting mass atrocities'. GCR2P, Third Meeting of the Global Network of R2P Focal Points. Preventing Atrocities: Capacity Building, Networks and Regional Organization, June 2013 at http://www. globalr2p.org/media/files/third-meetingof-the-global-network-of-r2p-focalpoints.pdf.

2 . United Nations, Framework of Analysis, iii.

3 . United Nations, Framework of Analysis, 7.

4 . Iryna Bogdanova, Unilateral Sanctions in International law and the Enforcement of human rights. In the International Enforcement of Human Rights, Volume: 9 World Trade Institute Advanced Studies, (Brill 2022) 180 -182.

5 . Inis Claude, 'Swords into Plowshares. The Problems and Progress of International Organization' (1972) Random House 72.

there were two competing parties in this conflict however asymmetrical they were in terms of numbers and resources. The Arakan Rohingya Salvation Army (ARSA) or Harakah al-Yaqin (faith movement) first came into prominence in October 2016 after launching small scale attacks on border posts in northern Rakhene region leading to "a disproportionate response from the Myanmar authorities."[1] The first recorded incident of armed resistance was on 25 August 2017, when it attacked 30 members of the security force outposts in the northern Rakhane state and these "attacks were planned and coordinated just hours after a final report of the Advisory Commission on Rakhine State, led by former UN Security General Kofi Annan. formed after the in 2017."[2]

The laws of war are governed by treaties and customary international law and the "rules of IHL are set out in a series of conventions and protocols". The Four Geneva Conventions which were signed in 1949 together with the laws of the Hague Convention 1907 form the basis of contemporary IHL which come into effect during an armed conflict. The aims to regulate the conduct of belligerents; all combatants and to those no longer taking part in hostilities, including POWS. The application of IHL is based on the framework of the Geneva Conventions for the protection of civilian persons in times of war. The International Committee of the Red Cross (ICRC) is the main international agency that oversees its implementation whose "basic principle underlying that law, humanity, impartiality, and neutrality are as valid as ever and of utmost relevance" in its work.[3]

The state parties under Common Article 1 which is generic to all 4 Geneva Conventions 1949 places a duty «*on the part of all States to use all available means to ensure respect for all provisions of the Conventions by all other States during all armed conflicts, even those to which the State in question is not a party.*"[4] The Common Article 3 states *"(1) Persons taking no active part in the hostilities, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria;" and '(2) An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict".*

The Common Article 3 is also applicable in the case of armed conflicts 'not of an international character'(NIAC.) which are armed conflicts where at least one Party is not a State.[5] There are also the Additional Protocols that applies to NIACs which were formulated in 12 August 1949, and relates to the Protection of Victims of NIACs (Protocol II) of 8 June 1977.The only provision applicable to NIAC before the adoption of the Protocol II was the Common Article 3 but this

1 . International Crises Group Statement 'Myanmar tips into New Crises after Rakhine State Attacks', 27 August 2017 https://www.crisisgroup.org/asia/south-east-asia/myanmar/myanmar-tips-new-crisis-after-rakhine-state-attacks; International Crises Group, 'Myanmar's Rohingya crises enters a dangerous new phase, Report no 292/Asia, 7 December 2017.https://www.crisisgroup.org/asia/south-east-asia/myanmar/292-myanmars-rohingya-crisis-enters-dangerous-new-phase.

2 . See International Crises Group, Myanmar: A new Muslim Insurgency in Rakhine State, Report No 283/Asia, 15/12/16https://www.crisisgroup.org/asia/south-east-asia/myanmar/283-myanmar-new-muslim-insurgency-rakhine-state; International Crises Group, Myanmar's Rohingya crises enters a dangerous new phase; Amnesty International, "We are at Breaking Point"; Rohingya persecuted in Myanmar, Neglected in Bangladesh (Index: ASA 16/5362/2016) 19 December 2016. https://www.amnesty.org/en/documents/asa16/5362/2016/en/.

3 . Yves Sandoz, The International Committee of the Red Cross as guardians of International Humanitarian Law, 31-12-98. icc.org/en/doc/resources/documents/misc/about-the-icrc-311298.htm. Accessed 12 March 2024.

4 . Laurence Boisson de Chazournes & Luigi Condorelli, Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests, 82 International Review of the Red Cross 67 (2000).

5 . Commentary of 2016. Article 3: Conflicts of Non-International Character. ISRC. iht-database.icrc.org/ihl/full/GLI-Commentary/aRT3.

instrument proved to be inadequate because approximately 80% of the victims of armed conflicts since 1945 have been victims of NIACs and these are often fought with more cruelty than international conflicts.[1]

This instrument has application to NIAC which is the definition for the persecution of the Rohingya Muslims and its non-compliance of Myanmar with the human rights and principles of IHL. Under customary international law the "use of lethal force must respect the legal principles of military necessity, distinction, (and) proportionality."[2] The breach of IHL is a structural problem because the Myanmar government has not signed the two additional protocols that been added to the Geneva Conventions in 1977 which cover armed conflict. These are the Additional Protocol (AP) I and II and while the former defines armed movements involving the "right to self –determination of colonized peoples in international armed conflicts, bringing, in some respects, guerrilla warfare and state responses to it within the protection ambit of IHL."[3]The latter was "specifically adopted to cover situations of NIAC, thereby bringing a situation of armed conflict occurring on the territory of a country within the framework of IHL."[4]

Part IV (Article 13) of the Additional Protocol II on Civilian populations and General Protections of the Civilian Population states:

> *(1): The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.*
>
> *(2) . The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.*
>
> *(3). The civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities."*[5]

The breach of the Geneva Conventions' Common Article 3 and the AP II which is crucial to the protection of civilians in a NIAC is evidenced in the non-compliance of Myanmar's authorities and the armed forces absolute immunity in breaching the norms of the IHL. In executing a proactive, offensive and retributive doctrine the Myanmar armed forces have breached the rules not to cause "indiscriminate and disproportionate attacks"[6] and failed to "observe a series of precautionary rules in attack, aimed at avoiding or minimizing incidental harm to civilians and civilian objects."[7]

This exposes Myanmar's officials to the allegation of war crimes and also for committing crimes against humanity. The collective punishments imposed on the people is a breach of IHL and the

1 . Allex Bellamy, Just Wars: From Cicero to Iraq (Cambridge University Press, 2006) 110.
2 . Jean Marry Henckaerts, Luise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, (Cambridge University Press 2005), 3-76.
3 . Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
4 . Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I), 8 June 1977
5 . Protocol Additional II to the Geneva Conventions of 12 August 1949, 94. Available at: https://www.icrc.org/en/doc/assets/files/other/icrc_002_0467.pdf
6 . Ibid, Rules 11-24.
7 . Ibid Rules 15-24

principles of culpability were defined in *Prosecutor v. Tadic*,[1] where an international tribunal was constituted to determine the crimes committed by former Yugoslavian military personnel. The decision states:

> *"Bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types, [...the General Assembly] Affirms the following basic principles for the protection of civilian populations in armed conflicts, without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict: ...in the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations".*[2]

The Myanmar government is not acting in self-defence against an armed attack and have used force to expel a minority and genocide has been documented by the UN human rights agencies. The principle of proportionality will apply in the context of rights that it has infringed which are considered to be *jus cogens* and, therefore, protected as human rights. The proportionality test as it is currently understood in the laws of armed conflict is one of the "*cornerstones of IHL, together with the other basic principles of distinction between civilians and combatants, the prohibition on the infliction of unnecessary suffering, the notion of military necessity, and the principle of humanity.*"[3]

Under this distinction it is only the armed personnel and military targets which may be targeted during armed conflicts. The attacking party "*must ascertain whether a given target is military or civilian, and refrain from attacking the latter. This prohibits even when targeting a military objective, when the attack that is* "*expected to cause incidental harm to civilians which would be excessive in relation to the concrete and direct military advantage anticipated.*"[4]

It has been referred to as a cardinal principle of IHL and has been commented on by jurists who consider it preeminent in regulating armed conflict.[5] This prohibits the collateral damage to civilians by placing a sanction on assaulting a building or a site which may retain the military objectives. The attack whether deliberate or reckless is proscribed that would be excessive relative to the military advantage gained. For example, in the conflict between the Government of the Philippines and the Moro Islamic Liberation Front (MILF) the agreement between the two parties commits them to "avoid[ing] acts that would cause collateral damage to civilians."[6]

1 . Case No. IT-94-1-T, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

2 . At 111, 127 (citing U.N. General Assembly Resolution 2675).

3 . Amichai Cohen, David Zlotogorski, 'Proportionality in International Humanitarian Law: Consequences, Precautions, and Procedures' (Oxford University Press 2021) 4.

4 . Ibid.

5 . Thomas Franck has explained, that it defines the "imagination of the epistemic community in which it is used as the prism for viewing, arguing, and ultimately resolving disputes". Thomas M Franck, On Proportionality of Countermeasures in International law, 102 AJIL, (2008)715,728. 102; Also see Marco Sassòli, 'Taking armed groups seriously: ways to improve their compliance with international humanitarian law' (2010) Vol. 1 Journal of International Humanitarian Legal Studies 32.

6 . Agreement on the Civilian Protection Component of the International Monitoring Team', 27 October 2009, Art. 1(a). Volume 93 Number 882 (June 2011) 9https://peacemaker.un.org/sites/peacemaker.un.org/files/PH_091027_Agreement%20on%20Civilian%20Protection%20Component.pdf.

In customary international law the principle of proportionality is defined by the parameters of not causing harm to civilians to the exclusion of non-military personnel. The presence of civilians within or near military objectives does not render such objectives immune from attack. However, this exemption only applies to "civilians working in a munitions factory. This practice indicates that such persons share the risk of attacks on that military objective."[1] It would also mean that civilians not involved in any military support role are excluded from the military objective of attack or forced expulsion.

There needs to be an international tribunal to try the Myanmar officials including the military leaders who headed the chain of command and gave the order for the ethnic cleansing of the Rohingya. The International Residual Mechanism for Criminal Tribunals (UNMICT) established by Security Council in 2010, by resolution 1966, should be invoked to prosecute these officials who are culpable[2] This was established under Chapter VII Article 39: Action with Respect to threats to the Peace, Breaches of the Peace, and Acts of Aggression. There is one branch that is located in the Hague and the other branch is in Arusha, United Republic of Tanzania.

The Security Council have established two ad hoc criminal tribunals, the Criminal Tribunal for the Former Yugoslavia (ICTY) promulgated by Security Council Resolution 827 of 25 May 1993[3] and the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of IHL Committed in the Territory of Rwanda and Rwandan Citizens and Other Such Violations Committed in the Territory of Neighbouring States (ICTR) on 31 December 1994 by Resolution 955.[4] It is possible to try the accused of Myanmar in ad hoc tribunals established to bring justice to victims of international crimes. This is an acceptable framework for a machinery of justice in IHL, because the mandate of the UNMICT has been extended for future referrals after the conclusion of the ICTY and ICTR proceedings.

The process of trying the accused of Myanmar is by establishing a separate criminal tribunal that would enable the indictment on the basis of "Joint Criminal Enterprise" or JCE. This concept was invoked by the two previous tribunals and the term considers each member of an organized group individually responsible for crimes committed by that group within the 'common plan or purpose'. The act is inculpatory by a "criminal agreement through which parties' intent becomes perceptible" and the principle has "developed through international case law."[5] This process enabled the guilt to be established by association of violent groups and the court entered convictions in all the cases it tried in the ad hoc tribunals.

This Criminal Tribunal for Myanmar for Serious Violations of IHL Committed against the Rohingya citizens will have to be created by the Security Council resolution and its terms of reference will be included in the statutory instrument and the various Articles that govern its

1 . See J.-M. Henckaerts, L. Doswald-Beck, Customary International Humanitarian Law, Vol 1: Rules. International Committee of the Red Cross, (Cambridge University Press 2009) 31.

2 . Security Council Resolution/1996 (2010) ww.icty.org/en/press/security-council-adopts-resolution-international-residual-mechanism-criminal-tribunals-irmct.

3 . International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991. https://www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf.

4 . Available at www.irmct.org.files.documents.101222_sc_res1966_statute_en, accessed on April 23, 2023.

5 . Elinor Fry, Elies van Sliedregt, 'Conspiracy/ Joint Criminal Enterprise', Oxford Bibliography. 13/6/17https://www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0096.xml.

functions and the Rules of Procedure and Evidence. The Secretary General can under Article 99 bring to the “attention of the Security Council any matter that threatens the maintenance of peace and security”. This will lead to the establishment of the tribunal and it will have the provision to be able to serve public indictments, to issue judicial decisions and produce the Annual Reports to General Assembly and Security Council on an annual basis.

The state of Myanmar has also abused human rights law as documented by the OHCHR reports along with the breach of IHL, and the infringements of international human rights law (IHRL) makes its officials liable for the crimes committed against the Rohingya for forcing their expulsion from the country of their birthright. The operations carried out by its armed forces, and their auxiliaries has caused the infliction of deaths, grievous harm and ethnic cleansing. The IHRL is based on the treaty framework that emanated from the adoption of the Universal Declaration of Human Rights (UDHR) on 10 December 1948. This was drafted as “*as a common standard of achievement for all peoples and nations”, and it enables the “civil, political, economic, social and cultural rights that all human beings should enjoy. It has over time been widely accepted as the fundamental norms of human rights that everyone should respect and protect.”*[1]

The IHRL establishes the tenets that the states are bound to respect and which are drafted in the form of “obligations and duties under international law to respect, to protect and to fulfil human rights”. These are framed in the negative context such as not restricting or annulling the standard terms ingrained in human rights. They apply to both the “individuals and groups” and states much respect against abuse of these enshrined rights.[2]

The Myanmar state has to abide by the basic human rights treaties such as the Convention of the Elimination of Racial discrimination (CERD); International Convention on the Economic, Social, and Cultural Rights (ICESCR); International Convention for Civil and Political Rights (ICCPR); Convention against Torture and Other Cruel, Inhumane and Degrading Treatment; Convention on Rights of Person with Disabilities, Convention on Enforced Disappearances; and the Convention on the Rights of the Child. The authorities in Myanmar have only ratified the ICESCR and the Optional Protocol to the Convention on the Rights of the Child which precludes the involvement of children in armed conflict.[3]

The actions of the armed forces of Myanmar will be judged for breaches of human rights that prevail generally under international treaties and customary laws that are inherent in these instruments and which are supplemented by the declarations, guidelines and principles adopted by the international bodies for the implementation of human rights. The breach of human rights law co-exists with humanitarian law and present a very persuasive argument for the prosecution of Myanmar’s officials in an international criminal tribunal and to be tried for violating laws that establish conduct of states in NIAC conflicts.

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1 . ‘International Human Rights Law, UNHR Commissioner, Office of the High Commissioner’ Available at: https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law. Accessed 20 Feb 2024.

2 . Ibid.

3 . UN-HR Treaty Bodies, Ratification Status for Mynamar. Available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=119&Lang=EN. Accessed 20 Feb 2024.

Conclusion

The mechanism for protection in international law for minorities is a process under the R2P which is a framework under Pillar I that defines 'atrocities' such as *genocide, war crimes, crimes against humanity and ethnic cleansing.* Pillar III establishes the grounds for intervention by which the international community may undertake resolute and collective action in furtherance of the UN Charter. The legal basis exists for intervention by consensus and the initiative is for the General Assembly to vote for activation of the mechanism in order to bring to justice the officials of the Myanmar government.

In this conflict the persecution, violation and the displacement of the Rohingya Muslims deserves the international community's attention and in particularly those in the General Assembly which voted for the measure to be enacted. It must be the body with powers to convene an international criminal tribunal that will prosecute the military officers and their commanders for genocide. The precedence was established in the *Tadic v Prosecutor* case and the jurisdictions is provided by the International Residual Mechanism for Criminal Tribunals which should be activated for the Myanmar officials to be indicted, tried and sentenced.

The ethnic minorities in remote parts of the world are often in conflicts where the majoritarian states which view them as alien despite their birthright in the country. In this instance the Rohingya who are original inhabitants of the country have been expelled from their homeland because of their creed and ethnic background. The conflict that has been imposed on them is a form of warfare that is defined as a NIAC and the rules that are applicable in their case stem from the international human rights and IHL principles. These need to be enforced vigorously and there should be no reluctance or reticence in forging the R2P procedures keeping in perspective the false flag operations of the past.

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Impact of Public Health Measures on Muslims in India and International Human Rights Law: Derogations, Limitations, and Justifications

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ABSTRACT

The COVID-19 pandemic made the fight against "leaving nobody behind" even more difficult, by exacerbating existing inequities and discrimination. Discrimination and inequality have no geographical bounds; they exist in varied forms in different social contexts. The widening inequality gaps caused by COVID-19 have severe ramifications for fundamental human rights, including the right to life and, most significantly, access to healthcare, education, and employment. The impacts of these inequities are already noticeable and continue to unfold in the near future. The "Coronavirus stigma," which is based on racial, religious, and gender grounds, has also been fueled by fear and uncertainty about the pandemic. This has exposed, in particular, the vulnerability of those living in precarious situations and marginalised groups, such as individuals with disabilities, women, children, refugees, and migrants. Therefore, this paper seeks to analyse the profound consequences of these problems, propose essential steps for combatting inequality in a novel way, and recommend strategies to lessen the effects of inequality and discrimination in the post-pandemic era.

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Introduction

The nation-states around the globe have taken exceptional preventive measures to combat the Coronavirus pandemic. Many of these measures restricted the people's freedoms in raisning concerns about the potential violation of national constitutions.[1] In Norway, lawmakers have proposed an emergency law[2] that temporarily empowered the government with unprecedented power to override the constitution and federal regulations for combating the Coronavirus. Similarly, In Italy, a complete lockdown was imposed, entailing criminal penalties that were against the provisions of the Italian Constitution. With little opposition, governments all around the world gained almost totalitarian authority when the coronavirus pandemic brought the world to a standstill and fearful citizens demanded swift action. Governments and human rights organisations concurred that exceptional measures were necessary in these unprecedented times. In order to impose quarantines, close borders, and locate infected individuals, states required further authority. According to constitutional lawyers, many of these measures were protected under international law.[3] Viktor Orban, the Prime Minister of Hungary, has used the COVID-19 pandemic to subvert basic democratic and legal norms under the guise of public health concerns.[4]There is a pertinent question in the United States as to what extent can the Constitution be overridden in combatting the Coronavirus. Are lockdowns, self-isolation,[5] or Physical Distancing Measures (PDMs) applicable to individuals who test negative constitutionally debatable? Some politicians in Newark, New Jersey,

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1 Arianna Vedaschi, Chiara Graziani Do, 'Coronavirus Emergency and Public Law Issues: An Update on the Italian Situation'March 12, 2020 Verfassungsbloghttps://verfassungsblog.de/coronavirus-emergency-and-public-law-issues-an-update-on-the-italian-situation/ <accessed on 20 March 2020>

2 The Local, 'Madness: Norway lawyers hit back at 'undemocratic' coronavirus law' March 19, 2020 The Local https://www.thelocal.no/20200319/norway-lawyers-hit-back-at-undemocratic-coronavirus-law

3 Selam Gebrekidan, 'For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power' April 14, 2020 The New York Times https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html <accessed on 22 October 2023>

4 Shaun Walker, 'Hungary to consider bill that would allow Orbán to rule by decree' March 23, 2020 The Guardian https://www.theguardian.com/world/2020/mar/23/hungary-to-consider-bill-that-would-allow-orban-to-rule-by-decree <accessed on 25 March 2020>

5 David Welna, 'Self-Isolation Orders Pit Civil Liberties Against Public Good In Coronavirus Pandemic' March 17, 2020 n.p.r. https://www.npr.org/2020/03/17/817178765/self-isolation-orders-pit-civil-liberties-against-public-good-in-coronavirus-pan <accessed on 20 March 2020>

have cautioned citizens against the spread of false information[1] about the Coronavirus that would violate the First Amendment. However, some people in California have challenged the authorities in San Jose for forcing a gun shop to shut down, asserting their right to arm themselves.

Therefore, the US Department of Justice "has unobtrusively asked the US Congress for the power to ask the chief judge to detain[2] people indefinitely without trial during emergencies." Nevertheless, ordinary Americans have supported civil liberties' curtailment for halting the spread of Coronavirus. In India, I found a unique story of Coronavirus spread that was beyond the ordinary human imagination circulating in print and electronic media outlets. There is a religious place called *Tablighi Jamat Markaz* (Outreach Society Centre) in southern Delhi, India, where a gathering of more than two thousand delegates was found violating the national lockdown in force.

The advocacy for civil rights amid a global health emergency might appear out of context. Lord Atkin rightly stated in his dissent[3] in *Liversidge v. Anderson* that "amidst the clash of arms, the laws are not silent." The dictum conveys that laws are equally applicable to public health emergencies as they are in times of war. Carl Schmitt observed in his *Political Theology* that "Sovereign is he who decides on the state of exception" while advocating the imposition of the state of emergency or resorting to exceptional measures during abnormal times. Such emergency measures do not make the sovereign or ruler legally despotic or uncontrolled. Therefore, during crises or pandemics, governments arrogate to themselves unfettered powers. But such unbridled power and authority cannot be exercised without submitting to the rule of law and judicial scrutiny framework. This is becoming mandatory because such sweeping powers tend to entrench themselves into the legal terrain even after exceptional times.

1. State Regulations: Constitutional Legitimacy and Implementation Challenges

In this section we will look at some of the important challenges that Indian Muslims faced during the pandemic.

1.1. Physical Distancing Measures

In India, the expression "physical distancing" is deemed inappropriate due to the hierarchical caste system[4] that breeds social divisions and untouchability[5] in violation of the Constitution of India. Therefore, I prefer Physical Distancing Measures (PDMs) with a spirit of social solidarity. The Government of India has adopted several PDMs, such as the nationwide *Janata* Curfew, curfews, lockdowns, quarantine, home quarantine, home-staying, and other measures by invoking the specific provisions of the law of the land. Binding curfews[6] should be regarded as necessary

1 Justine Coleman, 'Newark warns of criminal prosecution for false reporting of coronavirus' November 03, 2020 The Hill https://thehill.com/policy/healthcare/public-global-health/487006-newark-nj-warns-of-criminal-prosecution-for-false <accessed on 20 January 2020>

2 Betsy Woodruff Swan, 'DOJ seeks new emergency powers amid coronavirus pandemic' March 21, 2020 POLITICO https://www.politico.com/news/2020/03/21/doj-coronavirus-emergency-powers-140023 <accessed on 25 March 2020>

3 *Liversidge v. Anderson* [1942] AC 206

4 Manali S. Deshpande, 'History of the Indian Caste System and its Impact on India Today' (2010) College of Liberal Arts, California Polythechnic State University, San Luis Obispo 10-25

5 Article 17, the Constitution of India, 1950.

6 UN Doc. E/C.12/2000/4), Committee on Economic, Social and Cultural Rights, General Comment No. 14 [hereinafter GC

and proportionate if imposed gradually along with governmental calls for voluntary isolation[1] and home quarantine, ultimately leading to lockdowns. The least restrictive alternative should be applied where several limitations are present. Furthermore, the citizens should be allowed under the law to be invoked by the citizens to contest the restrictions. For example, there might be a possibility that individuals who have tested negative for COVID-19 and yet are subject to limitations may be willing to challenge the limits on their freedom of movement before a court of law.[2] Similarly, the scope of the right to leave a country should be subjected to international travel bans. However, exceptional travel restrictions are not forbidden, and the individuals' right to enter a country is protected under the International Convention on Civil and Political Rights (ICCPR).

These PDMs are consistent with the principles of Islam, but, unfortunately, some Indian Muslims have neglected to adhere to the Islamic traditions and preventive measures during the pandemic due to their misinterpretations of the Prophetic traditions. On physical distancing, Prophet Muhammad (PBUH) advocated for the separation of individuals with contagious diseases from the healthy people.[3] However, some Indian Muslims did notadhereto this command and broughtthe Islamic traditions into disrepute and controversy. Regarding situations like the COVID-19pandemic, the Prophet (PBUH) stated, "*Do not cause harm or return harm.*" Still, some Muslims have caused harm to others by avoiding, hiding from, and quarrelling with medical personnel and law enforcement agencies. Muslims associated with *Tablighi Jamat* have significantly contributed to the spread of Coronavirus.

On March 22, 2020, the Prime Minister of India proposed a nationwide Janata (general public) Curfew[4] and propagated it as "*a curfew of Janata for Janata and by the Janata,*" which was willingly complied with by the people of India. However, implementing PDMs cannot be limited to a few countries; specific and stringent PDMsare required for stopping the COVID-19 spread worldwide. In the case of pandemics, a globally uniform and well-organised action should be executed to prevent the complete devastation of human existence. Unfortunately, countries like the US and Brazil were not serious about the lockdowns initially. Former US President Trump was reluctant[5] in addressing the pandemic, emphasizing the reopening of the US economy. Moreover, he defended his tweets and sided with the with the public opposition to lockdown.[6] President Bolsonaro[7] of Brazil had similarly downplayed the efficacy of the lockdown.

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1 Thomas Hayes, 'Law in the Time of Covid' The Guardian, March 16, 2020 https://ukhumanrightsblog.com/2020/03/16/law-in-the-time-of-covid/ <accessed on 18 March 2020>

2 Jen Patja Howell, 'The Lawfare Podcast Bonus Edition: Steve Vladeck on Emergency Powers and Coronavirus' Lawfare March 19, 2020 https://www.lawfareblog.com/lawfare-podcast-bonus-edition-steve-vladeck-emergency-powers-and-coronavirus <accessed on 20 March 2020>

3 Bukhari (6771) and Muslim (2221)

4 The Government of India, Ministry of Home Affairs has directed the National Disaster Management Authority (NDMA) to issue an Order under Section 6 (2) (i) of the Disaster Management Act, 2005 and NDMA has accordingly issued the Order No. 1-29/2020-PP (Pt.II) dated 24.03.2020 directing the Ministries/Departments of the Government of India, State/Union Territory Governments and State/Union Territory Authorities to take effective measures to combat the spread of COVID-19 in India. https://ndma.gov.in/images/covid/MHAorder240320.pdf <accessed on 02 April 2020>

5 Eric Lipton, David E. Sanger, Maggie Haberman, Michael D. Shear, Mark Mazzetti and Julian E. Barnes, 'He Could Have Seen What Was Coming: Behind Trump's Failure on the Virus' April 11, 2020 and Updated April 21, 2020 The New York Times https://www.nytimes.com/2020/04/11/us/politics/coronavirus-trump-response.html <accessed on 22 April 2020>

6 Cas Mudde, 'The 'anti-lockdown' protests are about more than just quarantines' April 21, 2020 The Guardian https://www.theguardian.com/us-news/commentisfree/2020/apr/21/anti-lockdown-protests-trump-right-wing<accessed on 22 April 2020>

7 Simon Tisdall, 'From Trump to Erdoğan, men who behave badly make the worst leaders in a pandemic' April 26, 2020 The Guardian https://www.theguardian.com/commentisfree/2020/apr/26/trump-to-erdogan-men-who-behave-badly-make-worst-

1.2. Lockdown, Travel Ban, Staying-Home, Face-Masking, Hand-Washing

There were two fundamental goals of lockdown: to break the chain of COVID-19 transmission and to improve health infrastructure quality. These goals ensured the accessibility and availability of healthcare services for vulnerable people, including testing for COVID-19, tracking individuals with symptoms, and tracing the potential cases for treatment. Unfortunately, the Government of India has failed to conduct mass testing for the current epidemic. At the same time, some Muslims have not cooperated with the government in following its directions, despite the assenting of the Muslim intelligentsia[1] for adherence in this regard. There is a Prophetic teaching on Travel Ban, which states, "*Do not enter a land where the plague (a contagious ailment) has broken out; don't leave from where it has broken out.*"[2] Similarly, Another Prophetic instruction on Staying-Home states that, "*those who remain at home to safeguard themselves and others are under the protection of Almighty Allah.*"[3] Regrettably, some Muslims have not followed these Prophetic commands, and were driven by the politico-religious influences within the Muslim community.

Furthermore, the Prophet (PBUH) commanded that, if required, "*the entire Earth has been made a Masjid (place of worship), except graveyards and washrooms,*"[4] therefore, Muslims' insistence on offering prayers only in mosques during the pandemic was a misconception and a violation of Prophetic *Hadith* (tradition). But there is a cure, and patience is the virtue; as the Prophet (PBUH) says, "*There is no disease that Allah sent without sending for it a cure.*"[5] Still, many local Muslims have exhibited reckless behavior throughout India. Face-masking is also emphasized by the Prophetic advising that, "*while sneezing, one should cover his face with his hand or a garment,*"[6] and he further states that "*cleanliness is half of the faith.*"[7] However, some Muslims do not practice cleanliness as recommended in Islam.

In India, the first phase of the 21-day nationwide lockdown from March 24, 2020, to April 14, 2020, and the second phase of the 19-day pan-India lockdown from April 15, 2020, to May 03, 2020, have adversely affected several fundamental freedoms and rights. Freedom of religion, freedom of trade and commerce, and freedom of movement were significantly curtailed. However, it is difficult to determine the exact ambit of the lockdown due to its multifaceted legal complications. The government of India invoked Section 10 of the National Disaster Management Act, 2005 (NDMA), which empowers it to issue guidelines and directions to state (provincial) governments in disasters and calamities.[8] Subsequently, the NDMA also issued supplementary policies to address the unfolding pandemic scenarios in various parts of India. These lockdown guidelines or PDMs required the closure of government offices, public trans-

leaders-pandemic-covid-19 <accessed 16 April 2020>

1 Sanya Dhingra, Muslim IAS-IPS officers' Covid-19 appeal to community: Don't give anyone reason to blame you' April05, 2020 The Print https://theprint.in/india/muslim-ias-ips-officers-covid-19-appeal-to-community-dont-give-anyone-reason-to-blame-you/395665/ <accessed on April 08, 2020>

2 Bukhaari (5939) and Muslim (2340)

3 Ibid.

4 Tirmidhi (al-Salaah, 291)

5 Bukhari Vol. 7 Book 71 No. 582

6 Abu Dawud, Tirmidhi Book 43 Hadith 2969, Muslim Sahih

7 Muslim Sahih (223)

8 Bharat Vasani and Samiksha Pednekar, 'Is The Central Government Coronavirus Lockdown Order Constitutionally Valid?March 31, 2020 Bloomberg Quint Opinion https://www.bloombergquint.com/coronavirus-outbreak/is-the-central-government-coronavirus-lockdown-order-constitutionally-valid <accessed on 05 April 2020>

portation services, industrial installations, educational institutions, schools, hospitality services, corporate houses, commercial establishments, and suspension of scheduled events and large gatherings of people including religious congregations.

The NDMA guidelines do not explicitly include "curfew." Nevertheless, they prohibit individual "freedom of movement" to curb socio-political, cultural, educational, and sports activities, as well as the entertainment industry, gatherings at socio-cultural functions, and the perfors mance of collective religious duties and obligations. However, the NDMA does not define the terms "functions" or "gatherings" in its execution framework. Guideline 14 requires that "Incident Commanders" issue passes to facilitate essential movements. In contrast, Guideline 15 underscores these restrictions "relating to the movement of people" in exceptional circumstances. Nevertheless, the impact of these guidelines on the movement of individuals is incidental to the implementation of PDMs, but they do not restrict, prohibit, or control individual mobility.

On the other hand, some state (province) governments in India resorted to the colonial legislation called the Epidemic Diseases Act (EDA), 1897, which grants excessive powers and extensive discretionary choices to the states for preventing and combating the outbreak or spread of the COVID-19 pandemic. For example, the state government of *Maharashtra* passed regulations[1] on March 13, 2020, that provided the quarantine and isolation of individuals having an international travel history, the closure and sealing of particular areas where cases or spread of Coronavirus have been reported, and the prohibition of large gatherings, etc. These regulations overlap more narrowly with the legal mandate available to individual Executive Magistrates and Police Commissioners under Section 144 of the Criminal Procedure Code (CrPC).[2] However, the orders passed under this provision cannot be accessed due to their non-availability in the public domain. Therefore, collecting the actual scope and nature of the restrictions applied in different parts of India becomes difficult. But it is evident under the law that there was no "nationwide curfew." Moreover, I find the NDMA Guidelines ambiguous as they do not give any description of a curfew. In the State of Maharashtra case, even EDA provisions restricted gatherings only and did not curb individual mobility.

Nevertheless, I believe a curtailment of individual movements would be disproportionate if a pan-India curfew is imposed. It should be remembered that COVID-19 spreads through direct contact, immediate proximity, or close interaction. Therefore,Public Health Guidelines (PHG) on Coronavirus require physical distancing with social solidarity,[3] maintaining a minimum of two metres between individuals in general and self-isolation and quarantine for individue als with COVID-19 symptoms. On the contrary, the COVID-19 curtailment orders in Global North jurisdictions are more specific. for example, the government of the UK has issued "New Rules[4] on staying at home and away from others" which restricts an assembly of more than two

1 Government of Maharashtra, Public Health Department invoked the provisions of the Epidemic Diseases Act, 1897and issued vide Notification No. Corona 2020/CR-58/Aarogya-5 dated 13th March 2020 https://www.maharashtra.gov.in/Site/Upload/Acts%20Rules/Marathi/Korona%20Notification%2014%20March%202020....pdf <accessed on 28 March 2020>

2 The Section144 of the Criminal Procedure Code, 1973 (CrPC) empowers the Executive Magistrate of any state (province) or territory to issue an order to prohibit the assembly of four or more people in an area and as per the law, every member of such 'unlawful assembly' can be booked for engaging in rioting.

3 Eric Klinenberg, 'We Need Social Solidarity, Not Just Social Distancing' April 14, 2020 The New York Times https://www.nytimes.com/2020/03/14/opinion/coronavirus-social-distancing.html <accessed on 15 April 2020>

4 UK Guidance on Staying at home and away from others (physical distancing), March 23, 2020https://assets.publishing.

persons outside the home., these new rules allow limited individual movement exclusively to buy essential items. The absence of specific, uniform and clear directions under India law has caused a lot of hardships to the people. For example, at the enforcement stage, police officers have physically assaulted individuals found in public places. In the case of governmental decisions made under the NDMA and EDA legislations, particular and corroborative scientific evidence is not necessary.

When fundamental rights are violated, many proportionality standards become the accomplishment of PDMs as an indispensable state objective that includes combating the pandemics. Therefore, the proportionality standard requires a compatible connection between governmental PDMs and the goals of fighting the pandemic. Thus, it is evident that such a relationship should rely on credible scientific evidence. Unfortunately, there is a flaw in both theNDMA and EDA legislations, as their implementation necessitates the scope of "public disclosure ree quirements" in the laws, which would grant the government extensive powers during times of unprecedented public health emergencies. Incorporating such legally balancing provisions in the existing laws is imperative to ensure the implementation of proportionality standards and achieve the desired results.

1.3. The Quarantine

The word "Quarantine"[1] has its origin in Islamic teachings. There is a Prophetic guidance that states, "*Run away from the leper (the one with contagious ailment) as would you run away from a lion*."[2] The principle is consistent with state PDMs implemented in India. In the case of home Quarantine, the Prophet (PBUH) guided that "*the plague (contagion) patient who stays in his home with patience and anticipation of reward, understanding that nothing will happen to him other than Allah's command will attain the reward of a martyr.*"[3] The truthfulness of a religion depends on the prosperity it can yield for its followers. Thus, the state regulations under the EDA require mandatory quarantining of individuals with travel histories and people with COVID-19 symptoms. However, there have been reports of individuals breaching quarantine protocols in many quarantine facilities even though state governments have applied innovative techniques[4] in implementing the quarantine and other PDMs. One of the methods could be marking the body of a quarantined person with an ink stamp that can be erased after the termination of the forty-day quarantine period. Even the State of Karnataka government has gone one step further by publishing[5] the details of COVID-19-affected individuals like their localities, house numbers, PIN codes,

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service.gov.uk/government/uploads/system/uploads/attachment_data/file/876279/Full_guidance_on_staying_at_home_and_away_from_others__1_.pdf <accessed on 25 March 2020>

1 Rasia Hashmi, 'Muslim scholar Ibn Sina first came up with idea of quarantine' April 06, 2020, The Siasat Daily https://www.siasat.com/muslim-scholar-ibn-sina-first-came-idea-quarantine-1870313/ <accessed on 07 April 2020 > Ibn Sina was a Persian polymath who is regarded as one of the most significant physicians, astronomers, thinkers and writers of the Islamic Golden Age, and the father of early modern medicine.

2 Bhkhari Vol. 7 Book 71 No.608

3 Musnad Ahmad, Muslim Sahih(1914) & Bukhari (2829)

4 *See:* COVID-19 State-wise Status of Information availablehttps://www.mohfw.gov.in/ <accessed on 31 March 2020>

5 Naveen Menezes and Bellie Thomas, 'Government publishes details of 19,240 home-quarantined people to keep a check' March 25, 2020 Banglore Mirror https://bangaloremirror.indiatimes.com/bangalore/others/government-publishes-details-of-19240-home-quarantined-people-to-keep-a-check/articleshow/74807807.cms <accessed on 28 March 2020>

and recent travel records. Such measures kept a check on individuals who have been quarantined irrespective of their COVID-19 status after testing.

But there are some pertinent questions: *how do we meet the proportionality test regarding the non-stigmatic nature of ink-stamping? Is the government right to publish individuals' personal and private information and shift its burden of quarantine implementation? Will the good-faith argument of the government absolve it from its well-entrenched constitutional responsibility for protecting the right to privacy in India? Can execution or enforcement of quarantine be a lawful justification for undermining and infringing privacy and food rights (results of the right to life)? Are there less restrictive alternatives for enforcing quarantine?* In other words, the government cannot argue its inability to implement the PDMs, including the enforcement of quarantine and other forms of restrictions. Therefore, It is imperative to balance between curtailing human rights and containing pandemic spread. This delicate balance could only be achieved through a two-fold strategy: *firstly*, by sensitising the state officials and law enforcement agencies about the constitutional obligations on human rights, and *secondly,* by reminding citizens and non-citizens alike about their constitutional and legal duties towards the country or host State during exceptional health crises.

1.4. The Role of Law Enforcement Agencies

During national health emergencies or global pandemic crises, the role and responsibility of different segments of law enforcement agencies become more visible as they exhibit their professionalism on the ground. During the pandemic, these agencies have been handling multiple state services, operationalising the state apparatus, performing their duties, and leading health crises. Police officers have also utilised scientific gadgets like Drones and Artificial Intelligence[1] (AI) technology to enforce PDMs. However, some disturbing instances of police brutality have sent a draconian message about the enfocements during the COVID-19 crisis. police officers have resorted to excessive violence in enforcing PDMs, such as forced closure of meat shops and other essential grocery stores, contrary to the permitted relaxations under the PDMs.

Similarly, the closure of courts has effectively undermined and suspended the fundamental rights of both citizens and non-citizens. However, the Supreme Court of India and other High Courts have been formally working on urgent cases. But unfortunately, we do not have any plausible understanding of the urgent cases. For example, the Chief Justice of the Constitutional Court of South Africa[2] has directed that "subordinate courts would remain open for urgent matters that included bail applications, matrimonial maintenance cases, domestic violence, and matters involving children." These instances suggest a sufficient understanding of urgent matters. However, the mention of domestic violence is essential as one of the corollaries of national lockdown is that individuals enduring abusive and violent relationships are confined within

1 Tanweer Azam, 'Coronavirus COVID-19: Mumbai Police to use drones and AI technology to enforce physical distancing' April 14, 2020 https://zeenews.india.com/india/coronavirus-covid-19-mumbai-police-to-use-drones-and-ai-technology-to-enforce-social-distancing-2276310.html?utm_campaign=fullarticle&utm_medium=referral&utm_source=inshorts <accessed on 14 April 2020>

2 Nathi Mncube, 'Media Statement Courts To Be Operational To A Limited Extent During The Lockdown Period From 27 March To 16 April 2020' Issued by the Office of the Chief Justice, March 25, 2020 https://www.judiciary.org.za/images/news/2020/Media_Statement_-_Courts_to_be_Operational_to_a_Limited_Extent_During_the_Lockdown_Period_From_27_March_to_16_April_2020.pdf <accessed on 30 March 2020>

their homes. In other words, courts should remain open for individuals to exercise their right to access justice. Courts should also be available for hearing cases arising from police enforcement of PDMs, consequences of the lockdown itself, and complex domestic violence cases during the pandemic.

2. Harmonising the Human Rights and International Law: Derogations, Restrictions, and Justifications

The colossal impacts of COVID-19 have underscored the importance of cooperation[1] and commitment among nations to combat the virus and confront its socioeconomic effects. On April 02, 2020, adopting a unanimous resolution, the United Nations General Assembly (UNGA) called for 'intensified international cooperation to contain, mitigate and defeat the pandemic.'[2] Earlier, G20 countries[3] had warranted to cooperate fully to 'deploy a robust, coherent, coordinated, and rapid financial package' in supporting the imperilled communities bracing the 'health, economic, and social shocks of COVID-19'. Since the beginning of human civilization, armed conflicts and natural calamities have endangered human lives and rights; the current crisis of COVID-19 is a notable example. In peacetime, restricting several fundamental freedoms or non-absolute human rights are applicable and subject to judicial review after the pandemic. All restrictions should pass the proportionality test by conforming to the core human rights principles (CPHR) like equality, non-discrimination, and Discrimination Against Religious Distinction (DARD).On the other hand, derogations of human rights are exceptional measures permissible under Article 4 (1) of ICCPR.[4] Human rights can be temporarily suspended or limited[5] in addressing a public health emergency. Several other international human rights law (IHRL) instruments are relevant to the limitations and derogations of human rights or fundamental freedoms under the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[6]

2.1. Derogations and Limitations

Several components of the IHRL Framework, such as the ICCPR, were drafted post-World War II, recognising the exceptional circumstances that potentially intervene the state's compliance with IHRL obligations and commitments. Several human freedoms and rights, such as the right to life,

1 WHO Director-General's opening remarks at the media briefing on COVID-19, March 11, 2020 https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 <accessed on 15 March 2020>

2 Strengthening of the United Nations System Resolution adopted by the General Assembly on 2 April 2020 [without reference to a Main Committee (A/74/L.52 and A/74/L.52/Add.1)] 74/270. Global solidarity to fight the coronavirus disease 2019 (COVID-19) https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4F-F96FF9%7D/A_RES_74_270.pdf <accessed on 12 April 2020>

3 G20 Leaders' Statement Extraordinary G20 Leaders' Summit Statement on COVID-19, March 26, 2020 https://de.ambafrance.org/COVID-19-G20-Leaders-Statement <accessed on 28 March 2020>

4 International Covenant on Civil and Political Rights, 1966, General Comment No. 29 States of Emergency (Article 4) GE.01-44470 (E) 190901 GENERAL COMMENT ON ARTICLE 4 (adopted at the 1950th Meeting, on 24 July 2001) Distr. GENERAL CCPR/C/21/Rev.1/Add.11 31 August 2001 http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6Qk-G1d%2fPPRiCAqhKb7yhsjYoiCfMKoIRv2FVaVzRkMjTnjRO%2bfud3cPVrcM9YR0iix49nlFOsUPO4oTG7R%2fo7TS-sorhtwUUG%2by2PtslYr5BldM8DN9shT8B8NpbsC%2b7bODxKR6zdESeXKjiLnNU%2bgQ%3d%3d

5 UN Doc. A/56/40, Vol. I, 202 (2001), General Comment 29 [hereinafter GC 29], it signifies that in practice no human rights article can be entirely inapplicable to a state party.

6 International Covenant on Economic, Social and Cultural Rights (ICESCR) Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966 entry into force 3 January 1976, in accordance with article 27 https://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf

the right to freedom from torture and other cruel, inhuman, or degrading treatment or punishment, the right to be free from slavery and servitude, the right to be free from the imprisonment for inability to fulfil a contractual obligation, the right to be free from the retrospective application of criminal laws, and the right to recognition before the law are non-derogable and enjoy absolute legal protection under Article 4 (2) of the ICCPR. However, other rights can be derogated under Article 4 as some human rights-specific provisions in the ICCPR include limitation clauses. Still, these provisions do not address the state of emergency. Nevertheless, there is debate[1] among scholars regarding the review standards applicable to derogation. Nonetheless, there are comprehensive legal means[2] and an interface between public emergency powers[3] and international law in the IHRL approaches to public emergencies.

Several countries[4] have resorted to derogations from the human rights treaties, specifically in the current pandemic. Guatemala, Under the PDMs implementation, has registered derogation of Article 12 on the restriction of freedom of movement and the right to peaceful gathering provided in Article 21 of the ICCPR. Armenia has temporarily disregarded Articles 12, 21 and 9 on the right to liberty. Ecuador has derogated Articles 12 (1) and (3), 21, and 22 (1) and (2). Estonia neglected Articles 9, 12, 14, 17, and 21. Latvia has derogated Articles 12 and 17 on the right to private and family life. Peru has suspended Articles 9, 12, 17, and 21. Romania has denied Articles 12, 17, and 21. the most radical PDMs have been taken by France, Italy, and Spain among the States Parties to the ICCPR. However, these countries have not formally registered any derogations from the ICCPR. However, beyond the ICCPR framework, critical measures[5] adopted in China could be a guiding torch for a country that has not joined the ICCPR. The list will likely continue to expand as more other derogations might be formally notified.

2.1.1. Broad Legal Standards and IHRL Framework Tests

The principal human rights treaties do not explicitly authorise UN Human Rights Treaty Bodies[6] (HRTBs) to establish implementation rules on derogation standards. However, Article 40(4) of the ICCPR empowers the UN Human Rights Committee (HRC) to provide General Comments on the human rights practices of different nation-states during pandemics. The HRTBs have been unwilling to provide a comprehensive roadmap on reasonable restrictions on freedom of movement during the COVID-19 pandemic. While PDMs such as home quarantine amount to deprivation

1 Nickel, J., 'Two Models of Normative Frameworks for Human Rights During Emergencies' In E. Criddle (Ed.), Human Rights in Emergencies (ASIL Studies in International Legal Theory, pp. 56-80). Cambridge: 2016 Cambridge University Press. doi:10.1017/CBO9781316336205.004

2 Scott P. Sheeran, 'Reconceptualizing States of Emergency under International Human Rights Law: Theory, Legal Doctrine, and Politics, (2013) 34 MICH. J. INT'L L. 491 Available at: https://repository.law.umich.edu/mjil/vol34/iss3/1

3 *See* Robert Norris & Paula Desio Reiton, The Suspension of Guarantees, (1980) 30 AM. U. L. REV. 189; Brendan Mangan, Protecting Human Rights in National Emergencies: Shortcomings in the European System and a Proposal for Reform, (1988) 10 HUM. RTS. Q. 372; Colin Warbrick, The Principles of the European Convention on Human Rights and the Response of States to Terrorism, (2002) 7 EUR. HUM. RTS. L. REV. 287

4 Martin Scheinin, 'COVID-19 Symposium: To Derogate or Not to Derogate? April 06, 2020 Opinio Juris https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/ <accessed on 10 April 2020>

5 Peter Hessler, 'Life on Lockdown in China: Forty-five days of avoiding the coronavirus' The New Yorker March 30, 2020 Issue https://www.newyorker.com/magazine/2020/03/30/life-on-lockdown-in-china <accessed on 06 April 2020>

6 Nafees Ahmad, 'UN Human Rights Treaty Bodies Reforms: From Shuffling the Cards to Performing Global Constitutionalism' October 02, 2017 Modern Diplomacy https://moderndiplomacy.eu/2017/10/02/un-human-rights-treaty-bodies-reforms-from-shuffling-the-cards-to-performing-global-constitutionalism/ <accessed on 20 April 2020>

of personal liberty as it is not the provision of ICCPR, restrictions[1] on individual freedom should be the last resort. Further, detention on the grounds of combatting and limiting the spread of contagion might be proportionate[2] if imposed on individuals posing a danger to the general public.

Consequently, the imposition of a public health emergency has been justified under the *Siracusa* Principles[3] if a health crisis affects the entire population or some parts of a state's territory, thereby threatening the political independence and material integrity of a nation-states. Therefore, Article 4(1) of ICCPR advocates a multi-layered investigation to determine the legitimacy of nation-states' derogations from human rights commitments. Such an investigation should be based on some significant elements such as i) the formal proclamation of *imposition of emergency* by the state; ii) the *necessity* of derogation measures; iii) the test of *proportionality*; iv) *compliance with other IHRL obligations* and commitments, and v) the formal notification of the state about the imposition of such measures to the international community.

2.1.2. State and Public Health Measures

Therefore, broad legal standards on derogations and the principles embedded in the IHRL framework to test the legitimacy of the imposition of restrictive measures during epidemics should be examined based on the State and its authority to impose public health emergencies to curtail rights. The situation must mount to a public health emergency[4] that endangers the life of the nation-state, and the State Party must have formally declared a state of emergency.[5] Ensuring that nation-states conform to the norms of national constitutional law or other legal standards on such state declarations or proclamations is crucial to the rule of law. However, there is a lack of homogeneity in the rules and definitions in this regard under the IHRL Framework,[6] and national thresholds for proclaiming a federal state of emergency are of varying degrees. National institutions must exercise judgment in determining whether a crisis meets the requirements of a robust national health emergency and is not limited to a public health emergency. However, in the ordinary sense, states often rely upon the definitions provided by comparative domestic jurisprudence[7] and IHRL Framework understandings.

The ICCPR does not suggest that the concerned state authority be inclined toward an emergency proclamation; instead, they must determine the decision under their national laws. The HRC only examines the role of domestic authorities empowered to implement a state of emergency. Thus, it is a well-established practice that the proclamation of a national emergency is a governmental response to an exceptional situation endangering the country. The federal state

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1 Siracusa Principles,Paragraph 11 that provides for the least restrictive means clause.

2 *Enhorn v. Sweden*, App. No. 56529/00 (Jan. 25, 2005).

3 Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights Annex, UN Doc E/CN.4/1984/4 (1984)

4 Diego S. Silva, Maxwell J. Smith, 'Commentary: Limiting Rights and Freedoms in the Context of Ebola and Other Public Health Emergencies: How the Principle of Reciprocity Can Enrich the Application of the Siracusa Principles' June 11, 2015 Health and Human Rights Journal Vol. 17 No.1 https://www.hhrjournal.org/2015/06/commentary-limiting-rights-and-freedoms-in-the-context-of-ebola-and-other-public-health-emergencies-how-the-principle-of-reciprocity-can-enrich-the-application-of-the-siracusa-principles/ <accessed on 18 April 2020>

5 UN Doc. A/56/40, Vol. I, 202 (2001), General Comment 29

6 Siracusa Principle 30 states that 'National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.'

7 *Ireland v. The United Kingdom*, 5310/71, Council of Europe: European Court of Human Rights, 13 December 1977, https://www.refworld.org/cases,ECHR,3ae6b7004.html <accessed on 20 April 2020>

of emergency empowers the governments to implement unprecedented measures and policies to make their citizens aware, asking them to re-adjust their lifestyles and fund sources to deal with the emergency.

2.1.3. State and the Principle of Necessity

The principle of necessity constitutes the foundation for derogation measures which are applied in crises and rigorously assessed in the wake of armed conflicts. Further, the state of emergency empowers the government to impose exceptional policies and conditions. But it is equally crucial to understand that the total or partial derogations from human rights guarantees must specify limitations regarding time, regional application, and physical scope.[1]

2.1.4. The State and the Principle of Proportionality

The extraordinary character of the derogation mechanism that facilitates coordination between human rights and public safety results in a confluence of human rights values. These values have been enshrined in the Universal Declaration of Human Rights (UDHR),[2] IHRL instruments, customary international law (CIL) safety valves, and other national human rights laws and jurisprudence. These human rights values must be balanced and measured against other viable alternatives capable of accomplishing the derogation targets. Therefore, the principle of proportionality requires practical justifications for any measures based on the proclamation of emergency while ensuring that the enforced standards respect the principle of non-discrimination, specifically in the exceptional circumstances of a pandemic. UN Secretary-General has warned[3] against repressive measures amid the COVID-19 crisis: "Against the background of rising ethnonationalism, populism, authoritarianism, and pushback against human rights in some countries, the crisis can provide a pretext to adopt repressive measures for purposes unrelated to the pandemic" to national governments worldwide.

2.1.5. The State and Other IHRL Obligations

All States must observe and comply with additional human rights obligations under international law, UDHR, CIL, and other general legal principles. States Parties to IHRL treaties confront additional responsibilities due to PDMs if allowed under the ICCPR. However, this might circumvent the American Convention on Human Rights[4] (ACHR) and the European Convention on Human Rights[5] (ECHR), as these regional conventions contain wide-ranging arrangements of non-derogable human rights. Therefore, if a State Party resorts to derogation measures, it must immediately inform other States Parties through the UN Secretary-General regarding the time frame, scope, and geographical coverage backed by derogation justifications. The substantive right to execute derogation measures is not subjected to a formal notification to the State Parties.

1 UN Doc. A/56/40, Vol. I, 202 (2001), General Comment 29

2 Universal Declaration of Human Rights (UDHR), December 10, 1948, https://www.un.org/en/universal-declaration-human-rights/ <accessed on 24 March 2020>

3 Reuters, 'UN chief warns against repressive measures amid coronavirus crisis' New York, April 23, 2020 https://indianexpress.com/article/world/un-chief-warns-against-repressive-measures-amid-coronavirus-crisis-6375280/ <accessed on 23 April 2020>

4 Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969 https://www.refworld.org/docid/3ae6b36510.html <accessed on 18 April 2020>

5 Greer, S., 'The European Convention on Human Rights: Achievements, Problems and Prospects (Cambridge Studies in European Law and Policy). Cambridge: 2006 Cambridge University Press. doi:10.1017/CBO9780511494963

In the case of *Jorge Landinelli Silva et al. v. Uruguay*[1], it was observed that the State must, at a minimum, signify the necessity and provide a comprehensive account of the relevant facts that appropriately justify the derogation measures.

The ICESCR limits the scope of restrictions sanctioned by law and is consistent with the nature of these rights. However, it does not exclude the derogations from its category of rights. This limitation clause is tighter in scope than other IHRL instruments while legitimising the measures taken to foster the general welfare in a democratic society. Each State Party must strategically coordinate its efforts with the available resources of the state so that it can progressively achieve the full enjoyment of rights as per Article 2 of the ICESCR. Therefore, there is no need for certain derogation provisions in the ICESCR. However, multiple perceptions support the controversy that social, economic, and cultural rights are boundless. Consequently, human rights obligations must be proportionate to subsistence rights[2] such as the right to food, housing, energy, and clean water which intrinsically constitute the non-derogable right to life in all generations of human rights.

2.1.6. The State and Political Rights

During health emergencies, various rights are affected, such as liberty, health, and freedom of movement. For example, the political rights protected under Article 25 of the ICCPR might be affected in a state of emergency in an election year. The right to education under Article 13 of the ICESCR might be restricted when schools are closed as a part of PDM implementation.[3] Article 9 of the ICCPR states that the right to liberty can be limited and controlled based on sound legal endorsement regardless of a national state of emergency declaration. Within the territory of a nation, the freedom of movement under certain limitations and the right to leave the country under Article 12(3) of the ICCPR is somewhat diverse. The restrictive state measures on the freedom of movement are limited to protecting state security, public law, order and morality, public health, and the human rights and fundamental freedoms of others, particularly during the COVID-19 pandemic. Social values cannot be measured with a mathematical application. For example, mass COVID-19 testing capabilities would strengthen the States to focus on at-risk people instead of putting the whole population under indiscriminately restrictive and suppressive PDMs. Furthermore, the political executive's misuse of ultra-vires powers is detrimental to accountability during the COVID-19 pandemic, as the state exceeds its authority to dangerous levels. Thus, the state must balance PDMs with the right to health.

2.1.7. The State and the Right to Health under ICCPR & ICESCR

Article 12 of the ICESCR stipulates the right to health and includes state's obligations in controlling the spread of infectious diseases, including wide-ranging PDMs[4] for public security. The right to health includes access to healthcare infrastructure, health services, medical equipments, diagnosis, treatment, prevention, and control of the pandemic and other forms of infectious diseases.[5] Therefore, States must take PDMs beyond the public health emergency context. For exam-

1 UN Doc. CCPR/C/OP/1, HRC Communication No.34/1978: Jorge Landinelli Silva et al. v. Uruguay
2 Amrei Müller, 'Limitations to and Derogations from Economic, Social and Cultural Rights' (2009) 9 H.R.L. Rev. 599
3 In US and elsewhere, educational institutions have been closed as part of Physical Distancing Measures (PDMs).
4 GC 14
5 Article 12(2)(c), ICSECR, 1966

ple, States must develop academic curricula on pandemic prevention and education programmes, make well-integrated healthcare and medical technologies available, and enhance epidemiological surveillance and strategies for controlling and managing contagious diseases. The right to health also consists of the right to treatment, which comprises creating healthcare and medical infrastructures for pandemics, trauma cases, and other health hazards.

Therefore, the interconnectedness of human rights and their complementary nature emphasises the determinants of the right to health, such as food, housing, drinking water, energy, and climate safety., these determinants are indispensable and obligatory components in preserving and fostering the right to health during pandemics.Under the ICCPR, there are no specific guarantees on the right to health. however, the right to liberty and security has been recognised under Article 9 of the ICCPR which requires that hospitalisation be proportionate and mandatory if PDMs are enforced. Furthermore, the ICCPR and ICESCR grant and protect access to healthcare education[1] as inalienable parts of the right to access information. It is also an essential part of the right to health[2] under the ICESCR. The right to health also requires effective protocols for identifying and assisting the marginalised and vulnerable individuals needing additional care before their home quarantining, like individuals with disabilities, abandoned and underprivileged children, and patients under dialysis.

2.1.8. The State and the Right to Equality and the Freedom of Religion

The full enjoyment of human rights remains a mirage if the right to equality, the right to non-discrimination, and the freedom of religion are not considered the inherent parts of the right to health. However, the right to equality, non-discrimination, and freedom of thinking are not merely rights., they transcend the legal understanding of the rights and engraft them as core principles of the IHRL framework. These principles are enshrined in both the ICCPR and ICESCR. During a state of emergency, adopting PDMs under Article 4(1) of the ICCPR lays down distinctions among individuals based on colour, race, religion, sex, language, or social origin considering the principles of necessity and proportionality. Meanwhile, the ICESCR does not provide corresponding flexibility and requires the States to ensure that the rights under Article 2 of the ICESCR "will be exercised contrary to discrimination of any type based on race, religion, colour, sex, language, membership of national or social origin, political or other opinions, property, birth or another status." However, this might apply in the context of doctors and paramedics who engage in discriminatory practices on age, DARD, or other forms of unethical priorities in extending their access to limited diagnostic testing and treatment facilities in overburdened hospitals.

Moreover, States are the depositories of the principles and purposes of the United Nations organisation at the international level as well as the constitutional trust, morality, and duty to safeguard the lives of their citizens at the domestic level. As cited above, global geopolitical entities must refrain from discriminatory practices such as discrimination based on religion, nationality or other grounds. The equality protections in the provisions of the right to freedom of speech, thought, and opinion[3] have been adversely and irreparably affected in countries like

1 Article 19 (2) ICCPR and; ICESCR GC 14
2 Ibid.
3 UN Human Rights Committee (HRC), General comment no. 34, Article 19, Freedoms of opinion and expression, 12 September 2011, CCPR/C/GC/34 , available at: https://www.refworld.org/docid/4ed34b562.html <accessed on 20 April 2020>

Pakistan, Bangladesh, Sri Lanka, some European countries, and India, where FRAME dictate has been in place during the pandemic. However, Article 19 of the ICCPR does not list the freedom of opinion and expression as non-derogable rights. Nevertheless, the UN-HRC does not envisage a legitimate derogation from Article 19 as it does not fulfil the requirement of the necessity test for its justification during a state of emergency.

The encroachments on the freedom of speech cannot be justified unless done under certain conditions. However, under Article 19(3)(b), there is a right-specific limitation clause that can be invoked to protect the public health and morals, provided that the PDMs fulfil the requirements of necessity, proportionality, and core principles of the IHRL framework without expanding and jeopardising the right itself beyond its legitimate realisation. Under Article 18 of the ICCPR, the right to freedom of thought, conscience, and religion is non-derogable. however, the freedom to practice religion could be curtailed even without a formal state proclamation of emergency under Article 18(3) of the ICCPR. this is also evident from the implementation of PDMs even before the declaration of a state of emergency.

2.1.9. The State and the International Organizations

The World Health Organization (WHO) is the main global agency that promotes the right to health worldwide. The WHO works to achieve the highest international health standards and make non-binding recommendations to governments. in the past, the WHO has endorsed state interventions[1] that impinge on the fundamental freedoms, such as quarantine or self-isolation, in the wake of contagious diseases[2] provided that the PDMs adhered to the principle of necessity on legitimate grounds. Initially, the WHO favoured customary protections[3] against travel restrictions during the COVID-19 pandemic. However, the feared consequences of the pandemic, compelled many national governments to impose international travel restrictions against China and other infected countries before the WHO could formally determine the consequences of the pandemic. Therefore, questions arise as to the potential replacements or alternatives to *the WHOand whether administrative and structural changes would suffice to make the WHO more transparent, responsive, and accountable during public health emergencies.* There are many more such questions that require immediate international attention. There is not much time left for reviewing the entire global health infrastructure since its inception.

2.2. Balancing the Tensions Between Human Rights and Statecraft

The IHRL framework acknowledges for everyone the right to the highest attainable standard of health and mandates governments to implement PDMs to stop threats to the public health and help those in need of care. IHRL recognises that in the context of a severe pandemic, that threatens[4]

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1 UN Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, Annex (1985) http://hrlibrary.umn.edu/instree/siracusaprinciples.html <accessed on 12 February 2020>

2 WHO, 'International Health Regulations' (2005) 3rd Edition

3 COVID-19 Travel Advice, 'WHO advice for international travel and trade in relation to the outbreak of pneumonia caused by a new coronavirus in China' January 10, 2020, https://www.who.int/news-room/articles-detail/who-advice-for-international-travel-and-trade-in-relation-to-the-outbreak-of-pneumonia-caused-by-a-new-coronavirus-in-china/ <accessed on 16 January 2020>

4 UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 28 September 1984, E/CN.4/1985/4, available at: https://www.refworld.org/docid/4672bc122.html <accessed on 20 April 2020>

the life of nation-states, restrictions on several rights can be justified, provided that such justifications derive legal validity and constitutional legitimacy. Moreover, these restrictions must be free from arbitrary and discriminatory application, temporary, consistent with human dignity, subject to judicial review, and proportionate to accomplish their targets based on scientific evidence. The severity of the COVID-19 pandemic inevitably rise to the stage of a global health threat that could justify restrictions on several human rights due to the imposition of PDMs, which have limited the freedom of movement. At the same time, the fundamental principles of human rights, such as administrative accountability, democratic liberalism, transparency in governance, and the rule of law, as well as the rights to non-discrimination, human dignity, and the freedom of diversity, can foster a pragmatic response amidst the complexities that arise in times of pandemic. These principles can mitigate the harms that might come from the requirements of excessively wide-ranging PDMs that do not conform to the IHRL framework.

Therefore, the expansions of executive powers and repressive measures that might be in operation post-COVID-19 would pose the most problematic concerns for human rights. In such a scenario, acceleration in treaty ratification can mitigate the adverse impacts of Coronavirus by ensuring greater compliance with human rights obligations. However, registrations and notifications of derogations manifest a higher degree of transparency for IHRL framework implementation and the rule of law. Nevertheless, balancing contagion containment and ensuring healthcare protection while minimising the socioeconomic implications of FRAME-driven DARD persecution and disruption is not simple. Furthermore, promoting and preserving the right to health during the COVID-19 pandemic has become a global concern; therefore, nation-states must diligently balance human rights with their responsibilities.

3. Pandemic Policy Response Framework: Some Reflections

This paper proposes a Pandemic Policy Response Framework (PPRF) that incorporates various components that may be unconstitutional in many ways. Still, it may be balanced with the swift, sensitive, and human right-driven interventions of state authorities as follows:

3.1. Medical Law Measures

- The nation-states are generally not at war all the time, but they maintain military preparedness during peacetime; therefore, medical preparedness and its modernisation should be equal to military preparedness and modernisation, and doctors and medical personnel should have personal protective equipment (PPE), medical gadgets and harnesses ready at all times;
- The political leadership should establish a national medical leadership for responding to future medical emergencies, medical research and development should be prioritised over the political incentives and commitments;
- The conscription of medical professionals and healthcare workers should be ensured;
- The medically fit citizens should get training to serve as emergency health workers;
- The tracing, testing, tracking, and training of the whole population should be ensured;
- A conscription policy should be adopted during any pandemic or national or international health emergency.

3.2. Administrative Law Measures

- The forced quarantine of pandemic-infected people in government facilities should be ensured with all essential items for sustenance;
- In addition to public and private hospitals, public properties and vehicles such as stadiums, sports complexes, schools, universities, etc. could be designated and converted into quarantine and isolation centres; The National Anti-pandemic Task Agency (NATA) should supply good quality food with the required calories, which should primarily be created for this purpose under the Office of the Prime Minister. The NATA may liaison with the WHO, national and international NGOs and CSOs, and other volunteering institutions;
- The national governments may also establish a permanent NATA Fund to bear the costs of the pandemic;
- All urban or rural open areas, public parks, or lawns should be utilised for make-shift hospitals or health facilities;
- The national government should establish an independent and autonomous National Commission for Pandemics (NCP) as a headquarter platform to coordinate all measures in combating pandemics;
- All businesses and trade-related activities should be suspended or during the emergency period;

3.3. Religious Measures

- The National Anti-Pandemic Awareness (NAPA) programme should educate and sensitise heads of all religious organisations and civil society institutions in multi-religious and multicultural societies like India. In the case of Muslims, the *Imams* of Mosques, *Shahar Muftis* (Islamic jurists), *Qaris* of *Madraris* (Quran Recitation Teachers of Islamic Educational Schools), *Maulanas,* and delegates of *Tablighi Jamat* (Outreach Society), *Shahar Qazi* (City Judge), and other theologians. Among the Hindus, all Head Priests or representatives of Temples, *Akharas, Dhams, Piths,* etc. FromChristianity, the NAPA programme should draw bishops or their representatives, and Sikhs are already well-versed in their humanitarian duties, but they should also be integrated with the drive, and they can share their worldwide experiences of working in humanitarian crises;
- Any refusal to participate, non-compliance, or any recalcitrant behaviour towards the NAPA programme should be subject to penal consequences;
- The religious services at all places of worship should be suspended or banned, and the government take over all such premises to convert them into quarantine centres in all countries, including India;
- The religious rituals such as *Ramadhan Fasting, Navratri Upvas,* and other forms of religious obligations (offering collective *Tarawih* prayers, organising mass public or private *Iftar* Parties during *Ramadhan*) should be suspended for individuals who test

positive and those who have been diagnosed with negative may observe such obligations within their home-quarantines consistent with all PDMs;
- The national government should have the power and willingness to utilise the income generated and accrued by the places of worship of all religions through religious property rents, donations, and monetary collections from *Wakf* properties for re-building the societies and administrating the transitional justice in the post-pandemic period;
- The theological position on human rights should be discouraged instead, a medical position be appreciated and preferred in the time of pandemics for a proper balance of fundamental rights;
- In multicultural and multi-religious societies, scientific temperament, rational thinking, and national values should be promoted and inculcated;
- The Imams and other individuals who perform specific religious works have essential and desirable qualifications; for example, they should be post-graduates in theology from a well-established university under the law.

3.4. Artificial Intelligence (AI.) Technology Measures

- The law enforcement agencies should utilise the inventions and innovations in the form of drones, other scientific gadgets services provided by Artificial Intelligence (AI) technologies in pandemics;
- The orientation on the integration of science, technology, and religion should be promoted, and the academia and research institutions should also highlight linkages among them for an intellectually cohesive society.

3.5. Human Rights & International Law Measures

- The pandemic or epidemics should be regarded as genocide and crime against humanity under international law, and the comity of nations with international solidarity and responsibility-sharing principles should address such crimes;
- The WHO should not merely accept the pandemic versions of the country of origin; rather, it should pragmatically strive to corroborate and very the actual scenario of the pandemic by mobilising and deploying its resources;
- The WHO should access the country of origin of the epidemic with its multi-national medical teams and assess the pandemic situation at the zero-ground or its epicentre, determine the etiological roots of the epidemic, and examine the nature of the pandemic from the biological weaponry angle research and development and manufacturing, etc.;
- The non-citizens should be quarantined separately in facilities well-equipped with PDMs and global standards of human rights;
- The all refugee camps in the host countries should be quarantined by increasing the number of existing bases to accommodate all the available refugees with PDMs;
- The bans against international and domestic flights and the aviation industry for certain people entering the country;
- Cruise ships, cargo ships, and sea voyages should be suspended or banned,

3.6. Media, Criminal & Constitutional Laws Measures

- The media outlets should be made to realise their limitations in news reporting, news analysis, and news presentation; they should eschew their monstrous and absurd tendencies of converting news studios into sham media trial chambers where the multiple roles of prosecutor, judge, and jury are performed by only one person, i.e., news anchor.
- All the stakeholders should promote media pluralism and media diversity in a democratic governance structure;
- The criminal penalties for morphing, distorting, or editing videos for spreading fake news, fake videos, and medical misinformation about the pandemic and appropriately Epidemic Act, 1897 be amended by incorporating these safeguards against the religionisation of infectious diseases;
- The acts of indulging in the demonisation of a section of the national population for epidemics based on their religion by the electronic and print media or otherwise should entail penal consequences;
- The criminal penalties for culpability in attributing, shifting, and placing blame for pandemic spread on a particular religious community and its victimisation due to biases, bigotry, and prejudices or otherwise;
- Government should criminalise hate speech based on its religious contents and ensure that there should not be any media trial of a ministerial segment of the national population for pandemics;
- There is every possibility of looting, arson, violation of fundamental human rights, and disturbance of public order during and after the pandemic in the society. Therefore, sufficient deterrent and punitive measures should be in place, and if possible, special Human Rights Fast Track Courts (HRFTCs) should also be established for swift justice;
- The fundamental freedoms and civil liberties such as the right to privacy, freedom of movement, access to justice, and free speech should be suspended with data and documentation in the public domain along with accountability before a court of law if necessary whenever required or necessitated;

Conclusion

In a constitutional democracy, the determination of patriotism, nationalism, and citizenship should not be based on an individual's religious beliefs, political ideologies, or affiliations. Institutional integrity should prevail over minority considerations in the functioning of the Indian state, as mandated by the Constitution of India. All state institutions are discreetly required to respect the ideas and opinions of every individual according to established law. However, in the case of Muslims in India, these factors have become irrelevant, and they are hesitant to demand constitutionally-mandated treatment from state institutions due to the PERIL syndrome, DARD practice, and FRAME propaganda. State institutions have deviated from constitutional norms and have

oppressed Muslims and other vulnerable sections of society. Therefore, the question of minority status should not arise when it comes to ensuring justice and constitutional rights for all communities. Unfortunately, in post-colonial India, it has become fashionable to attribute communal narratives to every contention between Hindus and Muslims, disregarding constitutional, administrative, and legal merits.

Nevertheless, the COVID-19 pandemic can be seen as a 'universal equalizer' that has removed distinctions and discrimination based on age, caste, creed, gender, origin, race, religion, region, opinions, and ideology. Nature has confronted humanity with its limitations, exposing its shortcomings. The Coronavirus has presented a challenging situation that the FRAME community has exploited to target the entire Muslim community in India. However, the majority of individuals in the Hindu community uphold the principles of secularism as enshrined in the Indian Constitution. Nonetheless, there is a lack of awareness within the Hindu community about the interconnectedness, dichotomies, and intra-fragmentary dimensions of Islam in India and elsewhere.

Laws are never comprehensive at the time of their enactment because they cannot anticipate all future adverse situations. However, a flexible, liberal, and accommodative interpretation of legislative language empowers states to adjust domestic laws in line with the International Human Rights Law (IHRL) framework to address crises like COVID-19. The state of emergency should not be exploited to engage in oppressive practices, arbitrary detentions, censorship, or other draconian actions.

There are growing concerns that several States ents are undermining democratic principles and eroding dissent and human rights under the pretext of public health measures. When fulfilling their constitutional and IHRL obligations to protect the people, States must shape the national character based on social solidarity, necessity, proportionality, and the margin of appreciation of public interest. The idea of *"We, the People of India,"* based on unity in diversity, seems to have become ineffective and burdensome in India. The celebration of diversity in a vertically and horizontally fragmented Indian society is only allowed at the behest of the majority community.

The main concern lies in the tendency to shift blame and create a communal narrative during a pandemic, which is an existential crisis affecting all. Previously marginalized elements within the majority community have now occupied the liberal political space in India, leading to a normalization of divisive political discourse. These elements question the nationality and citizenship credentials of Muslims based on religious lines, which contradicts Indian constitutional values and the human rights-based approach (HRBA) developed within the IHRL framework. Moreover, in a scenario where the world is grappling with a pandemic and the Indian government is in solidarity with the international community, *should we perceive ourselves as divided along religious lines*? COVID-19 has transformed the world into a better version of people who respect equality, dignity, and justice. COVID-19 should serve as a catalyst for reasserting the importance of humanity based on national solidarity, cosmopolitan empathy, co-existential stability, and social cohesion.

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Legal Consequences Arising from US International Responsibility for Violations of the Treaty of Amity

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ABSTRACT

The term "legal consequences of international responsibility" covers the new legal relations which arise under international law as a result of a State's Internationally Wrongful Act (IWA). In this context, three types of obligations can be identified: the duty (a) to perform the obligation breached, (b) to cease the wrongful conduct, and (c) to make full reparation for the injury caused. In the Certain Iranian Assets Case, the International Court of Justice (ICJ) found that the United States had breached Articles III (1); IV (1) & (2); and X (1) of the Treaty of Amity. This article seeks to explore the legal consequences of US international responsibility. Specifically, it examines these consequences in the light of the International Law Commission's Articles on State Responsibility and the relevant case-law. The study recruits a descriptive-analytical method, relying on library sources for collecting data. In the Certain Iranian Assets Case, the ICJ concluded that, due to the fact that the Treaty of Amity no longer creates obligations on the Parties, as of October 3, 2019, the US has not obligation to perform its duties under the Treaty or to cease the wrongful conduct. The Court only ruled that the US should provide reparation for the injury caused. The most important finding of this article is that the Court is likely to reach similar results in the Case of Alleged Violations of the 1955 Treaty of Amity. Consequently, the United States bears no obligation to comply with the Treaty of Amity following its termination in October 2019. Similar to the Certain Iranian Assets Case, this termination has similar implications concerning the US responsibility to compensate the damages incurred by the injured State.

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Introduction

The dispute between Iran and the United States arose from certain measures taken by the US following its designation of Iran as a state sponsor of terrorism. As a result of the actions of the American judicial and executive authorities, the properties belonging to the Iranian companies were confiscated. After Iran's disappointment in referring to the American courts, Iran decided to refer to the International Court of Justice (ICJ) invoking the mechanism contained in the Treaty of Amity.[1]

On March 30, 2023, the ICJ delivered its judgment in the case concerning *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America). The Court rejected the US objection to admissibility, which claimed that Iranian companies had not exhausted local remedies. Moreover, the Court found that the United States had violated its obligation under the 1955 Treaty of Amity,[2] particularly the provision stating that the property of nationals and companies of the Contracting Parties "shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation."[3]

This article aims to explore the legal consequences resulting from US's violation of the Treaty of Amity. Additionally, it will examine the effect of the March 30 decision of the Court on the other ongoing case between Iran and the United States. The research adopts a descriptive- analytical method, and the author's hypothesis is that the Court identified certain legal consequences of international responsibility. It is also anticipated that the findings of the March 30 judgment will have significant implications for the other case.

This article is organized into two sections. The first section outlines the obligations arising from the Treaty of Amity that were breached by the United States. The second section examines the three above-mentioned effects concerning the Legal Consequences of International Responsibility, focus-

1 . Giulio Alvaro Cortesi, 'The Case of Certain Iranian Assets: The Standard for Joining Preliminary Objections to the Merits Revisited and the Treatment of State-Owned Enterprises before the International Court of Justice' (2020) Vol 25 Austrian Review of International and European Law 220-221.

2 . The Treaty of Amity entered into force on 16 June 1957 and remained in force when the United States and Iran cut diplomatic ties in 1980 following the 1979 Iranian Revolution that resulted in the seizure of the US Embassy in Tehran.

3 . Certain Iranian Assets; (Islamic Republic of Iran v. United States of America), International Law Reports, Vol 201, 2023, Cambridge University Press, 1 – 88.

ing on the judgment of the Court in the *Certain Iranian Assets* Case and relevant case-law of the ICJ. The significant purpose and implication of this study is that the effects of the Court's findings in the recent case will be revealed on the second case between Iran and the United States.

1. Violations of the Treaty of Amity by the United States

It is necessary to note at the time that Iran initiated proceedings at the ICJ in 2016, US courts had already rendered judgments totaling USD 56 billion in damages against Iran.[1] These judgments were the result of certain legislative and executive measures taken by the United States, leading to default judgments and substantial damage awards against the State of Iran and certain Iranian state-owned entities. Furthermore, the assets of Iran and certain Iranian entities, including the Central Bank of Iran, known as Bank Markazi, became subject to enforcement proceedings either in the US or abroad, or had already been distributed to judgment creditors. Iran argued that the United States had thereby violated its obligations under the Treaty of Amity. Iran specifically claimed that United States had violated Article III (1), Article III (2), Article IV (1), Article IV (2), Article V (1), Article VII (1), and Article X (1) of the Treaty.

It should be noted that the two necessary elements in proving the illegality of a State's action are: First, the conduct in question must be attributable to the State under international law. Secondly, for the State to be held responsible, the conduct must constitute a breach of an international legal obligation applicable to that State at that time.[2] It is only with the gathering of the aforementioned elements that international responsibility would be created.

Regarding the first element, it is certain that the property confiscation judgments on Iranian State-owned entities including the Central Bank of Iran, was based on the implementation of the US statutes and judicial decisions. According to Article 4 of the International Law Commission's (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Actions, these actions are attributable to the United States.

Regarding the second element, the Court concluded that the United States had violated certain obligatory provisions of the Treaty of Amity against Iran. Specifically, the Court found that the United States had violated its obligations under Article III (1), Article IV (1), and Article X (1) of the Treaty. However, this article does not examine the reasons behind the Court's agreement or disagreement with the arguments presented by the Parties. As indicated by the article's title, the focus is solely on the legal consequences of the violations identified by the Court. Brief mention will be made of the Treaty violations by the United States, establishing the link between the breach of primary rules (above-mentioned articles of the Treaty of Amity) and the international Consequences arising from such breaches.

First, it is necessary to outline the examples of the violation of the Treaty of Amity committed by the United States, as determined by the Court, and provide a brief explanation of each.

1.1. Breach of Article III (1) and Article IV (1)

Article III (1) of the Treaty contained the obligation that each of the contracting states is obliged to recognize the legal personality of companies registered in another country in their own legal

1 . Natalie Klein, 'Iran and Its Encounters with the International Court of Justice' (2021) Vol 21 Melbourne Journal of International Law 20.

2 . ILC Articles on State Responsibility, Article 2.

system. The Court considers that the expression "juridical status" refers to the companies' own legal personality. The recognition of a company's own legal personality entails the legal existence of the company as an entity that is distinct from other natural or legal persons, including States[1].

Therefore, the Court came to the conclusion that the United States has violated the obligation contained in Article 3 (1) to recognize the independent legal personality of Iranian companies from the state.

Article IV (1) of the Treaty contained this obligation that "Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party..."

Since the Court has determined that it lacks jurisdiction under the Treaty of Amity to entertain claims related to alleged violations of Articles III and IV concerning treatment with Bank Markazi,[2] the Court said that it will not consider Iran's claims regarding US's wrongful acts in relation to this entity. This was while Iran argued that the United States disregarded the principle of separate legal personality and unlawfully blocked and seized the assets of Bank Markazi.[3]

According to the Court, Article IV(1) consists of three clauses separated by semicolons, with each clause starting with the word "shall". [4] The Court notes that the rights of Iranian companies to appear before US courts, make legal submissions, and lodge appeals, have not been curtailed.[5] The Court further considers that the terms "unreasonable" or "discriminatory" in the second clause of Article IV(1) reflect two distinct standards against which a State's conduct may be separately assessed.[6] The Court concludes that even assuming the legislative provisions adopted by the United States and their application by US courts pursued a legitimate public purpose, they nonetheless caused a disproportionate impairment of the rights of the Iranian companies when measured against the protection invoked for that purpose.

The Court, therefore, concludes that the legislative and judicial measures were unreasonable, constituting a violation of the obligation under Article IV (1) of the Treaty of Amity.[7]

1.2. Breach of Article X (1)

Article X (1) of the Treaty of Amity provides that "[b]etween the territories of the two High Contracting Parties there shall be freedom of commerce and navigation."

Iran claimed that the set of executive and judicial actions of the United States against Iranian companies violates the obligations contained in this article, including the freedom of commerce. According to Iran, each of the parties has committed to respect the freedom of trade and seizing the assets of Iranian companies has violated this obligation.

The United States contends that Iran's allegations are unfounded for three reasons. First, it argues that the reference to "commerce" in Article X (1), when interpreted in context, means

1 . Certain Iranian Assets, (Islamic Republic of Iran v. United States of America), Judgment of 30 March 2023, para. 136.
2 . Certain Iranian Assets, (Islamic Republic of Iran v. United States of America), Judgment of 30 March 2023, para. 115.
3 . Memorial of Islamic Republic of Iran, 01 February 2017, para.4.23.
4 . Ibid, para. 140.
5 . Ibid, para. 143.
6 . Ibid, para. 145.
7 . Ibid, para. 156.

commerce related to navigation. Iran rightly emphasized that the Court rejected the view that Article X, paragraph 1, is limited to maritime commerce in the *Oil Platforms Case.*[1]

Secondly, the United States argues that Iran disregards the territorial limitation in Article X (1). According to the American, there was no practical trade between the territories of the parties at the time of seizure of Iranian property.

Thirdly, the United States maintains that the type of “legal impediments” to commerce, such as rules governing enforcement of judgments in domestic courts, do not invoke Article X (1) since they have too tenuous a connection, if any, to the commercial relations between the Parties. According to the United States, seizing the property of the Iranian state by the respondent is an issue unrelated to the issue of freedom of commerce.

The Court referred to its 2003 Judgment in the *Oil Platforms* Case and noted that the word “commerce” in Article X (1) “includes commercial activities in general not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce.”[2] The Court noted that it deems unnecessary to depart from its previous interpretation of the concept of “freedom of commerce” in Article X (1) of the Treaty.[3]

In the *Oil Platforms* case, the Court was concerned with physical interferences with freedom of commerce. However, the decision in that case does not prevent the Court from examining in the present case whether the legal measures adopted by the United States interfered with freedom of commerce between the Parties. The Court is of the opinion that Executive Order 13599 and Section 1610*(g)*(1) of the Foreign Sovereign Immunities Act (FSIA) blocked any assets of any Iranian companies in which the State holds an interest. Moreover, the judicial application of Section 1610*(g)*(1) of the FSIA and Section 201*(a)* of Terrorism Risk Insurance Act (TRIA) caused concrete interference with commerce.[4] The Court notes that “the effects of the enforcement proceedings with respect to contractual debts in the telecommunications industry and in the credit card services sector mentioned above (see paragraphs 180-181) constitute clear examples of such concrete interference with commerce.”[5] Therefore, the Court concludes that the United States has violated its obligations under Article X(1) of the Treaty of Amity.[6]

It seems that the court believed that the executive and judicial actions of the United States are not a case-by-case seizure of corporate property, but that the respondent, by seizing all property belonging to the Iranian state and its companies, has practically disrupted any free trade and commerce between the parties. The lack of connection between the issue of seizure of property and disruption of trade freedom can be true where seizure of property is a case-by-case measure, but the seizure of property of the Iranian government and Iranian companies is a general policy of the US government and is related to all assets of Iran state, and the court rightly found the US action it to be a violation of Article 10 of the Treaty.

1 . Ibid, para. 210.

2 . Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I), p. 34, para. 78, citing Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), 818-819, paras. 45-46 and 49.

3 . Judgment, Certain Iranian Assets, para. 212.

4 . Ibid, paras. 220-221.

5 . Ibid, para. 222.

6 . Ibid, para. 223.

2. The Triple Consequences of Treaty Violation

There is a well-established principle that legal consequences are entailed whenever there is an IWA of a State. The above-mentioned violations of the Treaty of Amity have consequences in the field of State responsibility, including the duty to perform the obligation breached, provide compensation, cease ongoing wrongful acts, and offer appropriate assurances and guarantees of non-repetition, if circumstances require so (see Article 30 of ILC Articles on State Responsibility).

These triple obligations also apply to the IWAs of international organizations.[1] Article 28 of the ARSIWA provides: “The international responsibility of a State which is entailed by an IWA in accordance with the provisions of Part One involves legal consequences as set out in this Part.” The three types of obligations will be examined below:

A: The duty to perform the breached obligation.

B: The duty to cease the wrongful conduct and to offer appropriate assurances and guarantees of non-repetition.

C: The duty to make full reparation for the injury caused.

However, it should be noted that in certain cases, it may not be appropriate to demand the fulfillment of all three obligations in one time, based on the relevant primary rules. For example, if State agents kill foreign diplomats illegally, the duty to perform or to cease the wrongful act is practically ruled out. However, where a part of a State’s territory is occupied by an aggressor State, it is feasible to demand all the three obligations. that is, the duty to perform the obligation breached (that is, to respect the independence and territorial integrity of the injured state), and also to cease the wrongful conduct, that is, upon the withdrawal of the aggressor State from the occupied territories. The injured state may also obtain reparation for the damage suffered.

Iran wanted to achieve all three demands in this case. As stated by the Court: “In its final submissions, Iran requests that the Court, having placed on record the alleged violations of the Treaty of Amity, declare, “*(c)* . . . that the United States is consequently obliged to put an end to the situation brought about by the aforementioned violations of international law, by *(a)* ceasing those acts and *(b)* making full reparation for the injury caused by those acts, in an amount to be determined in a later phase of these proceedings, and *(c)* offering a formal apology to the Islamic Republic of Iran for those wrongful acts and injuries.”[2]

It is worth noting that satisfaction is one of the forms of reparation (which also include restitution and compensation). Therefore, Iran’s demands in section *B* and *C* can be considered as two forms of reparations. In the following discussion, these consequences will be examined in light of Iran’s demands.

2.1. The Duty to Perform the Obligation Breached

Article 29 of ILC Articles on State Responsibility provides that, the legal consequences of an IWA do not absolve the responsible State of its ongoing duty to perform the obligation breached.

Requiring the responsible State to re-implement the violated obligations is a representation of

1 . Kristina Daugirdas, ‘Member States’ Due Diligence Obligations to Supervise International Organizations’ in Heike Krieger, Anne Peters, and Leonhard Kreuzer (eds), Due Diligence in the International Legal Order (Oxford University Press 2020) 67.

2 . Ibid, para. 224.

the rule of law. In many cases, the implementation of the primary obligation is still the desired goal of the injured state and payment of compensation alone cannot be considered as full compensation of the injured state unless the wrongful state is required to perform the breached obligation, so that the legal status of the parties returns to the point before the breach of obligations. Therefore, the breach of an obligation does not exonerate the default State from its continued duty to perform the obligation it has breached. The wrongful State is obligated to put an end to those treaty breaches. It is understandable that, as a result of an IWA, secondary rules under international responsibility may emerge between the State default and injured State. However, this does not imply that the previous legal relation resulting from the primary rules are disappeared.

Therefore, the first legal effect resulting from the international responsibility is the obligation of the responsible State to implement the primary obligations, including those outlined in the Treaty of Amity. The Treaty contains a set of rights and obligations for the parties involved. Iran has claimed that the United States, through the legislative, executive and judicial measures, has deprived Iranian companies of their independent legal personality conferred on them by their juridical status and conflated their assets with those of the Iranian State, in violation of Article III (1), of the Treaty of Amity.[1]

By accepting Iran's claim[2], the Court has found that certain private or state-owned companies, such as Bank Melli, should be considered a "company" within the scope of Treaty of Amity, whose rights have been violated by the United States. However, the Court has concluded that Bank Markazi is not a "company" within the purview of the Treaty.

The first legal consequence resulting from the US international responsibility is its obligation to perform the primary obligation (recognition of the juridical status of Iranian companies). This obligation resulted from article 29, and it can be referred to as secondary rule.

Though the breach of an obligation in certain situations may ultimately terminate the obligation itself,[3] the mere occurrence of a breach and even repudiation of a treaty does not inherently terminate the treaty, as specified by the relevant provisions of the 1969 Vienna Convention on the Law of Treaties (VCLT). According to Article 60 of the VCLT, the injured State may invoke the breach as a ground for suspending or terminating the treaty. Alternatively, the injured party may equally allow the treaty to remain in force and assert its right to the performance of the treaty. The ICJ held in Gabčíkovo-Nagymaros Project Case that, continuing material breaches by both parties did not lead to the termination of the 1977 Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System.[4] Therefore, the mere violation of the treaty does not mean the termination of that treaty *ipso facto*.

The power to terminate a treaty (and thereby terminate its binding obligations) lies solely with the injured State, and the responsible State cannot use this power. Therefore, the termination of the treaty did not occur *ipso facto* and had to be invoked within a reasonable period of time.[5] In other words, as long as the injured State has not exercised this authority, the respon-

1 . Certain Iranian Assets; (Islamic Republic of Iran v. United States of America), Memorial of Islamic Republic of Iran, 01 February 2017, para.1.22.

2 . Certain Iranian Assets, (Islamic Republic of Iran v. United States of America) I.C.J. Reports 2023, p.48, para. 159.

3

4 . Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 68, para. 114.

5 . Marl E. Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (Martinus Nijhoff Publisher 2009)

sible State must continue to fulfill its obligations and he cannot claim the termination of the treaty.

The options of suspension or termination prevent the defaulting State from enforcing the treaty against the innocent party while simultaneously violating it. However, the innocent party may choose to demand the resumption of treaty performance from the defaulting party, which cannot by its breach, force the termination or suspension of the treaty.[1]

Of course, it is possible that any party to a treaty, including the wrongful or injured State, may have the right to terminate the treaty based on the treaty provisions. The treaty may provide for a right to terminate or withdraw from the treaty. The term "withdrawal" is usually applied to multilateral treaties, while "termination" also includes the denunciation of bilateral treaties.[2] Article 54(a) of the VCLT provides that termination or withdrawal may take place in accordance with the provisions of the treaty. For instance, in a diplomatic Note dated October 3, 2018, the US Ministry of Foreign Affairs informed the Iranian Ministry of Foreign Affairs that, in accordance with Article XXIII (3) of the Treaty of Amity, that it has terminated the Treaty of Amity based on Article 21, paragraph 3. According to the provisions of the mentioned article, the Treaty is terminated one year after the written notice of the United States.

While it is true that the United States violated the Treaty of Amity, the termination of the treaty was done in accordance with the provisions of the treaty itself. In other words, the United States possessed the right to denounce the treaty based on Article 54(1) of the VCLT, and this matter had nothing to do with the legal consequences resulting from international responsibility.

To conclude, it seems that the US withdrawal from the Treaty of Amity was done in accordance with the provisions of the treaty itself and does not violate the provisions of the VCLT. Therefore, the termination of the primary obligations resulting from the Treaty of Amity was not due to the violation of those obligations by the United States, but because of the permission to terminate the treaty contained in Article 21(3) of the treaty. Therefore, since the termination of the treaty, the United States has no obligation to fulfill the primary obligations resulting from the Treaty of Amity.

As a general principle of state responsibility, where the IWA or omission constitutes a breach of a treaty, no state responsibility is generated, unless the treaty was in force at the time of the wrongful conduct.[3] This general principle is reflected in Article 13 of the ARSIWA, which state that "an act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs." Since the Treaty of Amity no longer imposes obligations on the parties from October 3, 2019, there are no binding obligations arising from the treaty for the parties, from that date onwards.

This point has important implications for the second case between two states (Iran and the United States), and The United States of America has not been accountable for violation of

736.

1 . Ibid, 738.

2 . Ibid, 685.

3 . Robert Howse, Barry Appleton 'Time and Tide Wait for No One: The Curious Consideration of Time in International Investment Treaty Law' in Klara Polackova Van der Ploeg, Luca Pasquet, León Castellanos-Jankiewicz (eds), International Law and Time: Narratives and Techniques (Springer 2022) 222.

the provisions of the Treaty of Amity in connection with the sanctions imposed by President Trump, at least since October 3, 2019.

2.2. The Duty to Cease the Wrongful Conduct and to Offer Appropriate Assurances and Guarantees of Non-Repetition

The second legal consequence resulting from the international responsibility is outlined in Article 30 of the ARSIWA. Article 30 stipulates that "[t]he State responsible for an internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require." The primary focus of this Article is the obligation set forth in the paragraph (a), which emphasizes the restoration of the previous situation as the primary goal of the international responsibility system. It is impossible to conceive of a legal order which does not impose on every party responsible for a breach the obligation to cease the breach.[1] The obligation to cease the wrongful conduct is a formulation of the principle of *pcta sunt servanda*, highlighting the fact that States must respect their international obligations.

In certain cases, the mere act of terminating the wrongful act, in itself, may be considered sufficient and appropriate compensation. Accordingly, it is possible, even the filing of a lawsuit may be rejected due to the unilateral obligation of the plaintiff to cease the wrongful act, and even the Court may not consider it necessary to award compensation. In the Nuclear Tests Case, the ICJ dismissed the Application on the ground that the Case had ceased to have any object in view of the French Declaration of a Cessation of Atmospheric Testing.[2]

Article 13 of the ARSIWA establishes the basic principle that for state responsibility to arise, the breach must occur when the State is bound by the obligation.

It is necessary to distinguish between breaches that extend in time and those which have already been completed. A completed act occurs "at the moment when the act is performed," even though its effects or consequences may continue. Article 14(1) of the ARSIWA expresses the division between terminated wrongful acts and continuing wrongful acts. For instance, killing a foreign diplomat should be considered as completed wrongful act. On the other hand, according to paragraph 2 of Article 14, a continuing wrongful act, occupies the entire period during which the act continues and remains in violation of the international obligation, provided that the State is bound by the obligation during that period. "Examples of continuing wrongful acts include the maintenance in effect of legislative provisions incompatible with treaty obligations of the enacting State, unlawful detention of a foreign official or unlawful occupation of embassy premises, maintenance by force of colonial domination, unlawful occupation of part of the territory of another State or stationing armed forces in another State without its consent."[3]

Iran requested the Cessation of internationally wrongful acts of the United States with regard to measures adopted by its Legislature and its Executive, and the decisions of its courts and those of other authorities infringing the rights of Iran and of Iranian companies. Also, another

1 . Oliver Corten, 'The Obligation of Cessation' in James Crawford, Alain Pellet and Simon Olleson (eds), The Law of International Responsibility (First Published, Oxford University Press 2010) 545.
2 . Nuclear Tests (Australia v France) case, ICJ Reports, 1974, p 253, at pp 312–19.
3 . See the commentary of ILC articles on Responsibility, article 14. Para 3.

demand of Iran was that the United States commits not to take any action against the provisions of the Treaty of Amity in the future.[1]

According to the Articles 13 and 14 of the ARSIWA, it seems that a difference should be made between the two time periods. The first period, when the Treaty of Amity between Iran and the United States was still in force. The second period, which begins on October 3, 2019, is related to the time when the United States terminated the Treaty and was no longer obligated to comply with its provisions. From this date onwards, there is no longer an enforceable obligation for the United States, and the US's wrongful acts before October 3, 2019 are considered to be terminated, for which the US only has to pay compensation for their violation.

It is obvious that the request to cease the wrongful acts is only reasonable in the assumption that the wrongful act has a continuous nature and that, at the time of the request to cease, the illegal act is still ongoing, and that the relevant obligation is still valid at the time of the stop request. If the wrongful act has already been terminated or completed, the request to cease the wrongful act is no longer relevant. Because there is no longer an enforceable obligation for the respective state at that time.

In the Court`s opinion, those conditions are not met in this Case. "Since the Treaty of Amity is no longer in force, as the United States denounced the Treaty by giving notification of its denunciation to Iran on 3 October 2018, the Treaty ceased to have effect a year later in accordance with the provisions of Article XXIII, paragraph 3, thereof."[2] It follows that Iran's request relating to the cessation of internationally wrongful acts must be rejected.[3]

Now that there is no binding obligation anymore, it is obvious that the obligation to offer appropriate assurances and guarantees of non-repetition does not exist as well.

The termination of the Treaty of Amity will have a similar effect on the second case (*Alleged Violations of the 1955 Treaty of Amity case)*, and the Court will reject Iran's claim that the Treaty was involved due to the sanctions imposed by Trump from October 3, 2019 onwards.

2.3. Full Reparation for the Injury Caused

The third legal consequence resulting from the international responsibility is to make full reparation for the injury caused. According to Article 31(1) of the ARSIWA, "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."

It should be taken into consideration that violations of international law, State responsibility, and remedies are closely interlinked.[4] A new legal relationship arises on the commission of an internationally wrongful act attributable to a State. Where a State has been recognized as the author of an internationally wrongful act- whether it is an act or an omission- it is certain that the State has an obligation to make reparation for the injury caused by its conduct.[5] The

1 . subparagraph (d) of the final submissions of Islamic Republic of Iran.
2 . Judgment, Certain Iranian Assets, para. 228.
3 . Ibid, para. 229.
4 . Malcolm Shaw, 'The International Court, Responsibility and Remedies' in Malgosia Fitzmaurice and Dan Sarooshi (eds), Issues of State Responsibility before International Judicial Institutions (Great Britain, Oxford and Portland Oregon, First Published 2010)19.
5 . Brigitte Stern, 'The Obligation to make Reparation' in James Crawford, Alain Pellet and Simon Olleson (eds), The Law of International Responsibility (First Published, Oxford University Press 2010) 563- 570, 563.

principle that a breach of a primary obligation (including Treaty of Amity) gives rise to a secondary obligation, on the part of the responsible State, to make reparation was clearly affirmed by the Permanent Court of International Justice (PCIJ) in the *Factory at Chorzow* Case, where it stated:

> *"It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."*[1]

As the Court stated in the *LaGrand* Case, "[w]here jurisdiction exists over a dispute over a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation."[2] Therefore, it is not necessary to find a separate basis for jurisdiction in the Treaty of Amity to consider the remedies that Iran requested. In fact, the necessary and inevitable consequence of committing a wrongful act is the compensation, and the courts do not need to rely on a separate jurisdictional basis to issue a judgment to compensate. It is only necessary that the Courts have jurisdiction to deal with the dispute.

As stated by the PCIJ in the *Factory at Chorzów case,* reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.[3]

Reparation can be described as the immediate corollary of a State's responsibility, i.e. as an obligation of the responsible State resulting from the breach, rather than as a right of the injured State(s). As Judge Higgins said, "[n]either a separate jurisdictional basis nor a separate finding of the engagement of responsibility is needed for the Court to order a remedy— once it has determined conduct to be illegal."[4]

The Court in *Certain Iranian Assets* Case declared that the respondent (USA) had violated its obligations under articles Article III (1), Article IV (1), and Article X (1). Having established these violations, the Court concluded that the United States was under an obligation to compensate Iran for the injurious consequences thereof, and decided that in case the Parties failed to reach an agreement on compensation within 24 months from the date of the Judgment, the matter would be settled by the Court at the request of either Party.

Giving a deadline to the disputing parties to determine the amount of compensation is a well-stablished rule in the Court procedure. In fact, in some cases, the Court is satisfied with finding a violation and leaving the determination of the extent of damages to the injured State based on the negotiations between the parties. It is obvious that if the parties do not reach an agreement in this regard, the Court will inevitably take the final decision on this issue. If they can't reach an agreement, then the Court will decide exactly on the amount of compensation.

Iran has also requested that the wrongful State (USA) make a formal apology for its internationally wrongful acts. It is interesting to note that an apology (or statements of regret)

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1 . Factory at Chorzów case, Merits, 1928, PCIJ, Series A, No 17 at p 29.

2 . LaGrand case, ICJ Reports, 2001, para 48 and the Avena case, ICJ Reports, 2004, para 34.

3 . Factory at Chorzów case, at p 47.

4 . Rosalyn Higgins, 'Issues of State Responsibility before the International Court of Justice' in Malgosia Fitzmaurice and Dan Sarooshi (eds), Issues of State Responsibility before International Judicial Institutions (First Published, Oxford and Portland Oregon 2010) 7.

is a traditional form of satisfaction referred to in jurisprudence.[1] The Anglo-American Claims Commission in the *I`m Alone* Case recommended that:

> *"The United States ought to finally acknowledge its illegality and apologize to His Majesty's Canadian Government. Furthermore, as a material amend in respect of the wrong, the United States should pay the sum of $25,000 to His Majesty's Canadian Government."*[2]

The *Rainbow warrior* Case followed a similar approach. Following the sabotage of the Rainbow warrior (owned by Greenpeace) by two French secret service agents in the port of Auckland in July 1985, France and New Zealand brought their dispute before the Secretary-General of the United Nations, who acted as a sort of arbitrator whose decision was beforehand accepted as binding by the parties. The Secretary-General ruled, *inter alia*, that:

> *"The Prime Minister of France should convey to the Prime Minister of New Zealand a formal and unqualified apology for the attack, contrary to International law."*[3]

The State which seeks an apology from another State it holds responsible for an incident which violated its international legal rights will, in principle, be seeking three things:

1. Acknowledgement by the other State that the incident did indeed take place (for it is often the case that the very occurrence of the incident—at least in the manner in which the State requesting the apology presents it will be denied or be in doubt),
2. Admission by that other State that it bears international responsibility for the occurrence of the incident (for even if the incident did occur in the manner alleged, any ensuing international responsibility is by no means automatically established), and
3. Expression of regret that the incident ever happened.[4]

In *Certain Iranian Assets* Case, the Court, in principle, accepts that a formal apology under appropriate circumstances, would constitute a form of satisfaction that the injured State is entitled to claim following a finding of wrongfulness.[5] In this Case, the Court considers that a finding of wrongful acts committed by the United States is sufficient satisfaction for the Applicant.[6] It seems that ICJ rarely accept the request for formal apology particularly in cases where the breached obligation arises from trade treaty rules.

Basically, the Court believes that an official apology is considered a form of double compensation. Therefore, in cases where monetary compensation is ordered, there is no need for an official apology as additional compensation. Also, it seems that the failure to find the violation

1 . Eric Wyler, Alain Papaux, 'The Different Forms of Reparation: Satisfaction' in James Crawford, Alain Pellet and Simon Olleson (eds), The Law of International Responsibility (First Published, Oxford University Press 2010) 630.
2 . The SS "I`m Alone" (Canada v. United States of America), 5 January 1935, 3 RIAA 1609-1618.
3 . Differences Between New Zealand and France arising from the Rainbow warrior affair, Ruling of the Secretary- General of the United Nations, 6 July 1986, 19 RIAA 199,214.
4 . Arthur Watts, 'The Art of Apology' in Maurizio Ragazzi (eds), International Responsibility Today (First Published, Koninklijke Brill NV 2005) 107-108.
5 . Ibid, para. 232.
6 . Ibid, para. 233.

of some other articles of the Treaty of Amity (Article 3(2), Article 5(1), Article 7(1) was one of the other reasons why the Court did not consider it necessary to condemn the United States to an official apology to Iran.

Conclusion

On March, 30, 2023, the International Court of Justice (ICJ) delivered its judgment in the case concerning *Certain Iranian Assets* (Islamic Republic of Iran v. United States of America). the Court found that the United States of America had violated some its obligation under the 1955 Treaty of Amity. It is a well-established rule that every internationally wrongful act committed by a State entails the international responsibility of that State. The term "legal consequences of international responsibility" covers the new legal relations which arise under international law as a result of the internationally wrongful act of a State. Specifically, three types of obligations are identified under Articles 28-31 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (the ARSIWA): the duty to perform the obligation breached the duty to cease the wrongful conduct, and the duty to make full reparation for the injury caused.

In the case of Certain Iranian Assets, Iran requests that the Court, by announcing the violation of the obligations arising from the Treaty of Amity, the United States is obligated, firstly, to end the violation of those obligations. Secondly, to pay the damages caused to Iran due to the violation of those obligations and thirdly, to formally apologize to the Islamic Republic of Iran for the violation of the relevant obligations and the damages caused to Iran.

ICJ finally decided that the United States had breached Articles III (1), IV (1) & (2), and X (1) of the Treaty of Amity. However, considering that the United States has terminated its primary obligation in accordance with Article XXIII (3) of the Treaty of Amity. Furthermore, as of October 3, 2019, onwards, the Treaty of Amity no longer creates binding obligations for the parties. Therefore, it should be acknowledged that, from that date onwards, there are no more binding obligations arising from the Treaty for the parties.

It is noteworthy that on July, 16, 2018, the Islamic Republic of Iran filed an Application with the Court an instituting proceeding against the United States for alleged violations of the Treaty of Amity. Iran sought a declaration from the Court that the US withdrawal from the Joint Comprehensive Plan of Action (JCPOA) on May 8, 2018, and the imposition of American sanctions from that date onward, violated the Treaty of Amity. The findings of the Court in the judgment of March 30, 2023, has important consequences on the other case between Iran and the United States in the *Alleged Violations of the 1955 Treaty of Amity* case. In that case, among other things, Iran requests the Court to adjudge, order, and declare that the United States shall immediately terminate the May 8 sanctions without delay and terminates the threats regarding further sanctions. Having found that the obligations of the United States under the Treaty of Amity no longer exist, the Court would conclude that the United States is not required to lift its sanctions on Iran based on its obligations under the Treaty of Amity. Therefore, Iran needs to modify its demands in the second case against the United States in light of the results obtained from the current judgment of the Court.

Iran also requests the Cessation of internationally wrongful acts of the United States in the *Certain Iranian Assets case*. It is obvious that the request to cease the wrongful acts is only reasonable if the wrongful act has a continuous nature, and at the time of the request, the illegal act is still going on. Therefore, this request was rejected by the Court.

The court finally accepted the third legal consequence of the US wrongful act against Iran. The Court declared that the United States was under an obligation to compensate Iran for the injurious consequences of its wrongful acts. It further decided that if the Parties fail to reach an agreement on compensation within 24 months from the date of the judgment, the matter would be settled by the Court upon the request of either Party. Therefore, it seems that in cases where the calculation of damages is complicated, the Court primarily leaves it to the parties to determine the amount of compensation, and if they do not reach a conclusion within a certain time, then the Court itself will determine the damages caused to the injured state.

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Iran's Involvement in Russia's Military Operations in Ukraine: an International Law Perspective

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ABSTRACT

The conflict between Russia and Ukraine has been dragged into political and legal fields in parallel with the battlefield, and the international community, including Iran, has been subsequently drawn into the situation. The controversial debates concerning Iran's role in supplying Russia with armed drones prior to and during Russia's Military Operations in Ukraine raise the question of Iran's international responsibility in the ongoing war. The provision of armed drones to Russia does not, in itself, constitute a violation of international law unless Iran knowingly and intentionally engaged in an internationally wrongful act. Evidence is not conclusive so far whether Iran's transfer of armed drones to Russia is a breach of international law. Besides, the use of the drones yielded military advantages to both sides: Russia could narrow down the impact of its attacks, respecting the principle of distinction, while Ukraine could target Iranian drones more easily than Russia's missiles, which is compatible with Iran's positive obligations under International Humanitarian Law (IHL).

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Introduction

Having engaged in a prolonged conflict with its Western neighbors over the potential threats to its sovereignty because of the progressive deployment of the NATO Integrated Air and Missile Defence System (NATINAMDS)[1], the Russian Federation justified the commencement of what it calls "Special Military Operations" on February 24, 2022. Russia's justifications is mainly based on individual self-defense and collective self-defense as well as the alleged humanitarian intervention[2] because of which invaded Ukraine's territory.

The conflict between Russia and Ukraine unfolded on the battlefield and dragged into political and legal realms. Consequently, the international community has taken different positions regarding Russia's so-called Special Military Operations in Ukraine, both politically and legally. While political steps have been taken through the United Nations General Assembly (UNGA), most notably, UNGA Resolution A/RES/ES-11/1.,[3] legal actions are mainly followed through the International Court of Justice's Case concerning "Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)."Russia's "Military Operations"[4] in Ukraine has also dragged other States into this conflict. The United States and the European Union have imposed a series of sanctions against the Russian Federation[5], and Russia has threatened to shut off gas supply to Europe[6],

1 . Jonathan Masters, 'Why NATO Has Become a Flash Point with Russia in Ukraine' (Council on Foreign Relations 20 January 2022), available at: https://www.cfr.org/backgrounder/why-nato-has-become-flash-point-russia-ukraine (accessed 13 January 2023). For NATO's responses to Russia's allegations, see 'NATO-Russia relations: the facts' (The North Atlantic Treaty Organization (NATO) 22 July 2022), available at: https://www.nato.int/cps/en/natohq/topics_111767.htm (accessed 13 January 2023).

2 . Kevin Jon Heller and Lena Trabucco, 'The Legality of Weapons Transfers to Ukraine Under International Law' (2022) 13(2) JIHLS 1, 2.

3 . UNGA Res ES-11/1 (2022) GAOR 11th emergency special session. (Aggression against Ukraine)

4 . This title has been addressed by the International Court of Justice in its Order of 16 March 2022 in Case Concerning Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the Indication of Provisional Measures (Order), ICJ, 16 March 2022. See: para. 81 of the Order. In this article the same title is mainly used.

5 . FACT SHEET: United States, G7 and EU Impose Severe and Immediate Costs on Russia (The White House 6 APRIL 2022), available at: https://whitehouse.gov/briefing-room/statements-releases/2022/04/06/fact-sheet-united-states-g7-and-eu-impose-severe-and-immediate-costs-on-russia/ (accessed 13 January 2023)

6 . 'Russia Threatens Oil and Gas Shut-Off as West Pursues Energy Price Caps' (The Moscow Times 2 September 2022), avail-

among other actions.[1] Additionally, It has been claimed that Russia's military is using Iranian armed drones, resulting in civilian casualties and infrastructure damages.[2] In her recent report to the UN Security Council on Non-Proliferation (UNSC, Implementation of Resolution 2231 (2015)), Under-Secretary-General, Rosemary A. Dicarlo repeated the claims of Ukraine, France, Germany, the United Kingdom, and the United States regarding Iran's involvement in Russia's Military Operations in Ukraine, highliting its inconsistency with the relevant provisions of annex B of the UNSC resolution 2231.[3] In its Resolution of 19 January 2023 titled "The EU response to the protests and executions in Iran," the European Parliament "calls for the expansion of restrictive measures in the light of the fact that the Islamic Republic of Iran continues to provide unmanned aerial vehicles and plans to provide surface-to-surface missiles to the Russian Federation for use against Ukraine; stresses that the Islamic Republic is contributing to war crimes in Ukraine, as these weapons are being used to target civilians and civilian infrastructure".[4]

The controversial debates around Iran's role in supplying Russia with armed drones before Russia's military operations in Ukraine raise two main questions that calls for examination under international law: 1) whether Iran bears international responsibility for supplying armed drones to Russia in the Ukraine situation, and 2) whether Iran bears responsibility for Russia's illegal conducts in violation of International Humanitarian Law (IHL)? According to the Lotus principle, what is not explicitly forbidden by international law is allowed for sovereign States[5]. Thus, Iran might not have violated international law by supplying armed drones to Russia unless it has explicitly engaged in an internationally wrongful act.

Article 2 of the "2009 Draft Articles on Responsibility of States for Internationally Wrongful Acts (the ARSIWA)," outlines the elements of an internationally wrongful act of a State, stating that "[t]here is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law, and (b) constitutes a breach of an international obligation of the State."[6] Besides, in a more elaborated sense, under Chapter IV, titled "Responsibility of a State in Connection with the Act of Another State," the responsibility of third States or "derivative responsibility" has been noted. Therefore, to find the answers to the above questions, firstly, we will identify and evaluate the relevant international obligations that may have been breached during Russia's Military Operations in Ukraine.

able at: https://www.themoscowtimes.com/2022/09/02/mikhail-gorbachev-theater-lover-a78702 (accessed 13 January 2023).

1 . For a comprehensive understanding of the effects of the Ukraine War on international legal order, see Ingrid (Wuerth) Brunk and Monica Hakimi, 'Russia, Ukraine, and the Future World Order' (2022) 116(4) AJIL 687, 694-697.

2 . Robin Wright, 'Iran Arms Russia in the War in Ukraine' (The New Yorker 5 November 2022), available at: https://www.newyorker.com/news/daily-comment/iran-arms-russia-in-the-war-in-ukraine (accessed 8 February 2023).

3 . Under-Secretary-General Rosemary A. Dicarlo's Remarks to the Security Council on Non-Proliferation (Implementation of Resolution 2231 (2015)), New York, 19 December 2022, UN Political and Peacebuilding Affairs, available at: https://dppa.un.org/en/dicarlo-restoring-jcpoa-remains-crucial-to-assure-international-community-of-peaceful-nature-of (accessed 14 January 2023).

4 . European Parliament resolution of 19 January 2023 on the EU response to the protests and executions in Iran (2023/2511(RSP)), P9_TA (2023) 0016, para. 23, available at: https://www.europarl.europa.eu/doceo/document/TA-9-2023-0016_EN.pdf (accessed 24 January 2023)

5 . PCIJ, The Case of the SS Lotus (France V. Turkey), Judgment, 7 September 1927, Collection of Judgments, Series A.-No. 70, p.20.

6 . International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, art. 2.

Secondly, a breach of an international obligation by Iran and the question of attribution with a focus on Iran's involvement in Russia's Military Operations in Ukraine would be examined.

It is important to note that this article focuses on the international legal aspects of arms trade between Russia and Iran and will not discuss the legality of Russia's so-called Special Military Operations in Ukraine, which has been dealing with properly so far.[1]

1. Recognizable International Obligations Regarding Arms Ttrade

Regarding Russia's Military Operations in Ukraine, there exist General (already provided for) and Special (of a sui generis nature emerging due to the ongoing war in Ukraine) international obligations. Both kinds of these international obligations will be surveyed in the following.

1.1. General International Obligations

Although war is prohibited in the UN Charter[2], arms trade between States is not generally forbidden under modern international law. In its Judgment of 27 June 1986 in the case concerning "Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)," the ICJ dealt with this issue and concluded that:

> *[…] in international law, there are no rules, other than those that may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception.*[3]

As emphasized by ICJ, some international regulations prohibit or limit the use and trade of certain weapons and their related activities. For instance, the Treaty on Non-Proliferation of Nuclear Weapons (the NPT) provides that both nuclear-weapon and non-nuclear-weapon States undertake to prohibit transfer or reception of nuclear weapons or control over such weapons directly, or indirectly.[4] Other treaties, such as the 1996 Amended Protocol II to the Convention on Certain Conventional Weapons (CCW)[5], the 1997 Anti-Personnel Mine Ban Convention[6], 1997 Chemical Weapons Convention (CWC)[7], and the 2008 Convention on Cluster Munitions[8] take a less or more similar approach to certain weapons and their related activities.

1 . In its volume 116 - Issue 4 (October 2022), the American Journal of International Law (AJIL) has published several articles reviewing the Ukraine War from different legal perspectives. There are other articles about the Ukraine War, some of which have been mentioned in this article.

2 . Article 2(4) of the UN Charter states: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the Purposes of the United Nations."

3 . ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgg ment, 27 June 1986, ICJ Rep 1986, para. 269.

4 . Treaty on Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161 (NPT), article. 2, and article. 3.

5 . Article 3(3) provides: "It is prohibited in all circumstances to use any mine, booby-trap or other device which is designed or of a nature to cause superfluous injury or unnecessary suffering."

6 . Article 1(1) provides: "Each State Party never undertakes under any circumstances: a) To use anti-personnel mines; b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines; c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention."

7 . Article 1(1) provides: "Each State Party to this Convention undertakes never under any circumstances: (a) To develop, proe duce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; (b) To use chemical weapons; (c) To engage in any military preparations to use chemical weapons; (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention."

8 . Article 1(1) provides: "Each State Party undertakes never under any circumstances to: (a) Use cluster munitions; (b) Dee

Arms Trade Treaty (ATT) is a comprehensive treaty that prohibits or limits certain activities related to the trade of not only a group of weapons but conventional weapons in general. Articles 6 and 7 of the ATT, forming the core of the Treaty's regulations on transfer and export control regime[1], are particularly relevant to this article. Article 6 provides that:[2]

1. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4 if the transfer would violate its obligations under measures adopted by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations, in particular, arms embargoes.
2. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4 if the transfer would violate its relevant international obligations under international agreements to which it is a Party, in particular those relating to the transfer of, or illicit trafficking in, conventional arms.
3. A State Party shall not authorize any transfer of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4 if it knows at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party.

Paragraphs 1 and 2 of Article 6 are among the widely recognized and fundamental rules of international law, while paragraph 3 is vague in terms of international responsibility. Firstly, it seems that paragraph 3 has an overlap with paragraphs 1 and 2; however, it might be helpful in case the Security Council is not able to act under Chapter VII of the UN Charter because of the Veto Power; secondly, the international law authority that determines the occurrance of those international crimes shall be specified. Thirdly, establishing knowledge could be challenging in the absence of any official legal declaration from responsible international authorities, such as the UNSC, ICJ, and International Criminal Court.

In the same vein , Article 7 of the ATT establishes a self-assessment mechanism through which the exporting State Party must, prior to authorization of the export of conventional arms, evaluate whether the exportation would contribute to or undermine peace and security or could be used to commit or facilitate a serious violation of international humanitarian law or international human rights law; an act constituting an offense under international conventions or relating to terrorism to which the exporting State is a Party; or an act constituting an offense under international conventions or protocols relating to transnational organized crime to which

velop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions; (c) Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention."

1 . Andrew Clapham and others, The Arms Trade Treaty: A Commentary (first published 2016, Oxford University Press 2016) 246.

2 . Arms Trade Treaty (adopted 2 April 2013, entered into force 24 December 2014) 3013 UNTS 269 (ATT), article. 6.

the exporting State is a Party. The applicability of Article 7, the same as Article 6, needs to be clarified.[1]

Along with international conventions and treaties, UNGA Resolution A/RES/2625(XXV), also known as the "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States under the Charter of the United Nations", should be taken into account. It provides that:

> *State parties to an international dispute and other states shall refrain from any action which may aggravate the situation to endanger the maintenance of international peace and security [...].*[2]

Finally, the Program on Humanitarian Policy and Conflict Research (HPCR) Manual on International Law Applicable to Air and Missile Warfare is a highly relevant legal material to this article. Though non-binding, it is a reliable source providing "the most up-to-date restatement of existing international law applicable to air and missile warfare, as elaborated by an international Group of Experts."[3] Paragraphs 5 and 6 of the Manual prohibit two categories of weapons based on 1) their methods or means of use and 2) certain models of weapons. In the first category (paragraph 5), which is based on the fundamental principle that "in any armed conflict, the right of the Belligerent Parties to choose methods or means of warfare is not unlimited":

a. […] it is prohibited to conduct air or missile combat operations which employ weapons that (i) cannot be directed at a specific lawful target and therefore are of a nature to strike lawful targets and civilians or civilian objects without distinction; or (ii) the effects of which cannot be limited as required by the law of international armed conflict and which therefore are of a nature to strike lawful targets and civilians or civilian objects without distinction;
b. […] it is prohibited to conduct air or missile combat operations that employ weapons that are calculated, or of a nature, to cause unnecessary suffering or superfluous injury to combatants.[4]

In the second category (paragraph 6), certain weapons are prohibited in air or missile combat operations, including:

a. Biological, including bacteriological, weapons.
b. Chemical weapons.
c. Laser weapons are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is, to the naked eye or the eye with corrective eyesight devices.

1 . See Public International Law & Policy Group, The Arms Trade Treaty: Key Principles Limiting Trade to Human Rights Violating States (Legal Memorandum), July 2015, p. 46; Andrea Edoardo Varisco, Giovanna Maletta and Lucile Robin, Taking Stock of the Arms Trade Treaty - Achievements, Challenges, and Ways Forward (first published 2021, SIPRI 2021) 52.
2 . UNGA Res 2625 (1970) GAOR 25th Session Supp 18 preamble. (Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations)
3 . HPCR Manual on International Law Applicable to Air and Missile Warfare, Program on Humanitarian Policy and Conflict Research at Harvard University, 15 May 2009, p. iii.
4 . Ibid, para. 2(2).

d. Poison, poisoned substances, and poisoned weapons.
e. Small arms projectiles calculated, or of nature, to cause an explosion on impact with or within the human body.
f. Weapons, the primary effect of which is to injure by fragments in the human body, escape detection by x-ray.

To conclude, it is clear that general international obligations on the transfer of arms took an exclusive and exceptional approach based on "methods or means of use" and "certain types of weapons."

1.2. Special International Obligations

Given the circumstances of an international conflict, special international obligations could be temporarily and exclusively established by certain international entities, including the UNSC and the ICJ, to maintain international peace and security.

> *In addition to established international regulations, in some instances, the UNSC has imposed arms embargoes under Chapter VII of the UN Charter. For example, the UNSC, in Resolution 713 (1991), mandates that: [...] under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia;*[1]

Somalia (Resolution 733 since January 1992), Côte d'Ivoire (Resolution 1572 since November 2004), Democratic People's Republic of Korea (Resolution 1718 since October 2006), Eritrea (Resolution 1907 since December 2009), Libya (Resolution 1970 since February 2011), Yemen (Resolution 2216 since April 2015), are other examples of UNSC's arms embargoes.

Regarding Russia's Military Operations in Ukraine, there is, and probably will be, no binding Resolution under Chapter VII of the UN Charter due to Russia's Veto Power. Furthermore, the UN General Assembly, in its Resolution of March 18, 2022, entitled "Aggression against Ukraine", "[d]eplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter"[2], "[c]ondemns all violations of international humanitarian law and violations and abuses of human rights, and calls upon all Parties to respect the relevant provisions of international humanitarian law strictly."[3] It further "[d]emands that all parties fully comply with their obligations under international humanitarian law to spare the civilian population, and civilian objects, refraining from attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population, and respecting and protecting humanitarian personnel and consignments used for humanitarian relief operations."[4]

1 . UNSC Res 713 (1991) UNSCOR 3009th meeting, para. 6. (Socialist Federal Republic of Yugoslavia)
2 . UNGA Res ES-11/1 (2022) GAOR 11th emergency special session, para.2. (Aggression against Ukraine)
3 . Ibid, para. 11.
4 . Ibid, para. 12.

Giving a title to a UNGA Resolution (such as Uniting for Peace) does not make it special or equal/identical to a UNSC-Chapter-VII Resolution; the UNGA's so-called "Uniting for Peace" Resolution cannot, technically and legally, alter the nature of a UNGA's Resolution and go beyond a recommendation[1] to the UN member States.[2] However, it can reflect the international community's ethical, phantom judgment and concern towards the ongoing situation in Ukraine. Thus, UNGA Resolutions or even recommendations by the UNSC cannot *ipso facto* constitute an international obligation, as confirmed by the ICJ in the Corfu Channel case.[3]

The maintenance of international peace and security under Chapter VII of the UN Charter is the *primary* responsibility of the UNSC.[4] However, the recognition of "threats to the peace", "breaches of the peace" and "acts of aggression" as the prerequisite for taking measures to maintain international peace and security is the *exclusive* responsibility of the UNSC.[5]

It is worth mentioning that the United States has initiated and led the Uniting for Peace Resolution against the Russian Federation in the UNGA.[6] However, it has undermined the utility of the same Resolution to condemn Israel and recommend sanctions against it in 1967, 1980, 1982, and 1997.[7]

Probably, the only legally-binding material that can be invoked as a criterion in Russia's Military Operations in Ukraine so far is 2022 Order of the ICJ in its recent Case (Ukraine v. Russian Federation). The Order contains several crucial considerations. The ICJ as the principal judicial organ of the United Nations "reaffirms that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" […] and thus create international legal obligations for any Party to whom the provisional measures are addressed."[8] The operative part of the Order determined two general obligations; firstly, it orders that:

> *The Russian Federation must, pending the final decision in the case, suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine. […] the Russian Federation must also ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of these military operations.*[9]

Secondly, with a broader approach, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of the dispute.[10]Despite these obligations arising from the operative part of the Order, the Court declares that it

1 . ICJ, Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, 20 July 1962, ICJ Rep 1962, p.165.
2 . Florian Kriener, 'Can the United Nations General Assembly Authorize a No-fly-Zone over Ukraine?' (Opinio Juris 15 April 2022), available at: https://opiniojuris.org/2022/04/15/can-the-united-nations-general-assembly-authorize-a-no-fly-zone-over-ukraine/ (accessed 13 January 2023).
3 . ICJ, Corfu Channel case, Preliminary Objection, Judgment, 25 March 1948, ICJ Rep 1948, p.22.
4 . Charter of The United Nations (adopted 26 June 1945, entered into force 24 October 1945), article. 24(1).
5 . Ibid., article. 39.
6 . Michael P. Scharf, 'Power Shift: The Return of the Uniting for Peace Resolution' (2023) 55 Case W. Res. J. Int'l L 1, 26.
7 . Ibid, 14.
8 . ICJ, Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the Indication of Provisional Measures, Order, 16 March 2022, para. 84.
9 . Ibid, para. 81.
10 . Ibid, para. 82.

"can only decide on Ukraine's claims if the case proceeds to the merits."[1] Besides, the Court declined Ukraine's request for a provisional measure directing Russia to "provide a report to the Court on measures taken to implement the Court's Order on Provisional Measures one week after such Order and then on a regular basis to be fixed by the Court" given the circumstances of the case.[2]

> *Regarding the Order, two critical points should be noted: firstly, the Court selectively references certain parts of the UNGA Resolution A/RES/ES-11/1 of March 2, 2022:The Court takes note of Resolution A/RES/ES-11/1 of 2 March 2022 of the General Assembly of the United Nations, which, inter alia, "[e]xpress[es] grave concern at reports of attacks on civilian facilities such as residences, schools and hospitals, and of civilian casualties, including women, older persons, persons with disabilities, and children," "[r]ecogniz[es] that the military operations of the Russian Federation inside the sovereign territory of Ukraine are on a scale that the international community has not seen in Europe in decades and that urgent action is needed to save this generation from the scourge of war," "[c]ondemn[s] the decision of the Russian Federation to increase the readiness of its nuclear forces" and "[e]xpress[es] grave concern at the deteriorating humanitarian situation in and around Ukraine, with an increasing number of internally displaced persons and refugees in need of humanitarian assistance."*[3]

Even though the Decisions of the Court, including Judgments and Orders, "[have] no binding force except between the parties and in respect of [a] particular case,"[4] the legal effects of the Court's Decision, even its Advisory Opinions, concerning the international community are undeniable. The Court must have astutely selected those parts of the UNGA Resolution and considered them reliable facts based on which it could assess whether or not "Risk of Irreparable Prejudice and Urgency" was confirmable.

The Court endorsed those paragraphs of the UNGA Resolution and gave them legal weight. Hence, as of March 16, 2022, in which the Order has been delivered by the Court, supplying Russia with arms might be a *de jure* violation of international humanitarian law since the Court, through the endorsement of the UNGA Resolution, took on the inhumane situation in Ukraine arising from Russia's Military Operations. The effect of this act of the Court is called by Öberg the causative effect of factual determinations, according to which "in the eyes of the determining body, a certain fact did or did not happen."[5] As "the principal judicial organ of the United Nations,"[6] the ICJ's factual determinations of the UNGA Resolution have transformed the nature of the Resolution from *de facto* to *de jure*.

1 . Ibid, para. 76.
2 . Ibid, para. 83.
3 . Ibid.
4 . Statute of The International Court of Justice (24 October 1945), article. 59. Also see ICJ, LaGrand (Germany v. United States of America), Merits, Judgment, ICJ Rep 2001, para. 109.
5 Statute of The International Court of Justice (24 October 1945), article. 59. Also see ICJ, LaGrand (Germany v. United States of America), Merits, Judgment, ICJ Re
6p 2001, para. 109.
ited Nations, op. cit., article. 92.

2. Breach of International Obligations by Iran in Connection With Russia's Military Operations in Ukraine

Breach of an international obligation by Iran could happen directly or indirectly. Focusing on Iran's involvement in Russia's Military Operations in Ukraine, in this part direct and indirect breaches of international obligations by Iran in connection with Russia's Military Operations in Ukraine will be analyzed.

2.1. Direct Breach of International Obligations by Iran

The majority of international conventions and treaties regulating arms trade among States, including the Anti-Personnel Mine Ban Convention, Chemical Weapons Convention, Convention on Cluster Munitions, etc., are unrelated to the subject matter of this article. Regarding the utilization of Iranian drones in Russia's Military Operations in Ukraine, in the absence of special conventions and treaties as well as binding documents dealing with "Unmanned Aerial Vehicle" or "Missiles", only international legal instruments emanating general obligations will be reviewed since special international obligations do not apply in this particular case.Arms Trade Treaty (ATT) consists of the most general international obligations regarding controlling and limiting arms trade[1]; however, neither Russia nor Iran is a State Party or Signatory to the ATT. As a result, these two States could not be held accountable unless it is argued that the provisions of the ATT, particularly Articles 6 and 7, have become a part of customary international law and States' practice.[2]

There are two solid reasons for undermining this assumption. Firstly, customary international law is formed when there is a "constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future."[3] Quite the contrary, according to the latest Stockholm International Peace Research Institute (SIPRI)'s research on international arms transfers, volumes of arms transfers and international sales indicate how eager Powers are to preserve this lucrative market[4] and how reluctant they are to abide by the obligations arising from the ATT. Secondly, since the transfer of weapons is derived from the fundamental principle of sovereignty in international law, according to which "a State could generally control all activities within its territory over which it has sovereignty",[5] those States who do not accept obligations under customary or codified international law, including the ATT, cannot be held accountable. Therefore, Russia and Iran are not obligated to apply the provisions of the ATT. Notwithstanding the achievements of the ATT and the value it has, there

1 . Marlitt Brandes, '"All's Well That Ends Well" or "Much Ado About Nothing"?: A Commentary on the Arms Trade Treaty' (2013) 5(2) GOJIL 399, 401.
2 . ICJ, Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia), Preliminary Objections, Judgment, ICJ Rep 2016, para. 33.
3 . International Law Association, Statement of Principles Applicable to the Formation of General Customary International Law, 2000, para. 1(i).
4 . International arms transfers - The trend in international transfers of major arms, 1982–2021 (SIPRI), available at: https://www.sipri.org/research/armament-and-disarmament/arms-and-military-expenditure/international-arms-transfers (accessed 13 January 2023).
5 . Chris McGrath, 'Principles of sovereignty under international law' (Lecture in International Regulatory Frameworks for Climate Change and Environmental Management (ENVM7124), Environmental Law Australia 10 December 2018), available at: http://envlaw.com.au/wp-content/uploads/handout_sovereignty.pdf (accessed 27 January 2023).

is a long way to go for this treaty to form and establish a comprehensive regulatory mechanism among its member States, which cannot come along in such a short time.[1]

The 2009 HPCR Manual is a non-binding instrument that mirrors some universally accepted principles and rules in other binding documents, such as the 1949 Geneva Conventions. It adds nothing to the existing legal literature but rather codifies them into one document.

On the other hand, there is an enriched literature about Iran's arms trade limitations in the UN resolutions. In fact, "Iran has been the subject of numerous rounds of UN sanctions for its weapons program, and a basis under international law to prevent its ballistic missile program has predated the Joint Comprehensive Plan of Action (the JCPOA)[2]for decades."[3] Nevertheless, after the JCPOA was approved, the UN Security Council lifted the sanctions imposed in Resolutions 1696 (2006), 1737 (2006), 1747 (2007), 1803 (2008), 1835 (2008), 1929 (2010), and 2224 (2015) through Resolution 2231.

In the case of Iran, UNSC Resolution 2231[4] endorsed the JCPOA and lifted previous rounds of sanctions, which is the key in determining whether Iran has breached an international obligation. The Resolution has two annexes: "Annex A: Joint Comprehensive Plan of Action (JCPOA), Vienna, 14 July 2015" and "Annex B: Statement". Paragraph 3 of Annex B states:

> *Iran is called upon not to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons, including launches using such ballistic missile technology, until the date eight years after the JCPOA Adoption Day or until the date on which the IAEA submits a report confirming the Broader Conclusion, whichever is earlier.*

Iran is forbidden "to undertake any activity related to ballistic missiles designed to be capable of delivering nuclear weapons […]." The Pentagon acknowledged that it "could not confirm news reports that Russia has asked Iran for ballistic missiles and other capabilities […]."[5] consequently, "*Contra rationem*, there is no limitation or prohibition for Iran to establish ballistic missiles programs designed to be capable of delivering non-nuclear weapons."[6]

On the one hand, the UN ban on Iran's transfer of conventional weapons and ballistic missiles ended on October 18, 2020,[7] and Russia, on the other hand, is not a ban-territory-to-transfer-arms country; arms trade between Iran and Russia did not breach any international obligation so far.

Iran has not been taking direct action in Russia's Military Operations in Ukraine so far. On the contrary, "Iran's position of active neutrality *vis-à-vis* the war in Ukraine" has been reaf-

1 . Andrea Edoardo Varisco, Giovanna Maletta and Lucile Robin, Taking Stock of the Arms Trade Treaty - Achievements, Challenges, and Ways Forward (first published 2021, SIPRI 2021) 52.
2 . Joint Comprehensive Plan of Action (JCPOA), 14 July 2015.
3 . Alireza Ranjbar, 'Iran's Ballistic Missile Program from an International Law Perspective' (JURIST – Legal News and Commentary 31 December 2017), available at: https://www.jurist.org/commentary/2017/12/alireza-ranjbar-iran-ballistic-missile/ (accessed 13 January 2023).
4 . UNSC Res 2231 (2015) UNSCOR 7488th meeting. (Non-proliferation)
5 . Jim Garamone, 'Russia's Reliance on Iran, Sign of Putin's Isolation' (US Department of Defense 1 November 2022), available at: https://www.defense.gov/News/News-Stories/Article/Article/3206808/russias-reliance-on-iran-sign-of-putins-isolation/ (accessed 13 January 2023).
6 . Alireza Ranjbar, op.cit.
7 . UNSC Res 2231 (2015) UNSCOR 7488th meeting, Annex B, paragraph 6(b). (Non-proliferation)

firmed by Iran's Ministry of Foreign Affairs.[1] Nevertheless, Iranian Foreign Minister Hossein Amirabdollahian admitted that "a few drones had been delivered to Russia before Moscow's troops crossed the border with Ukraine in late February."[2]

The act of supplying Russia with conventional arms, allegedly done by Iran during the Ukraine War, should be magnified from time perspective. From October 18, 2020, the date of termination of the UN ban on Iran's transfer of weapons, to March 16, 2022, the date of the ICJ's Order, there are no general or special international obligations forbidding the transfer of conventional weapons, including drones, between Russia and Iran. It should be noted that the ICJ's Order of March 16, 2022 is a turning point since it endorsed the UNGA Resolution of 18 March 2022 and confirmed the inhumane situation in Ukraine arising from Russia's Military Operations and the possibility of violation of IHL by Russia. So, the remaining question is whether or not Iran has indirectly breached an international obligation regarding IHL by supplying Russia with arms.

2.2. Indirect Breach of International Obligations by Iran

An indirect breach of an international obligation is either a "negative" or a "positive" obligation. Negative obligations are addressed in Article 16 of the ARSIWA:

A State that aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.According to article 16 of the ARSIWA, *contra rationem*, Iran should not aid or assist Russia if it knows that Russia has committed an internationally wrongful act. Commentary No. 3 after article 16 provides three clauses as follows:

> *First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given to facilitate the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.*
>
> *Importantly, commentary No. 2 makes a distinction between "the act of assisting State" and "the act of assisted State":The assisting State will only be responsible if its conduct has caused or contributed to the internationally wrongful act. Thus, in cases where that internationally wrongful act would have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.*

Accumulation of commentaries No. 2 and No. 3 leads us to an important conclusion: the assisting State should have "knowledge" about the commission of an internationally wrongful act that the assisted State has done, and its assistance should be a wrongful act in its nature. Since March 16, 2022, the date the ICJ delivered its Order, providing Russia with arms and

1 . 'Iran's Foreign Ministry spokesman reacts to comments by Ukrainian foreign minister' (Islamic Republic of Iran's Ministry of Foreign Affairs 04 November 2022), available at: https://en.mfa.gov.ir/portal/newsview/698706 (accessed 13 January 2023).
2 . Gian Volpicelli, 'Iran admits providing drones to Russia but denies involvement in Ukraine' (POLITICO 5 November 2022), available at: https://www.politico.eu/article/iran-russia-drone-war-ukraine-hossein-amirabdollahian/ (accessed 13 January 2023).

weapons by Iran would constitute a breach of an international obligation and bring about Iran's international responsibility unless Iran argues and proves that its assistance has been done in compliance with its obligations under international law in general and international humanitarian law in particular so that the nature of its assistance could not be considered as a wrongful act.

Along with negative obligations, there are perceivable positive obligations for Iran concerning Russia's Military Operations in Ukraine to be considered, particularly from the IHL perspective.

According to the Common Article 1 to the four 1949 Geneva Conventions (the 1949 GCs), "[t]he High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." Not only does this provision establish a negative obligation, meaning member States shall "neither encourage, nor aid or assist" in a conflict, but it also contains a positive obligation, which means they shall "do everything reasonably in their power to prevent and bring such violations to an end,"[1] as it is reflected in rule 144 of Customary International Humanitarian Law:

> *States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law.*

Since "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives,"[2] third parties have the same obligations as the parties to the conflict in respecting and ensuring respect for IHL. It also should be stressed that "[t]he High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so."[3] One of the results of article 1 is that "in the event of a Power failing to fulfill its obligations, the other Contracting Parties (neutral, allied or enemy) may, and should, endeavor to bring it back to an attitude of respect for the Convention."[4] Therefore, Iran has willingly or unwillingly assisted Russia in minimizing the collateral damages of its attacks by providing Russia with "precision-guided munition." Compared to Russian missiles, Iranian drones, which belong to the "precision-guided munition" category, are more precise and compatible with International Humanitarian Law (IHL), especially when it comes to the "principle of distinction." Needless to mention, Iranian drones are more targetable objects than Russia's missiles so that Ukraine Air Force has shot them down during the War.[5] Consequently, Iranian drones brought military advantages to both

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1 . 2016 Commentary of the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949), International Humanitarian Law Databases, International Committee of the Red Cross (ICRC), 2016, available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD (accessed 13 January 2023).

2 . Protocol Additional to the Geneva Conventions of 12 August 1949, and the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, article. 48.

3 . Ibid, article 86(1).

4 . Jean Pictet, Commentary on the Geneva Conventions I of 1949 (first published 1952, ICRC 1952) 26.

5 . AFP, 'Ukraine Shoots Down 45 Drones: Air Force' (Kyiv Post – Ukraine's Global Voice 01 January 2023), available at: https://www.kyivpost.com/post/6319 (accessed 13 January 2023).

sides: Russia could narrow down the impact of its attacks, respecting the principle of distinction, while Ukraine could target Iranian drones more easily than Russia’s missiles.

However, there would be a conflict between third parties’ negative and positive obligations. For instance, what if Russia uses Iranian drones without respecting the IHL? Sassòli answered this question proficiently twenty years ago:

> *Violations of international humanitarian law are often committed with weapons provided by third States. As long as those particular weapons are prohibited, a State providing them is not responsible for violations of international humanitarian law committed by the receiving State with such weapons. However, once it knows that the receiving State systematically commits violations of international humanitarian law with certain weapons, the aiding State has to deny further transfers thereof, even if those weapons could also be used lawfully.*[1]

Emphasizing the importance of the “systematic violations of IHL” test, he highlighted the importance of “knowledge” as another test:

> *Indeed, once the violations are known, ongoing assistance is necessary to facilitate further violations. Such a strict standard may be different from the ILC in its Commentary. However, it is supported by the special obligation, under international humanitarian law, of the third State, not only not to assist in violations but also to “ensure respect” for the rules of international humanitarian law by all other States. A State providing assistance, knowing that the latter is used for violations, is certainly not complying with that specific obligation.*[2]

In Sassòli’s view, then, two criteria minimize the scope of the positive obligation of third states: the sending State’s “knowledge” of “systematic violations of IHL” by the receiving State, both of which are subjective in case there is no authority to announce violation of IHL. It is hard and complicated, if not impossible, for Iran to detect and collect detailed information on whether Russia has used Iranian drones with the aim of systematic violations of IHL or not.

It seems that the knowledge of systematic violations of IHL could not be established unless Ukraine helps Iran with concrete documents to understand how Russia misused Iranian drones and violated IHL. If Ukraine has any information about misusing of Iranian drones by Russia, it must share the information and relevant documents not only with Iran but also with respective organizations such as the United Nations and the International Committee of the Red Cross (ICRC) to review the documents. Otherwise, Iran would not be responsible for Russia’s act in Ukraine.

Conclusion

There are a variety of technical and legal considerations and a need for more evidence regarding Iran’s involvement in Russia’s Military Operations in Ukraine. Alleging States *must* provide Iran and the United Nations with concrete facts and explain how Iran’s obligations under international

1 . Marco Sassòli, ‘State responsibility for violations of international humanitarian law’ (2002) 84(846) IRRC 401, 413.
2 . Ibid.

law have been violated. What is claimed by the US authorities,[1] concerning Iran's obligations under the JCPOA, plainly shows how anecdotally and politically, and not legally, their allegations are. The United States endeavors to politicalize international law, particularly international responsibility, and extend Iran's international responsibility to Russia's Military Operations in Ukraine, which Iran has condemned from the beginning, are primitive by international law standards and far from the rule of international law, which works based on facts and legal principles. It clearly aligns with the United States lawfare policy in pursuit of its "[…] strategy of using— or misusing—law as a substitute for traditional military means to achieve an operational objective."[2]

Furthermore, Iran's good faith and due diligence in resolving the difficulties with Ukraine, including a mutual meeting to go into Russia's use of Iranian drones,[3] showed Iran's seriousness about not getting involved in Russia's Military Operations. Fishing in troubled waters, the United States has been trying to distort the truth about Iran's role in Russia's Military Operations in Ukraine as a supporter of Russia, a sponsor of War, and a threat to international peace and security while the United States is the main cause and beneficiary of the war.[4]

Even if this presumption be accepted that Iran provides the Russia with "precision-guided munition", it does not proof any breach of international Law obligations by Iran since the use of the drones yielded military advantages to both sides: Russia could narrow down the impact of its attacks, respecting the principle of distinction, while Ukraine could target Iranian drones more easily than Russia's missiles, which is compatible with Iran's positive obligations under IHL.

Considering the bigger picture, Iran is not the problem of the War in Ukraine. The big and main problem is the malfunctioning of the UNSC rather than Iran's alleged involvement in Russia's Military Operations. The function of the UNSC has been called into question because of the Veto power of the Security Council's Permanent Members. If the United States and European Permanent Members of the Security Council (France and the United Kingdom) were genuinely concerned about the situation in Ukraine and similar situations, they should consider amending the Charter of the United Nations and reconsider the Veto's function. Otherwise, their concerns regarding the War in Ukraine are political leverages against Russia and Iran.

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1 . See for examples: David Vergun, 'General Says Iranian Drones, Troops Operating in Ukraine' (U.S. Department of Defense 20 October 2022), available at: https://www.defense.gov/News/News-Stories/Article/Article/3195380/general-says-iranian-drones-troops-operating-in-ukraine/; Jim Garamone, 'Russia's Reliance on Iran, Sign of Putin's Isolation' (U.S. Department of Defense 01 November 2022), available at: https://www.defense.gov/News/News-Stories/Article/Article/3206808/russias-reliance-on-iran-sign-of-putins-isolation/ (accessed 18 February 2023).

2 . Charles J. Dunlap Jr., 'Lawfare Today: A Perspective' (2008) 3(1) YJIA 146, 146.

3 . 'Iranian, Ukrainian Experts Meet to Discuss Russia's Use of Iranian Drones' (The Kyiv Independent 22 November 2022), available at: https://kyivindependent.com/news-feed/iranian-ukrainian-experts-meet-to-discuss-russias-use-of-iranian-drones (accessed 20 February 2023).

4 . For more information see: Anthony H. Cordesman, 'United States Aid to Ukraine: An Investment Whose Benefits Greatly Exceed its Cost' (Center for Strategic & International Studies (CSIS) 21 November 2022), available at: https://www.csis.org/analysis/united-states-aid-ukraine-investment-whose-benefits-greatly-exceed-its-cost; 'US economy is reaping benefits from the Ukraine crisis' (Global Times 03 March 2022), available at: https://www.globaltimes.cn/page/202203/1253787.shtml; 'What does the Ukraine crisis mean for the US?' (Economist Intelligence 12 April 2022), available at: https://www.eiu.com/n/what-does-the-ukraine-crisis-mean-for-the-us/; 'Revisiting U.S. Grand Strategy After Ukraine' (Foreign Policy 2 September 2022), available at: https://foreignpolicy.com/2022/09/02/us-grand-strategy-ukraine-russia-china-geopolitics-superpower-conflict/ (accessed 26 January 2023).

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Challenges Facing International Cooperation in Addressing War Crimes, with Reference to the Ongoing Conflicts in Ukraine and Gaza Strip

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ABSTRACT

The commission of war crimes by States in armed conflicts has become a distressingly common occurrence, resulting in devastating consequences for and profoundly affecting global conscience. In response, international jurists have sought to develop practical and appropriate solutions to minimize the occurrence of such crimes during armed conflicts. Consequently, they have succeeded in devising specialized documents which form the current international system for addressing war crimes. Recruiting a descriptive-analytical method and using library sources, this research aims to investigate the primary causes hindering the efficacy of the current system in holding perpetrators accountable. The study, also explores key international documents related to this subject matter. Findings indicate that challenges such as inadequate implementation mechanisms in these documents, the prioritization of international relations over international law by governments, the absence of participation from major military powers, and the limited use of political tools by others States against the offending States are crucial reasons behind the weakness of the current international system in addressing war crimes.

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Introduction

The contemporary world has recognized the importance of maintaining global peace and security and nations are continually seeking to resolve their differences through peaceful methods. However, despite the destructive effects of past wars on mankind, certain governments still consider war as an inevitable and effective way to resolve disputes and assert their rights. The leaders' failure to acknowledge the unfortunate results of armed conflicts has compelled the rational ones to work together in order to regulate the conditions and terms of armed conflicts, reducing its destructive effects. these efforts have led to imposing some restrictions on war tools and methods.

Historically, the use of certain methods and tools in conflicts can be traced back to the past centuries, the concept of war crimes, as it exists today, developed at the end of the 19th and the beginning of the 20th century, coinciding with the formulation of the rules of International Humanitarian Law (IHL). The Hague Conventions (also known as the Peace Conventions)[1]of 1899 and 1907, prohibiting the use of unconventional and inhumane tools and methods of war, became the central rules during military conflicts. Subsequently, several other treaties have been ratified in this field, such as the four Geneva Conventions of 1949 and the two additional protocols of 1977, which focus on the protection of persons no longer participating in armed conflicts.[2] These conventions, echoing the conditions at the time of their adoption, outline various examples of war crimes. However, no single international document has been approved to comprehensively address all war crimes to date. Therefore, examples of these crimes can be found in sources of IHL, International Criminal Law (ICL) treaties, and customary law.

Unlike genocide and crimes against humanity, war crimes can be committed against a wide range of victims, including combatants or non-combatants, depending on the nature of the crime. In international armed conflicts, victims include wounded and sick members of armed forces on land and at sea, prisoners of war, and civilians. In non-international armed conflicts, protection is provided to persons not actively participating in hostilities, such as members of the armed forces who have laid down their arms and persons detained because of illness, injury, or

1 . Hague Conventions of 1899 and 1907 (peace conferences).
2 . The Geneva Conventions of 1949 and their Additional Protocols.

other reasons. In addition, in both types of conflicts, medical, religious and humanitarian sites and personnel are protected. from a broader perspective, war crimes can be divided into the following: a) Crimes against persons who need special protection; b) Crimes against humanitarian aid providers and peacekeeping operations; c) Crimes against property and other rights; d) Use of prohibited methods of war; e) Use of prohibited weapons of war. While a discussion of the various examples of war crimes falls beyond the scope of the present article, some of the significant classifications are presented. Perhaps the most comprehensive definition of war crimes in international documents can be found in the first and second clauses in Article Eight of the Rome Statute. This Article outlines various examples of war crimes under the heading of "serious and severe violations of the four Geneva Conventions."[1]

The authors of this article believe that despite the significant progress in the international criminal law system, and notwithstanding its relatively short life compared to the domestic criminal law systems, this legal system has thus far failed to meet the expectations of the world legal community in effectively preventing and controlling war crimes during armed conflicts, as well as prosecuting criminals and perpetrators of war crimes following the cessation of hostilities. Therefore, the authors intend to analyze the overall effectiveness of international cooperation by scrutinizing the international interactions and collaborations, as well as applying the international legal rules to recent wars to investigate the reasons behind the current system's inability to response properly to these crimes.

Consequently, this article seeks to find whether international cooperation in addressing war crimes has been effective so far and under diverse conditions. The authors, operating under the hypothesis of a negative answer, aim to specify the reasons for such failures, while offering guidelines for various events and occurrences during and following armed conflicts in the present era. To achieve this goal, the article begins by examining various international documents in this field, discussing and reviewing the general guidelines presented therein. Subsequently, by applying these guidelines to current global events, the authors attempt to clarify the shortcomings and inadequacies that hinder their ability to meet the needs of international community in this regard.

1. International Cooperation in Addressing War Crimes

An analysis of the procedures of the governments and the historical evolution of international law reveals that bilateral and multilateral regional or global treaties and agreements are the most significant forms of international cooperation in addressing war crimes. Conventions, treaties, and official international documents are the prominent outcomes of the cooperation of various members of the international community. These cooperative efforts have had a positive effect in advancing the goals of governments in various areas, including the prevention and prosecution of war crimes. This section presents some of the significant measures taken in this regard.

1.1. The Geneva Conventions (1949)

Compliance with humanitarian principles and rules during wars can help prevent the occurrence of war crimes. In this regard, on August 12, 1949, member States of the international community

1 . The Rome Statute of the International Criminal Court (1998).

approved rules on the protection of persons who no longer participate in conflicts in the majority of the four Geneva Conventions. These Conventions, along with their additional protocols approved on June 8, 1977, which addressed the protection of civilians and all persons affected by war, greatly influenced the framing and regulation the tools and methods of war. these international documents now form the foundation of IHL and the principles contained in them have become international customs.[1]

The term "war crime" is not explicitly mentioned in these documents, yet a series of actions and behaviors specific to war conditions been prohibited. on the other hand, recent international documents, such as the Rome Statute (which will be discussed below), often cite the prohibited acts mentioned in the Geneva Conventions as examples of war crime. These documents play a pivotal role in detecting, identifying and introducing examples of war crimes during international armed conflicts, facilitating the prosecution and trial of perpetrators by international courts. The significance of the provisions of the Geneva Conventions and their protocols can be seen in their implementation. for instance, in the current genocide in Gaza perpetrated by the Zionist regime, clear instances of non-compliance with the provisions of these documents have been observed. These violations can be referred to international courts for future follow-up. Therefore, the drafters of the Geneva Conventions, by codifying prohibited actions, behaviors, and tools of war at the international level, laid the foundation for prosecuting and punishing the perpetrators of war crimes, establishing the first legal pillars of the legal system in this area.

In addition to addressing war crimes, the text of Geneva Conventions reveal that the drafters (representatives of the contracting States) had important goals and values in mind. This shows the significance of international cooperation among member states to prevent the occurrence of these crimes. some of the important points related to these international documents are outlined beneath.

- Article 1 common to the Geneva Conventions regarding the need to respect the Convention states: "The High Contracting Parties undertake to respect the present Convention under any circumstances and ensure respect for it." It is clear that the contracting parties have paid attention to the special features of these documents by committing to comply with the provisions of the Convention at the outset. it is not merely a mutual obligation that binds parties to the contract as long as the other party fulfills its obligations. Rather, it consists of a set of unilateral commitments officially concluded before the world and on behalf of other contracting parties. Therefore, every government undertakes obligations towards itself and others. In other words, the parties to the treaty must not only respect its rules, but also guarantee respect by other governments. This unique feature of the Geneva Conventions signifies the desire for international cooperation to prevent and reduce war damages.
- The second common article regarding the implementation of the Convention points out that its provisions apply to all hostilities declared by its members, even if one par-

1 . Sharifi Kia Mohammad Ali, Ghasemi Gholam Ali, 'The role of the European Union in the promotion and development of international humanitarian law' (2023) Journal of International Law, (published online, available at: https://www.cilamag.ir/article_710232.html). (forthcoming)

ty to the conflict fails to meet the conditions of war. It also applies in cases that lead to partial or total occupation of the territory of the contracting States, even if such occupation occurs without armed resistance. this emphasis shows the drafters' recognition of the imbalance of power among different countries in armed conflicts. In addition, the Conventions do not attach much significance to the formal declaration of war or the occurrence of full-scale war between parties. Since there is a potential for damage and casualties, they stress the application of the Conventions' provisions.

- The third common article, which addresses non-international conflicts in the territory of the contracting parties, also reflects the high goals of the Conventions. In addition to their main mission of supporting war-affected individuals, by covering this category of armed conflicts the Conventions restrict governments from using force without control and supervision. The article emphasizes that regardless of the nature of the conflict or the parties involved, the main objectives of the Conventions, which is the protection of individuals, must be respected.

1.2. United Nations General Assembly Resolution 3074 (1973)

In 1973, the United Nations General Assembly (UNGA) adopted Resolution 3074, titled "Principles of International Cooperation in the Field of Detection, Arrest, Extradition and Punishment of War Crimes and Crimes Against Humanity."[1] This Resolution, building on previous resolutions in this area,[2], acknowledged the principles mentioned in the UN Charter, which promote international cooperation to maintain peace and security. Through the Resolution, the UNGA also recognized the urgent need for the trial and punishment of war criminals, with 94 votes in favor and 29 abstentions agreed on nine basic principles in this field. Though UNGA resolutions are non-binding and serve as recommendations to the international community, their impact on subsequent rule-making processes carried out by different countries should not be overlooked. some of these principles are outlined below:

- The first principle states that crimes of this nature should be investigated regardless of the place of occurrence, and if there is evidence against a person of committing these crimes, they should be tracked down, arrested and tried.[3] Two significant pillars in this principle have been agreed upon by the UNGA. Firstly, the location of the crimes is considered irrelevant and it can be interpreted as such that even if such crimes are committed by a non-member State or a country that has withdrawn front the United Nations, the international community should investigate the matter. Secondly, the mere existence of evidence against individuals regarding the commission of these crimes is considered sufficient reason to start investigations, pursue and arrest these individuals, and, if proven guilty, subject them to proportionate punishment.
- The second principle recognizes the right of every government to try its citizens who

1 . Principles of international cooperation in the detection, arrest, extradition and punishment of persona guilty of war crimes and crimes against humanity, 3074 (XXVIII).

2 . Including resolutions: 2583 (XXIV) of December 15, 1969, 2712 (XXV) of December 15, 1970, 2840 (XXVI) of December 18, 1971 and 3020 (XXVII) of December 18, 1972.

3 . A_RES_3074(XXVIII), Article 1.

have committed such crimes.[1] Evidently, this principle does not reserve this right only for the respective states of the criminals but just emphasizes the right of their respective states for prosecuting these kinds of criminals, in other words trying the war criminals is not exclusive.

- The third principle emphasizes the necessity for bilateral and multilateral cooperation between governments to prevent the occurrence of these crimes and encourages all countries to take domestic and international measures in this regard.[2] If we consider the conclusion of treaties as a form of cooperation, encouraging member states to conclude bilateral and multilateral treaties on extradition of criminals and war criminals to the jurisdiction where the crime was committed, and regarding the methods for pursuing, trying, and punishing suspects and criminals are of the focal points of this principle.
- the fourth principle emphasizes governments' cooperation in the discovery, arrest and trial of the suspects as well as the punishment of the perpetrators of war crimes.[3] Dividing the duties of governments into two separate areas- the prevention and stopping of war crimes, and the prosecution and punishment of criminals- demonstrates the General Assembly's thorough approach before, during and after the outbreak of hostilities and indicates the Assembly's serious commitment to eradicating war crimes.
- The fifth principle highlights to the necessity of cooperation between the governments in extraditing the accused and criminals of war crimes to the country where the crimes were committed, and calls on all countries to make efforts in order to facilitate this process.[4] The trial and punishment of war criminals in the country where the crimes took place can have a significant deterrent effect on potential perpetrators in that country. Furthermore, this principle aligns with the second principle, which stresses the right of the respective government to prosecute and punish these criminals.
- The sixth principle focuses on the cooperation of governments in collecting evidence and summoning witnesses necessary for the trial of war criminals and requires governments to exchange such information with each other.[5] This measure by the UNGA helps in identifying the individuals involved in the commission of the crimes and significantly facilitates the trial and punishment processes. The Assembly's primary focus in this principle is to prepare the proceedings and trials of these unique criminals.
- The seventh principle refers to Article 1 of the Declaration on Territorial Asylum adopted on December 14, 1967. This Article deprives governments of the right to grant asylum to persons who have serious reasons to be prosecuted for war crimes.[6] This action prevents the political efforts by allies of war criminals and hinders attempts to avoid trial and punishment through changing citizenship or seeking asylum.
- The eighth principle requires the member States to refrain from any action that may

1 . Ibid, Article 2.
2 . Ibid, Article 3.
3 . Ibid, Article 4.
4 . Ibid, Article 5.
5 . Ibid, Article 6.
6 . Ibid, Article 7.

disrupt in the process of investigation, prosecution, and punishment of war criminals.[1] This principle can be seen as complementary to the third and fourth principles, which urged countries to cooperate in these areas. In other words, the underpinning of this principle suggests that if a government does not intend to cooperate in the direction of the third and fourth principles, at the very least and possibly, it should not disrupt the follow-up processes of other governments.

- Finally, the ninth principle subjects all the actions of the governments in the above fields to compliance with the principles of the UN Charter and the Declaration of the Principles of International Law regarding friendly relations and cooperation between governments.[2] the obligations of the countries under this Resolution have been made conditional on complying with the provisions of the aforementioned documents. The aim is to prevent suspicious activities and ensure that governments not to violate the basic and significant principles of international law in order to achieve the goals of this Resolution.

1.3. Draft Code of Offences against the Peace and Security of Mankind (1996)

The UNGA, on December 10, 1981, considering the undeniable role of the ILC in preparing and codifying new international rules, and referring to Article 13(1) of the UN Charter, which empowers the commission to undertake studies and research to develop progressive rules in international law, requested the ILC to prioritize its work in drafting laws on crimes against the peace and security of humanity. During this request, the assembly asks the commission to consider the possibility of reviewing this draft during a five-year plan and reporting the final results in its thirty-fourth session.[3]

Subsequently, with continuous follow-up by the UNGA, the main text of the above draft code, which had been initially approved in 1991, was updated and approved in its final form in the forty-eighth meeting of the ILC in 1996. The Commission presented the draft code to the Assembly in the form of a report, consisting of 20 articles. the last Article of the draft code specified examples of war crimes, stating that any of the war crimes mentioned in the Article, when committed systematically or on a large scale, would be considered a crime against the peace and security of humanity.[4] The use of the terms systematic and widespread in the draft code emphasizes that while any crime and harm against individuals is in conflict with the spirit of law, the Commission prioritizes collective interests over individual interests in war situations. in order to limit the scope of the destructive effects of war, the draft code will be applicable only when the crime is committed with premeditation and against a large number of identified individuals.

The draft code and the interpretations provided by the Commission fail to yield a clear conception of the term "wide scale". Additionally, it seems that Article 20 is merely a restatement

1 . Ibid, Article 8.
2 . Ibid, Article 9.
3 . Draft Code of Offences against the Peace and Security of Mankind (A/RES/36/106).
4 . Ibid, Retrieved from https://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf, accessed on March 5, 2024.

of the prominent norms of IHL, and there is significant overlap among the seven categories of crimes mentioned in this Article. For instance, torture leading to death could potentially violate four clauses of this Article simultaneously.[1] Therefore, it seems that no new propositions have been added in this regard, but rather a repetition of existing international legal principles.

Secondly, the text of the draft code seems to be in contradiction with the text of the Geneva Conventions, which form the basis of contemporary IHL. Article 20 stipulates that different categories of war crimes are considered crimes against human security when committed on a large scale. However, the first paragraph of Article 20, for instance, considers acts that are in contradiction with IHL, such as torture and inhumane treatment as war crimes. While the Geneva Conventions do not make any reference to the scale of such acts and absolutely prohibit governments from engaging in such behaviors. Consequently, it seems that the draft code does not consider actions like torture as crimes against the security of mankind unless they are carried out on a large and wide scale. in other words, instead of emphasizing the absolute prohibition of actions that causes human, financial, and emotional damage, the draft code implicitly permits such acts on a smaller scale, as if the Commission considered war crimes to be forgivable as long as they are carried out on a smaller scale.

- Despite these contradictions, it is important to acknowledge the positive aspects of this draft code. Articles seven to ten of this draft are significant matters in dealing with criminals, which will be briefly discussed in the subsequent section. article 7 refers to the position of criminals in the internal system of their government and the lack of influence of such position on their criminal liability.[2] according to this Article, the official position of a person who committed the crimes outlined in this draft, even if he acted as the head of the government or a certain government, will not exempt them from prosecution or a reduction in their punishment. By addressing the highest officials of the governments, this provision has exhausted the argument made by officials of different countries and states that the position of criminals should not be act as a shield against their prosecution for committing such crimes, thereby obstructing the administration of justice.
- The first section of Article 8 grants member States the authority to exercise global jurisdiction over crimes listed in Articles 17 to 20, regardless of where and by whom these crimes were committed.[3] This provision, similar to the previous Article, respects the application of jurisdiction over any person who has committed the aforementioned crimes within any member State. However, the second section specifically designates the competence to deal with the crime of rape (the subject of Article 16) within the jurisdiction of the International Criminal Court (ICC), thereby prohibiting governments from unilaterally prosecuting their nationals for this crime. The development of jurisdictional competence of government in dealing with such crimes is undoubtedly

1 . The mentioned action seems to be a simultaneous violation of the following provisions in the draft: the first part of the first paragraph, the fourth part of the second paragraph, the fourth paragraph and also the first part of the sixth paragraph.
2 . A/RES/36/106, Article 7.
3 . Ibid, Article 8.

an important step towards preventing and addressing the commission of such crimes, and it serves to limit the maneuverability for criminals.

- Article 9 addresses the responsibility of States regarding the extradition or trial of individuals referred to in Articles 17 to 20, while safeguarding the jurisdiction of the ICC., provided that the said person is found in the territory of the member States[1]. The Article stipulates that if a person accused of committing a war crime is found in the territory of a member State, the government should either extradite the accused to his respective state or the ICC Court, or alternatively, initiate domestic proceedings against them.
- Article 10 further facilitates the conditions for the extradition of the individuals subject of this draft. It includes four paragraphs which urge the member States to: (1) include the crimes outlined in this draft in their extradition treaties with other countries; (2) consider this draft as a legal basis for extradition of the criminals if there is an absence of a bilateral treaty with the requesting country; (3) henceforth consider the crimes subject of this draft as extraditable; and (4) address the crimes mentioned in the draft as if they were committed not only in their country, but also in all other countries.[2] This provision marks an important step towards facilitating the extradition of those accused of war crimes, and with the approval of the member countries, it can potentially replace bilateral or multilateral treaties, and give the states the opportunity to pass new laws in this area and prevent delays that may lead to the destruction of evidence against defendants or an internal political maneuver hindering extradition of war criminals.

Naturally, there are concerns about aspects of these articles that cannot be disregarded; for instance, the authority that Article 8 grants to the member States to exercise jurisdiction over trials of individuals accused of rape within their jurisdictions may give rise to controversy and collusion. Furthermore, it is possible that a government which has not approved this draft (whether through a resolution or convention), based on the procedure established by other countries, claim the authority to prosecute nationals of other countries in its domestic courts.[3] Nevertheless, despite these issues, this significant international effort should not be completely discredited. it is evident to international lawyers that the rule-making process in international law is slower and more cautious than in domestic law. As the famous saying goes, sometimes one has to settle for a flawed agreement rather than opt for no agreement at all.

1.4. The Rome Statute (1998)

The Rome Statute, also known as the Statute of the International Criminal Court, recognizes four categories of war crimes: (1) gross violations of the four Geneva Conventions; (2) serious violations of customary international law in international armed conflicts; (3) serious violations of the provisions of the third common article of the Geneva Conventions, which applies to non-international armed conflicts; and (4) serious violations of laws and customs applicable to conflicts that

1 . Ibid, Article 9.
2 . Ibid, Article 10.
3 . Jean Allain, John R.W.D. Jones, 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind' (1997) Volume 8, Issue 1, European Journal of International Law 103–104.

do not have an international aspect and character. The complete list of these crimes is provided in Article 8 of the Rome Statute, but a detailed discussion of all the examples is beyond the scope of the present analysis.[1]

The serious violations raised in the first category essentially correspond to the prohibited acts outlined in the four Geneva Conventions, which include intentional killing, torture, inhumane treatment, and hostage taking or extensive destruction of property. Crimes specified in the second category originate from various previous international sources and documents, such as the 1899 Hague Resolution on fragmentation shells,[2] the 1907 Hague Rules on rules and customs of war on land,[3] the 1925 Geneva Gas Protocol,[4] and the First Additional Protocol to the Geneva Conventions of 1977.[5] The crimes specified in the third category, related to common article 3, include the prohibition of acts such as violence against the life of persons, mutilation, cruel treatment and torture.[6] Finally, the crimes specified in the fourth category are derived from various sources such as the 1907 Hague Laws and the Second Additional Protocol to the Geneva Conventions.[7]

The significance of the Rome Statute in addressing war crimes can be examined from different perspectives. One notable feature is the substantial number of States that have ratified this international document so far. According to the latest outlets of the Court, 123 States have officially joined and accepted the Court's jurisdiction over crimes listed in the Statute.[8] Another important feature that can turn this document into one of the crucial international tools in addressing war crimes is the evolution of its provisions in various fields of identification, prosecution, trial and punishment of war criminals. The relevant topics discussed in this analysis are included in the third and ninth sections of the Statute; The third section focuses on the general principles of criminal law and the ninth section is dedicated to principles related to international cooperation and judicial assistance. In this section, we will highlight some of the most important provisions found in the third part of the Statute.

- Authorizing the Court the competence to address the crimes committed by natural persons and outlines the conditions of this jurisdiction, stating that individuals who participates in or facilitates the commission of crimes falling under the jurisdiction of the Statute will be held responsible.[9] This article is one of the few rules in international law that directly affects natural persons and imposes responsibility directly on them. While individuals are generally not subjects of international law, the Rome

1 . Rome statue of the International Criminal Court (ICC), 1998, Article 8.
2 . the 1899 Hague Declaration (IV; 3) concerning Expanding Bullets.
3 . the 1907 Hague Convention respecting the Laws and Customs of War on Land.
4 . Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva 17 June 1925.
5 . Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva 8 June 1977.
6 . Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva 8 June 1977.
7 . Knut Dormann, Elements of war crimes under the Rome statute of the international criminal court (Cambridge University Press 2002) 343-345;
Retrieved from https://assets.cambridge.org/97805218/18520/sample/9780521818520ws.pdf., accessed on March 5, 2024.
8 . 'The States Parties to the Rome Statute', Available at https://asp.icc-cpi.int/states-parties., accessed on March 5, 2024.
9 . the Rome Statute, Article 25.

Statute, by establishing this international institution that addresses crimes committed by natural persons, marked a significant step towards the development of international peace and security.

- Article 27 complements the preceding paragraph, by delineating that the position, status and official capacity of individuals, whether private, governmental or international does not exempt them from criminal liability under this statute. This means that all individuals regardless of their position (even heads of State), will be held accountable for their actions before the Court.[1] Emphasizing on Article 25 without considering the significance of this Article would render this analysis incomplete. The drafters of the Statute exhibited remarkable accuracy in this section, because the history of wars is a testimony to the claim that the crimes covered by the Statute are committed by or upon the orders of heads of the independent political entities, such as governments. Consequently, the entire text of the Statute would be rendered futile if these individuals were exempt from responsibility.
- Article 28 dwells on the separate responsibility of military commanders in relation to the crimes under the Statute, holding them directly accountable for crimes committed by forces under their command.[2] The rationale behind this provision is that is that a military commander either had knowledge of the crimes being committed or failed to take reasonable measures to prevent them. In both cases, the superior commander bears responsibility. However, this responsibility is contingent upon the commander's effective control, which means that they must have been aware of the crimes and consciously ignored them, failed to take necessary measures to prevent them, or neglected to refer the issue to competent authorities for consideration. Only under these circumstances can they be held responsible for the crimes committed.
- Article 30 emphasizes the significance of a mental or psychological element[3] in establishing criminal liability. In addition to the occurrence of a crime or the presence of a material element,[4] a person must have intention and knowledge[5] to incur criminal liability. This means that the individual participated in the action with premeditated intention and had the purpose of achieving a certain result, or they created a situation where, based on their actions or the normal course of events, such a result was probable. In other words, the same criteria for intention and result considered in the domestic law are also applicable as the standards for individual responsibility in international law. This provision can help screen the main suspects in addressing a war crime. naturally, for these crimes to happen, several events must occur, and sometimes a number of individuals facilitate the process of their implementation; however, it is irrefutable that in military matters, the information is classified and not all the individuals are informed of the details. Therefore, the premise that certain individuals who participated in the commission of a crime did not have the knowledge of the final

1 . Ibid, Article 27.
2 . Ibid, Article 28.
3 . Mens rea.
4 . Actus reus.
5 . Ibid, Article 30.

result anticipated by the commanders or the main officials, or did not intend for such a result to occur, and hence should not be prosecuted and held responsible is warranted to some international legal scholars.

- Article 33 elaborates on the orders of superiors and legal provisions, stating that if a crime occurred as a result of the order of a superior or a legal authority from a higher organizational hierarchy, the perpetrator would not be absolved from responsibility whether they are military or not, unless the individual is obligated to obey orders of their superior or government, the order is not clearly illegal or the individual has no knowledge of the illegality of the order.[1] In this section, the Court considers the orders to commit genocide and crimes against humanity clearly illegal and excludes them from the scope of discussion. Therefore, like the provisions of Article 30, it can be said that, according to the Court, the obligation and coercion resulting from employment or military relations combined with the lack of knowledge of the law and the possible result of the committed act can be taken as grounds for absolving international criminal responsibility.

As mentioned above, the ninth section highlights the importance of international cooperation in areas related to the objectives of the Court. The opening article of this section requires a general commitment to cooperation from all member States in the investigation and trial of crimes under the jurisdiction of the Court. It stresses the necessity for immense cooperation with this international institution. Given the significance of this topic, we will provide a brief overview of some key provisions outlined in this section.

- Article 87 of the Statute addresses the authority of the Court regarding requests for cooperation from member States, non-member countries, or international organizations. It also outlines the mechanisms for submitting requests for cooperation to governments, as well as principles such as the confidentiality of correspondence of the Court.[2] Granting authority to the Court to pursue its goals from non-member countries and organizations is a strong point that the drafters of the Statute gave special attention to. The importance of this provision arises from the fact that, due to the sensitive nature of the Court's goals, requests for information or other forms of cooperation cannot be limited to member States. Presumably, the purpose of this Article, as perceived by its drafters, is to increase the authority of the Court in line with its inherent mission, ensuring that the Court can seek assistance from any subject of international law in preparing proceedings and addressing crimes falling within its jurisdiction, without any limitations.
- Article 88 requires the member States to establish and approve cooperation mechanisms with the Court in their national laws.[3] The implementation of this provision also facilitates the execution of the Court's requests and the governments' compliance with their obligations towards the Court. By establishing internal laws governing co-

1 . Ibid, Article 33.
2 . Ibid, Article 87.
3 . Ibid, Article 88.

operation with the Court, there is no longer a need for political votes or reliance on the interests of governments to establish communication channels. Consequently, regardless of whether the government or the ruling party, there will be greater hope for cooperation from member governments. On the other hand, this provision emphasizes that after the approval of the Statute by a government, any law that overshadows the functioning of the Court and the relationship between the said government with the Court should be dismissed.

- Article 89 addresses the process of surrendering individuals to the Court. According to this Article, member States must allow the transfer of individuals subject to the Court's jurisdiction from their territories. If the individual is found in the same territory, the same State will be responsible for the transfer.[1] In order to implement the transfer request, it must include the profile of the individual, a summary of their legal status, and a warrant for their arrest and surrender. This provision practically expands the Court's jurisdiction to member countries and considers the implementation of the transfer request issued by the Court as an obligation of the requested country, facilitated by the provisions outlined in the previous article.[2]
- Article 90 examines potential conflicts between requests for transfer from the Court and other countries.[3] According to this Article, when the reasons behind the Court's request and those of the other government regarding the transfer of individuals are the same, and the Court considers the case of the individual admissible, priority will be given to the request of the Court. This provision minimizes the possibility of political lobbying and preventing the application of the universal jurisdiction of the Court and facilitates the Court's proceedings by prioritizing the request of the Court. The only circumstances in which priority can be given to the request of a third State from the point of view of the Statute are when the Court considers the case of the individual in question inadmissible based on preliminary information or when the requested State is not a member of the Statute and is obligated, according to its previous treaties with the requesting State (third State) to surrender the individual to that State. Therefore, in other cases and when the requested State is a member of the Statute, priority is given to the request of the Court.
- Article 92 mentions the possibility of issuing a request for temporary detention by the Court.[4] The importance of this request is related to situations such as emergencies where there is a sense of urgency to arrest the accused or to protect witnesses and evidence related to the activity of the Court. The possibility of issuing this request, like

1 . Ibid, Article 89.

2 . In addition to the cases that have been stated so far regarding the extradition and trial of war criminals, we can refer to the report of the working group of the International Law Commission regarding the obligation of governments to extradite or try these criminals in 2013 and the 65th session of the commission, which is for further reading. In this context, you can refer to the following address: https://legal.un.org/ilc/reports/2013/., accessed on March 5, 2024.

3 . Ibid, Article 90.

4 . Ibid, Article 92.

the national legal systems, can have a significant impact on the prosecution and trial of war criminals.

- Article 93 refers to other forms of government cooperation with the Court regarding the investigation and trial process of criminals.[1] Upon scrutinizing the provisions of this Article, it seems that the diverse forms of cooperation considered by the drafters of the Statute are very similar to the category of judicial representation in national legal systems. Because the cooperation contemplated by the Court and outlined in this Article includes identifying individuals and their whereabouts , obtaining documents, witness testimony and expert reports, interrogating wanted people, serving judicial documents, facilitating the voluntary presence of individuals in the Court as witnesses or experts, transferring people to the headquarters of the Court, examining various places such as the location of graves and examining them, conducting searches and seizures, supporting victims and witnesses, identifying and confiscating property, assets, and instruments of crimes, and providing any other type of assistance that is not prohibited by the domestic law of the requested country and helps with the purposes of investigation and prosecution. Furthermore, the provision of such possibilities by the Statute for the member States empowers the Court to leverage the facilities and resources of member States in the same way as its central function, thus saving resources in the process of prosecuting and punishing criminals. Additionally, granting these powers to the member States seemed necessary, because for instance, in cases where the place of crime, the place where the accused are found, the residence of witnesses and informants, as well as the seat of the Court or the government that intends to prosecute criminals are different, the best way to go through the process of the case more swiftly is to delegate the powers of the Court to the member States.

The Rome Statute, like the other international documents mentioned above, dwells on issues that can be effective in addressing war crimes, but unlike them, due to its treaty structure, it has an executive sanction. In other words, it has provided practical solutions that are proportionate to the goals of the Court. However, it seems that for various reasons, such as trying to gain the consent of the international community to express agreement with the founding treaty of the Court and approve it in its internal systems, there is no guarantee of solid implementations in international law compared to national systems. Also, due to the evolutionary nature of this document, its drafters have in some cases simplified the rules and taken steps to satisfy the States. For instance, Article 98 of the Statute, regarding the cancellation of the immunity of individuals considered by the Court, states that, the Court lacks the authority to compel States to surrender individuals when such action would conflict with the State's other international obligations to a third State, unless prior consent has been obtained from that third State."[2]

Such propositions may be instrumental in creating an international consensus to join the Statute of the Court. However, to some extent, they may harm the spirit and main goals of this

1 . Ibid, Article 93.
2 . Ibid, Article 98.

international institution. Because there are two different interpretations of this provision. First, the drafters of the Statute have taken steps to respect the international obligations of governments and respect the rights enshrined in international treaties by applying this provision, and in this provision, they have given equal value to other obligations of governments in addition to their obligations to the Court. Second, the result of this respect can be the exploitation of this rule by hostile governments that violate the international rules governing armed conflicts, evading prosecution and punishment of war crimes, invoking and justifying the existence of diplomatic immunities.

Furthermore, a careful examination of the preamble of the Statute[1] reveals the scope of the views held by the contracting States and its originators. At the beginning of this document, the drafters outline the lofty and fundamental goals that have become the basis for the formation of this international institution.

In order to better understand the need for cooperation of the international community regarding the crimes covered by this document, in this section we will outline some important points concerning its goals.

- Emphasizing the bonds and common heritage of humanity, referring to such concepts, indicates that despite the existence of differences between societies, the human race is basically the same, and as a result, the provisions of the Statute are designed to support all the people of the human race and at least regarding the crimes falling within the Court's jurisdiction, exceptions cannot be made and the occurrence of these crimes in different parts of the world cannot be disregarded.
- Emphasizing the category that the crimes under the statute are the most serious crimes of concern to the international community as a whole. As a result, this category of crimes should not remain unpunished, and effective prosecution should be guaranteed by taking action at the national level and by strengthening international cooperation. This paragraph underscores the rule of fighting impunity, a commitment reiterated in the following paragraphs of the introduction. Moreover, it seems that from the point of view of the drafters of the Statute, this fight against the immunity of war criminals is only possible with the cooperation of governments at the international level and the implementation effective measures at the national level.
- Emphasizing the additional jurisdiction of the Court compared to national criminal courts, this clause raises one of the main features of the Court, stating that domestic criminal investigations and prosecutions have priority over the exercise of the Court's jurisdiction. while, it may seem that this supplementary jurisdiction is in conflict with the jurisdiction of temporary criminal courts that have primacy over national criminal courts; However, Article 17 discusses this in detail.
- Emphasizing the formation of the Court on a permanent basis in order to protect the present and the future of human generations, this paragraph refers to the permanence

1 . The preamble sets the tone of the ICC Statute. Pursuant to Article 31 of the Vienna Convention the preamble is part of the context within the ICC Statute and should be interpreted and applied.

of the Court, in contrast to the temporary nature of the Nuremberg and Tokyo military Courts, as well as the ad hoc tribunals of the former Yugoslavia and Rwanda. Will have. It seems that the drafters of the Statute deemed the existence of a permanent court necessary to deal with these crimes, considering the previously mentioned cases. In doing so, they responded to some criticisms leveled against their predecessors who were the justice of the victorious parties in the war or used the laws that have been passed on to us during the proceedings.

2. The Reasons for the Failure of the Current System in Addressing War Crimes

When examining the course of international developments and the historical process of the wars of the present age, it is practically evident that except for some cases in the previous generations of international criminal courts, the international system has taken appropriate and practical reaction in confronting war criminals. This means that except for a few specific cases where relevant courts have been formed and sometimes individuals have been tried, other tragedies that have occurred in various international conflicts in recent decades have received little attention. Additionally, not only the previous generations of criminal courts have not been given much attention to, but also, they have been targets to many criticisms. For instance, some jurists argue that Tokyo trials were victors' courts[1], only dealing with the crimes of the officials of the defeated parties, as if the purpose of holding them was only to take revenge by the countries that won the war,[2] while war crimes committed by victorious parties, such as the United States' use of atomic bombs against civilians and residential areas in Hiroshima and Nagasaki, went unpunished.

In support of this claim, reference can be made to the famous words of Winston Churchill's son,[3] the British Prime Minister during World War II, who commented on the holding of the Nuremberg and Tokyo trials: "The events of the Nuremberg and Tokyo trials showed that politicians, the society that thinks of aggressive wars in the future and plans such actions, will not be immune from punishment. But it should be remembered that the Nazi and Japanese leaders were called to trial not because they started the war, but because they failed in it."[4] Therefore, it seems that the current international law system of the world, despite the progress it has made in criminal fields, has not yet achieved sufficient deterrence in the field of committing war crimes and has failed to achieve its main goal.

This section aims to outline some of the significant reasons for the current system's failures, with a particular focus on the ICC, in addressing war crimes in recent international con-

1 . Ismaili Mahdi, Jedi Siamak and Biglou Rahim, 'Jurisdiction, Duties and Options of International Courts', (2018), 4th International Conference on Jurisprudence and Law, Advocacy and Social Sciences, Hamadan 1; https://civilica.com/doc/1001178.

2 . Chapari Mohammad Ali, Shaygan Fard Majid 'Criminal responsibility in international crimes and its confrontation with the discourse of immunity' (2016) 10(37) International Legal Research 65.

3 . Randolph Churchill.

4 . Plavski Stanila, 'review of the principles of international criminal law' (translated by Seyed Ali Azmayesh, Tehran University Press 2014) 66.

flicts, such as the crises in Ukraine and the Gaza Strip. We will briefly explore the role of each of these causes in the aforementioned conflicts.

2.1. Failure to Ensure Effective Implementation in International Instruments

Scrutinizing the various reasons behind the lack of accountability in the current system for addressing war crimes in the international law may bring to mind the suspicion that due to the nascent nature of international law and the sensitivities that arise in this branch of legal science, currently due to the lack of documents and international treaties in the field of dealing with war crimes, and this is one of the main factors for the ineffectiveness of the current international law system in this field. Therefore, criticisms can be raised about this proposition, including the fact that the number of international documents in this field does not necessarily correlate with the efficiency and implementation of these documents in the international arena.

The history of the development of international law shows the fact that States can commit themselves to the implementation of the rules of that document by simply expressing their commitment to a comprehensive document in various areas. For instance, with the entry into force of the Convention on the Law of the Sea, it practically became the fundamental law governing maritime affairs, and now most of the countries of the world follow its provisions. Therefore, the main problem lies not in the lack of resources in this field. Instead, it can be argued that the lack of provisions guaranteeing appropriate executions in the mentioned documents is the main reason. While previous international documents in this field have played a role in shaping legal texts related to war crimes, they have not effectively addressed these crimes. In this regard, General Assembly resolutions have solely served as a suggestive role, and the draft proposals presented by the ILC have laid the foundation for the formation of a treaty in this field, yet they have not had much practical effect at the time of approval. They have not done much to address these crimes. Of course, one cannot overlook the role of such documents in the development of legal texts related to war crimes over the past years, and certainly, the international community owes the efforts of the drafters to the current version of the Rome Statute, which facilitated the formation of a specialized institution in addressing these crimes. There are previous international documents in this field.

The issue of execution guarantees, in various branches of international law, has its own sensitivities, and naturally, due to the differences between the domestic legal system and the international law system, one cannot expect the same level of guarantee of execution from this system. However, regarding such crimes that harm human conscience, more was expected from the compilers of international documents. In the previous section, it was mentioned that the text of the Rome Statute itself sometimes considers the international obligations of different countries preferable to the obligations they have in dealing with such crimes, and governments can rely on the diplomatic immunity granted to the officials of other countries and refrain from submitting them to the Court.

Furthermore, in addition to the permission given to the States, the practical inability of the States to prosecute the heads of other States has also had an effect on this issue. An example of acknowledging this weakness can be seen in the words of the President of South Africa and

the then-Prime Minister of Brazil regarding the non-implementation of the arrest warrant for the President of Russia, Vladimir Putin, issued by the ICC.[1] On March 17, 2023, the Second Branch of the Court issued an arrest warrant for Vladimir Putin following accusations of committing war crimes by forcibly moving thousands of children from Ukraine to Russia, following which the leaders of several States exhibited different reactions to this decision of the Court, including the president of South Africa on July 18, 2023, in an interview with his national media, stating that the President of Russia is going to participate in the economic conference held in the coming month in South Africa, and the respective government will not arrest him, because this action is a declaration of war against the Russian Federation.[2] Similarly, the Prime Minister of Brazil announced in an interview on September 11, 2023, at the G-20 Summit that if Putin participates in the next year's Summit in Rio de Janeiro, the Brazilian government will not be able to arrest him.[3]

The failure to anticipate appropriate responses by the international community during cooperation, particularly in ensuring the security of the participating countries while prosecuting war criminals, is another neglected aspect in the planning of these cooperations. Fear of new conflicts between cooperating countries or the spread of existing armed conflicts to the territory of other States significantly impacts States' willingness to cooperate in addressing war crimes and punishing criminals. Therefore, it seems that the international community has not adequately considered providing appropriate and preferably collective guarantees to participating countries in this matter to instill confidence and facilitate progress in this direction.

2.2. The Primacy of International Relations over International Law

The intricate relationship between international relations and international law, and the impact of international relations on the development and evolution of international law, cannot be disregarded. These two concepts have historically been intertwined, with the formation and development of international law being the result of the international relations of different governments and their shared interests. Therefore, political alliances established among different governments are noteworthy. The same thing has been manifested in the behavior of different governments towards various issues so that alliances have even affected the degree of governments' adherence to their international commitments in the face of war disasters and crises, and sometimes we have witnessed a dual approach from different countries regarding the same issues.

As an instance, the dual approach of the European Union and the United States in response to the crises in Ukraine and Gaza serves as an illustrative case. From the beginning of the war in Ukraine, the European Union has imposed sanctions on Russia in various areas, through various resolutions passed by the European Commission. The Union even imposed sanctions on

1 . 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova', Retrieved from https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and., accessed on March 5, 2024.

2 . 'South Africa Says Arresting Putin Would be Declaration of War', Retrieved from https://abcnews.go.com/International/wireStory/south-african-leader-arresting-putin-johannesburg-month-war-101434563, accessed on March 5, 2024.; https://www.aljazeera.com/news/2023/7/18/south-africa-says-arresting-putin-would-be-declaration-of-war., accessed on March 5, 2024.

3 . 'Up Brazil's Judiciary Decides Putin Arrest if He Visits Luna', Retrieved from https://www.reuters.com/world/up-brazils-judiciary-decide-putin-arrest-if-he-visits-brazil-lula-2023-09-11/., accessed on March 5, 2024.

governments suspected of cooperating with Russia, such as Belarus and the Islamic Republic of Iran. Up until June 23, 2023, the Union had approved approximately eleven sanctions and restrictive measures in economic, military and agricultural sectors against Russia.[1] Similarly, the United States had taken various measures and condemned Russia's invasion of Ukraine. The President of the United States strongly denounced Russia's actions in the annexation of the eastern regions of Ukraine,[2] and the US Treasury Department has imposed about 100 new sanctions on Russian natural and legal entities until November 2, 2023, with the aim of cutting off the supply chain of war supplies needed for further invasion of Ukraine.[3]

However, in the case of the Gaza crisis, the European Union refrained from imposing any sanctions on the Zionist regime so far and even some high-ranking officials of the Union have supported this regime wholeheartedly on multiple occasions. For instance, the High Representative of the European Union for Foreign Affairs and Security Policy,[4] as well as members of the European Parliament,[5] expressed support for the actions of the Zionist regime, while solely emphasizing that these actions should comply with the IHL framework. Nonetheless, reports on the ongoing conflicts in the Gaza Strip clearly indicate that the Zionist regime does not have the slightest respect for these international rules.

In confirmation of this claim, it suffices to mention two points. firstly, according to numerous reports from human rights organizations like Human Rights Watch, the Zionist regime has used white phosphorus chemical bombs in densely populated areas of Gaza and Lebanon, causing severe long-term injuries to the civilians.[6] Secondly, on October 18, 2023, the Zionist regime committed a great war crime by bombing al-Ma'mdani hospital, resulting in the death of approximately 500 to 1000 civilians. Following this tragedy, the Ministry of Foreign Affairs of some Islamic countries including Iran, condemned the attack.[7] However, despite these atrocities, the unwavering support of certain countries for the horrifying actions of the Zionist regime persists, as far as the heads of five States- France, Germany, Italy, England and the United States- in a joint statement on October 9, 2023, declared their full support for the Zionist

1 . 'EU response to Russia's war of aggression against Ukraine', Retrieved from https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/#sanctions., accessed on March 5, 2024.

2 . 'Statement from President Biden on Russias Attempts to Annex Ukrainian Territory', Retrieved from https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/30/statement-from-president-biden-on-russias-attempts-to-annex-ukrainian-territory/., accessed on March 5, 2024.

3 . 'Treasury Hardens Sanctions With 130 New Russian Evasion and Military-Industrial Targets', Retrieved from https://home.treasury.gov/news/press-releases/jy1871#:~:text=The%20U.S.%20Department%20of%20State,effort%20and%20other%20malign%20activities., accessed on March 5, 2024.

4 . 'Israel/Palestine: what the EU stands for', Retrieved from https://www.eeas.europa.eu/eeas/israelpalestine-what-eu-stands_en., accessed on March 5, 2024.

5 . 'MEPs condemn Hamas attack on Israel and call for a humanitarian pause', Retrieved from https://www.europarl.europa.eu/news/en/press-room/20231013IPR07136/meps-condemn-hamas-attack-on-israel-and-call-for-a-humanitarian-pause., accessed on March 5, 2024.

6 . 'Israel Used White Phosphorus in Gaza and Lebanon', Retrieved from https://www.hrw.org/news/2023/10/12/israel-white-phosphorus-used-gaza-lebanon#:~:text=(Beirut%2C%20October%2012%2C%202023,answer%20document%20on%20white%20phosphorus., accessed on March 5, 2024.

7 . 'Syrian Government Denounces Barbaric Zionist Massacre at al-Mamdani Hospital in Gaza', Retrieved from https://syrianobserver.com/news/85732/syrian-government-denounces-barbaric-zionist-massacre-at-al-mamdani-hospital-in-gaza.html, accessed on March 5, 2024.;
https://en.mfa.ir/portal/newsview/732292/Iran-FM-pens-letter-to-Vatican-counterpart-calls-on-followers-of-Abrahamic-religions-to-confront-Gaza-aggression., accessed on March 5, 2024.

regime.[1] Moreover, also during the Gaza crisis, the heads of these States made frequent visits to the occupied territories as a sign of support for the Zionist regime, and certain States offered financial and military aid to the regime, as well.

In the examination of this dual policy adopted by the countries in response to the two crises and armed conflicts, and the indifferent approach of the States towards international rules in the face of the Zionist regime's current crimes in the Gaza Strip, shows the greater importance of the policies of the major States and international relations by high-ranking officials compared to the accepted rules of international law. In other words, it seems that the States' relations with each other determine their willingness to implement international rules and take a position in the face of widespread violations of the rules of armed conflict. This view can also be considered as a significant reason for the failure of the current system of dealing with war criminals. Because if the heads of the States were committed to the implementation of international rules during international conflicts and the prosecution and trial of war criminals under all circumstances, such contradictions in the conduct of the aforementioned States would cease to exist, fostering greater hope for the punishment of criminals.

2.3. Non-Membership of Certain Major Powers in the Rome Statute

The Statute of the ICC is currently the most comprehensive treaty in the field of dealing with war crimes. the drafters of this document have taken a significant step toward addressing these crimes by accurately predicting the methods and mechanisms of prosecution, trial and punishment of war criminals. However, it is noteworthy that certain influential States such as the United States, Russia, India and Pakistan are not members to this Statute. These States have a history of armed conflicts and direct or indirect involvement in numerous wars. The non-membership of the Zionist regime[2] in the Statute is also of great importance.[3] To explain the significance of this issue, reference can be made to the considerable number of wars these States have been involved in.[4]

The non-membership of these States and the Zionist regime in the Statute can be examined from three perspective. Firstly, in the event of armed conflict and war crimes, there is no obligation for these States to try their criminals or surrender them to the Court or opposing States. As another example of the importance of this issue, the crisis in Ukraine and Gaza can be states, where currently Russia and the Zionist regime are considered the main parties in these conflicts, and the United States is also involved in the Gaza war, fully supporting the crimes of the Zionist regime. Secondly, these States can become safe havens for war criminals who are nationals of other allied States, and when necessary, these criminals can implement these States' policies

1 . 'Joint Statement on Israeli', Retrieved from https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/09/joint-statement-on-israel/., accessed on March 5, 2024.

2 . The authors of this article do not recognize the Zionist Occupation Regime as an independent entity and state.

3 . 'States Parties to the Rome Statute', Retrieved from https://asp.icc-cpi.int/states-parties#U., accessed on March 5, 2024.

4 . To read more, see the following:
https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf;
https://libraries.indiana.edu/political-history-americas-wars;
https://en.wikipedia.org/wiki/List_of_wars_involving_the_United_States;
https://www.zdf-studios.com/en/program-catalog/international/unscripted/history-biographies/russias-wars;
https://en.wikipedia.org/wiki/List_of_wars_involving_Russia;
https://www.britannica.com/event/Arab-Israeli-wars;
https://en.wikipedia.org/wiki/List_of_wars_involving_Israel., accessed on March 5, 2024.

in various forms such as proxy wars. Thirdly, their non-membership means not obligated to cooperate with the Court in prosecuting and punishing criminals, nor engage in political consultations with allied States to address these crimes. In other words, the membership of these States could empower the Court through international relations in various fields related to the Court's objectives.

2.4. Non-Utilization of Political Power against States that Violate International Rules in this Area

Given the devastating consequences of various war crimes, it is necessary to recruit every legal and non-legal method to minimize the occurrence of these crimes and punish their perpetrators. the members of the international community are expected to take steps and recruit their resources to stop such crimes and punish the offenders. political tools, such as economic and arms sanctions, can play a significant role in reducing the aggressiveness and power of the conflicting parties, thereby minimizing the occurrence of these crimes.

For instance, economic sanctions against hostile States, can exert substantial pressure, compelling officials and commanders responsible for these crimes to surrender. Applying economic pressures and cutting off commercial relations in the long run can disrupt the economic system of a country, leading to public dissatisfaction and increasing the likelihood of surrendering criminals to international courts. furthermore, comprehensive arms embargoes can prevent the recurrence of such crimes by the parties to an armed conflict. For instance, if there is a fear of a reduction in weapons resources in the long run for the State involved in the conflict, naturally, the use of weapons will be restricted and more controlled.

Addressing war crimes involves three distinct stages. the first stage includes applying legal methods, such as the conclusion of treaties, to prevent the commission of these crimes. Second, the control of the conflict conditions through the clear and unambiguous directives of the international community regarding the denunciation of war crimes. and finally, comprehensive international cooperation utilizing legal and political methods in the pursuit, trial and punishment of war criminals in accordance with the rules of international law. It is noteworthy to reiterate that both legal and non-legal solutions can be instrumental before, during and after conflicts and war crimes occur, making political tools such as sanctions complementary to legal methods.

The negative impact of not applying these methods and especially the provision of weapons by hostile countries, is evident in the current Gaza crisis. Several States have continued to support the Zionist regime with weapons, resulting in extensive bombings of hospitals, schools, religious and cultural centers, as well as civilian gatherings. the statements made by the President of the United States on October 10, 2023, during a press conference at the White House, further exemplify this support, where Joe Biden said in part of his speech: "We will ensure that the Zionist regime have all of what it needs to respond to this attack", and announced his intention to request a budget of 105 billion dollars from the US Congress to support their strategic partners such as the Zionist regime. Undoubtedly, if it were not for the comprehensive economic, political and military support from the United States to the Zionist regime, the number of crimes

committed by this regime would have been greatly reduced, fostering hope for justice and the trial of criminal leaders of this occupying regime.

2.5. Expediency in Drafting the Rome Statute

The Rome Statute, as the founding document of the ICC, despite its binding nature at least for its members, has not been able to fully meet the expectations of the international legal community. Although some jurists may consider the overall performance and output of the ICC relatively acceptable given its limited history of activity, this section aims to highlight certain shortcomings that may have arisen due to reasons such as appeasing the majority of member States, ensuring the ratification of its founding treaty, complacency with the formation of an international institution to act at a minimum level in order to deal with the crimes subject to the jurisdiction of the Court, lack of sufficient capacity in international law or drafters' inattentiveness at the time of the conclusion of the founding treaty.

- One of these shortcomings pertains to the jurisdiction of national and international courts during the investigation and punishment phases. According to the first paragraph of Article 17 of the Statute, if a case is being investigated or prosecuted by a country with jurisdiction, the Court will consider the case inadmissible, unless that State is unable or unwilling to carry out the investigation and prosecution. The commentary of the Statute in this regard distinguishes inaction from the unwillingness/ inability of the competent government.[1] It considers unwillingness and inability when an official investigation has started, while inaction occurs when no legal action has been taken to pursue the case. The criticism of this article emanates from the fact that inaction can be seen and recognized by the Court and the beneficiaries of the case, while the unwillingness and inability to prosecute and try the accused, which occurs when the investigation has officially started, is not easily recognized, and governments are unlikely to admit to this issue. Furthermore, if a government intends to delay proceedings, it can easily do so and even prevent the proceedings of the case from being brought before the Court simply by presenting false reports.
- Another issue relates to the validity of the opinions rendered by national courts regarding the trial and punishment of their own citizens. According to the third paragraph of Article 17, if an individual has already been tried for a specific crime and a retrial is not allowed according to the third paragraph of Article 20, the Court does not consider the case admissible for the same act committed by the same individual. The third paragraph of Article 20 also states that an individual who has been tried in another court for crimes falling under Articles 6, 7 and 8 cannot be tried by the ICC unless the other court was established to protect the individual from criminal liability for crimes under the jurisdiction of the ICC, or the court was not held independently and impartially and in accordance with the norms of international law. Criticisms of these provisions arises from the fact that recognizing trials conducted by national courts can potentially ena-

1 . Klamberg Mark, Commentary on the law of the international criminal court, (Torkel Opsahl Academic E Publisher, Brussels 2017) 206-217

ble criminals, particularly high-ranking State officials and officials responsible for war crimes, to evade criminal responsibility. The possibility of extra-legal relationships of these individuals and those who hold positions and responsibilities in judicial institutions cannot be overlooked. additionally, while the Court can identify the same individual, it may prove challenging to determine whether the act in question is the same act previously prosecuted in a national court. for instance, if an individual or group is killed as a result of torture and the national court punishes the perpetrator according to the higher-level crime of murder, it remains indefinite whether the Court can subsequently deal with the crime of torture, particularly if the national court has decided to waive punishment for that specific crime or has combined it with the crime of murder based on their domestic procedures. And if this is the case, if the punishment of an individual in the national court is prolonged, halting opportunities for retrial in the ICC, and as a result, the individual goes unpunished for other crimes they have committed, can it not be claimed that justice is not attained for victims of those crimes?

Conclusion

Based on the analysis presented in this article, it is argued that the existence of specialized institutions in the international arena, which derive their legitimacy from the majority of the United Nations member States, has facilitated cooperation in the development of rules on war crimes. These rules aim to prevent such crimes in international armed conflicts and ensure the prosecution, trial and punishment of war criminals. With the exception of the Statute of the International Criminal Court (ICC), other non-treaty documents resulting from international cooperation hold significance due to their origins in UN-affiliated institutions and the involvement of representatives from various countries. Certainly, their influence in the gradual advancements in the field of International Criminal Law (ICL) should not be disregarded.

Moreover, this article observes a gradual progress in the legal literature of the international community concerning war crimes. It is as though the international institutions have been adopting a mechanism similar to the current ICC from the outset. The United Nations General Assembly's adoption of Resolution 3074 marked the initial step, establishing nine general principles for international cooperation in addressing war crimes to maintain international peace and security. Subsequently, the International Law Commission (ILC) approved a draft law on crimes against humanity in 20 articles, considering war crimes on a systematic and wide scale. This shift indicates the desire of the international legal community to move from citing generalities in this field to details and more concrete specifics. Both of these documents emphasize the need for cooperation in the prosecution, trial, and punishment of war criminals, addressing concepts like extradition and the prohibition of granting asylum to these criminals, which has facilitated the grounds for subsequent developments in this field. Ultimately, the Rome Statute, with its treaty form, broad membership, sand comprehensive definitions, stands as the most important international document in the field of crimes.

This article acknowledges the limitations inherent in treaty-making processes in the inter-

national arena, such as of the need for consensus among participating States during the initial negotiations. Additionally, when examining the international conflicts that unfolded following the Court's establishment, it becomes apparent that the current system for addressing war crimes is still flawed. The shortcomings have allowed the heads of States involved in armed conflicts to commit these crimes enjoying impunity, while the international community is manifestly unable to effectively respond to such crimes. Therefore, considering the significance of this issue and the hope for structural reforms in this area, an evaluation of international community's performance reveals the following shortcomings in the current system:

- Firstly, the absence of guarantees for appropriate and practical implementation of international documents has turned these documents into mere sources for the development of legal rules and has reduced their significance considerably. While the two initial documents lack implementation sanctions due their non-treaty nature, the drafters could have strengthened their provisions and facilitated future implementation mechanisms. Furthermore, issues such as the concern of States with lesser military power for retaliatory measures by powerful States, as well as a lack of hope for a coordinated and comprehensive response from the international system, have diminished the implementation of treaty obligations, including those outlined in the Rome Statute.
- Secondly, the prioritization of international relations over international law has overshadowed the obligations of States to international documents, placing the political considerations above international justice and the implementation of their obligations to the international community in maintaining peace and security.
- Thirdly, the non-membership of certain international major powers in the Rome Statute significantly impedes the Court's ability to fulfill its specialized functions. as long as States with substantial military power and allies remain non-members, comprehensive action against war crimes becomes practically unattainable.
- Lastly, the non-utilization of political tools by other States against offending States allows these States to continue committing crimes without facing pressure from the international community or being deprived of the facilities and privileges associated with membership in the international community.

In conclusion, the main weakness of the current system for addressing war crimes, lies not in the lack of legal documents or deficiencies in existing legal texts. Rather, it is the lack of proper and coordinated implementation, as well as the unwillingness of certain offending States to abide by the agreements which have been approved by the majority of member States of the international community and have even taken the form of treaties. The authors of this article argue that unless these issues are effectively addressed by legal professionals and policymakers worldwide, achieving practical accountability for war criminals, including the authorities of the Zionist regime, will remain elusive, despite their flagrant violations of international regulations.

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The Right of Children in Environmental Crises from the Perspective of International Human Rights Law

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ABSTRACT

Environmental crises affect children's rights to such an extent that they can be boldly referred to as children's rights crisis. There are a variety of environmental crises, including air, water and soil pollution, destruction of ecosystems and resources, toxic pollution, the spread of infectious diseases, ozone depletion, rising greenhouse gases and so on which adversely affect various aspects of children's basic rights including right to life, right to health, right to education, right to welfare and adequate living standards, right to healthy nutrition and their cultural rights. The present paper seeks to explore the rights of children in environmental crises from the perspective of international human rights law (IHRL). Finally, the findings of this article indicates that, states and large corporations, which have the largest share in creating environmental crises, also have the greatest responsibility. Now, when environmental damage directly and/or indirectly violates the rights of children and governments are directly or/and indirectly involved in creating them, it makes sense to consider them committed to resolving environmental crises and guaranteeing children's rights. To this end, states should take effective action, including reducing greenhouse gas emissions, preventing ecosystem degradation, preventing pollution and global warming, respecting the right of children to be heard, guaranteeing the right to freedom of expression and association, and involving them in environmental decisions.

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Introduction

Children have the least responsibility for making environmental changes but they are most affected by it. Climate change is a direct threat to a child's ability to survive and grow. Severe weather events such as hurricanes and floods have also affected their lives and endangers their health Including the spread of infectious diseases such as cholera, to which children in particular are very vulnerable. On the other hand, drought and changing rainfall patterns have caused food shortages and increased prices, and can cause insecurity and long-term food deprivation for children. By 2040, almost 600 million children are projected to be living in areas of extremely high-water stress.[1] Air pollution is another threat to the lives of millions of children. Nearly two billion children live in areas where air pollution levels exceed global standards. Climate change is also affecting children's learning Such as the destruction of schools or the destruction of transportation infrastructure and access to educational centers due to events including floods and earthquakes. Another interesting point is that recently it has been proven that increasing the temperature even affects the learning ability of children and reduces it.

These effects on children's rights, when combined with poverty and deprivation, have more deplorable consequences. Poverty alone makes it difficult to access welfare and health necessities now if mixed with the environmental crisis, it will be much more complicated. Today, 400 million children live in areas at high risk of flooding and about 50 million children in areas affected by drought and in countries where more than half of the population lives below the poverty line, climate change is exacerbating these crises.

In a report published in January 2018, the UN Special Rapporteur named a list of environmental harms that directly violate the rights of children which can be placed in 5 general categories:[2]

- Air pollution
- Water pollution

1 . UNICEF, An Environment Fit for Children, UNISEF's Approach to Climb Change, (2019), https://www.unicef.org/media/73331/file/An-Environment-Fit-for-Children-2019.pdf

2 . A/HRC/37/58, John H. Knox, Report of the Special Rapporteur on children's rights and environmental protection (2018), https://daccessods.un.org/TMP/2866833.50801468.html

- Climate change
- Contamination of toxic and chemical substances
- Loss of biodiversity and access to nature

Each of which has been the subject of a number of global and regional agreements and some of which have brought obligations to member states including Paris Agreement, Basel Agreement, Ozone Layer Convention, Climate Change Convention, etc.

This article tries to answer some important questions:

- How does environmental crisis change international children's rights?
- What are the responsibilities of states in guaranteeing and respecting the rights of children in environmental crisis?

For this purpose, first the civil rights of children in environmental crises and then their cultural and social rights are examined and finally examine the responsibilities and obligations of governments in this regard.

1. The Civil Rights of the Child in Environmental Crisis

Environmental hazards from pregnancy to childhood and adolescence and adulthood affect human health and growth. Growth disorders at an early age due to environmental factors can overshadow a person's quality of life for the rest of life. That is why it is so important to pay attention to this. Adverse environmental conditions and pollution are a very important factor in death, incapacitation and disability of children, especially in developing countries. Children are much more vulnerable than adults, especially in the face of certain environmental hazards such as air pollution, water pollution, chemical pollution, hazardous waste, climate change, as well as emerging threats such as electronic waste. Unfortunately, this fundamental right of children to a healthy environment is today being violated a million times over: owing to environmental degradation and the exploitation of nature, countless children have no access to clean drinking water or to safe food. Many children suffer under environmentally unacceptable living conditions and are constantly exposed to pollution harmful to health. The opportunity to grow up in a healthy and safe environment is extremely unjustly distributed: between North and South, rich and poor. Without a realignment of political, legal and economic conditions this situation will not fundamentally change. On the contrary, the increasing exploitation of natural resources and degrading or destruction of ecosystems will make a healthy environment a scarce commodity, which very few children will be able to enjoy in future.[1] Reducing environmental risks can prevent the death of one in four children in the world. In 2012, about 1.7 million children under the age of 5 lost their lives due to environmental hazards.[2]

1.1. The Right to Life

According to the World Health Organization, environmental hazards are the biggest threat to children's lives, and no group is so affected by the consequences of environmental pollution.

1 . Jonas Schubert, Translator Elaine Griffiths, Protecting Environmental Child Rights, P3 (2013), retrieved from https://www.terredeshommes.org/wp-content/uploads/2013/01/tdh_Environmental-Child-Rights_2012-11-final.pdf

2 . WHO, Children's environmental health (2012), https://www.who.int/health-topics/children-environmental-health#tab=tab_3

Approximately 1.7 million of the 5.9 million deaths of children under 5 - more than a quarter - in the world due to environmental damage are easily preventable. Air pollution alone kills about 550,000 children under the age of 5 worldwide due to respiratory infections such as pneumonia.[1] Other major causes of child mortality, including malaria, diarrhea, and injuries such as poisoning, falls, and drowning, are directly or indirectly related to environmental damage Such as exposure to hazardous chemicals, toxins and waste, polluted water and climate change.

It has been proven that children are more vulnerable to environmental damage than adults. Nervous systems and organs such as the lungs and respiratory system are still small and growing and have less resistance to toxic and polluted air or airborne diseases. On the other hand, playing them in open environments and activities such as putting hands in mouth and not having enough understanding of the dangers of environmental pollution, complicates the situation and makes children more vulnerable.

E-waste is another serious health and environmental problem that threatens millions of children, young people, adolescents and expectant mothers. These are people who work in dangerous conditions to recover precious metals to earn a living to support themselves and their families.[2] This exposes them to hazardous chemicals, heavy metals and toxic air. E-waste pollutes the air of communities, schools, homes, air and soil. Therefore, it is necessary to quickly identify the issue of pollution from electronic waste as an acute health problem. Accordingly, the World Health Organization's duty is to make the information and tools at its disposal available to all, to raise awareness, and to support policies that protect and secure the lives of children and women.

Undoubtedly, analysis of the methods of exposure to environmental contaminants with consequent health effects at various periods of development is a crucial requirement to define a child-protective framework of risk assessment and stratification. In addition, we cannot forget that although genetic factors can contribute to non-communicable diseases, exacerbated also by combined influence of stress and other lifestyle habits, their rapid increase suggests that there may be other dynamics involved, probably linked to the environment, thus suggesting that it becomes necessary to identify, understand, and if possible prevent, variables that can alter the perinatal environment by increasing the susceptibility and the risk to develop pathologies in the long term.[3]

Additionally, one of the most famous environmental crises is the thinning of the ozone layer. The thinning of the ozone layer is one of the most important factors that lead humans to be exposed to more harmful rays of the sun. According to official statistics every year, between two and three million new cases of non-melanoma skin cancer and more than 130,000 new cases of melanoma skin cancer are emerging worldwide. Of these, about 66,000 deaths occur from melanoma and other skin cancers. Many of these skin cancers are caused by the sun's ultraviolet

1 . UNEP, children' right and the environment, (2020), https://wedocs.unep.org/bitstream/handle/20.500.11822/34181/CRE.pdf?sequence=1&isAllowed=y

2 . WHO, Massive Open Online Course On E-waste-Launched by UN and partners to galvanise action for better managing this expanding source of hazardous waste,(2020), https://www.who.int/news/item/28-02-2020-massive-open-online-course-on-e-waste

3 . Francesca Mastorci and Others, Environment in Children's Health: A New Challenge for Risk Assessment, Para 2, Published online (2021) Oct 4. doi: 10.3390/ijerph181910445

(UV) rays.[1]Children are disproportionately and severely affected by this damage, both because they are more vulnerable and because they are more likely to be exposed to these rays.

It seems that environmental crisis including air, water and land pollution, toxic substances, ozone depletion and ecosystem destruction first of all endanger human life especially children and this means the violation of the first and most fundamental human right, the right to life.

1.2. The Right to Health

Environmental degradation, climate change, exposure to pollution and toxic substances are an immediate challenge that affects the rights of children now and for generations to come. Children are exposed to environmental damage due to their constant physical and mental development. They are exposed to the immediate and long-term effects of climate change and exposure to toxins and pollutants that cause disease, disruption and death. These effects are often irreversible and violate a child's rights to health, life, growth, health, food and water.

Approximately one-third of the world's children - about 800 million children - have lead levels above 5 micrograms per deciliter in their blood. The level declared by the World Health Organization and the US Centers for Disease Control and Prevention as the permitted level of lead. Lead is a potent neurotoxin that causes irreversible damage to children's brains. This is especially dangerous for children under the age of 5 and infants because their brains are damaged and suffer lifelong neurological, cognitive and physical damage before they have a chance to grow fully. Childhood lead exposure is also associated with mental health and behavioral problems and increased crime in children.[2] Also the relationship between environmental pollution and morbidity and mortality from neoplasms and respiratory diseases has been demonstrated in various epidemiological studies. More recently, an association between environmental data and chronic degenerative diseases has been documented, including cardiovascular disease.[3]

To protect children and prevent problems with lead contamination, they should be kept away from high-risk areas in the first place. Another way is to reduce children's exposure to lead-containing products, including removing lead from paint and gasoline compounds in countries that still use lead. Environmental Declaration of 8 Countries (France, Italy, Japan, Spain, China, Portugal, Russia and Germany) on Child Environmental Health (G8 Ministerial Meeting) 1997described child poisoning as a major threat to children's health and believes that one of the most important commitments of governments in ensuring the right of children to health is Reducing the impact of environmental hazards on children, monitoring their blood lead levels, as well as implementing and promoting the OECD Declaration on Reducing Risk Internationally.[4]

Most of the disease of children under 5 years old is caused by destructive environmental effects such as air and water pollution … and only by taking a comprehensive approach to these

1 . WHO, Children Suffer Most from the Effects of Ozone Depletion (2003), https://www.who.int/news/item/16-09-2003-children-suffer-most-fom-the-effect-of-ozone-depletion

2 . UNICEF, The Toxic Truth, (2020), https://www.UNICEF.org/reports/ Toxic-Truth-Childrens-Exposure-To-Lead-Pollution-2020

3 . Marabotti C and others, Ecological study comparing neighboring areas with substantial differences in environmental pollution, Int. J. Occup. Med. Environ. Health. (2017); 30:641–653, doi: 10.13075/ijomeh.1896.00972

4 . G7 Environment Ministers' Meetings. "1997 Declaration of the Environment Leaders of the Eight on Children's Environmental Health" http://www.g8.utoronto.ca/ environment/1997miami/children.html

destructive factors, significant progress can be made in preventing and reducing its effects on children's health. Such an approach means the participation of all sectors and at all levels of society, including individuals, institutions, municipalities, politicians and health and environmental professionals. With immediate and decisive action against climate pollution, safe disposal of toxic substances and chemical wastes, disclosure of information and improvement of water quality and environmental health, most environmental hazards and harms on children can be prevented. It is clear that only in healthy environments can children grow up and enjoy their full rights.

2. The Social and Cultural Rights of the Child in Environmental Crisis

Environmental crisis not only affect children's basic and civil rights, but also other aspects of their lives. According to Articles9 and 20 of the Convention on the Rights of the Child, all children have the right to live with their families and parents, and this right must be recognized while one of the indirect consequences of the destruction of ecosystems and the environment is the displacement of families and the separation of children from their parents. A lesser-known issue is the trauma that children experience as a result of the loss of loved ones and their families and homes. Home and family that may be torn apart due to severe climate change.

Also, certain groups of children, including children with disabilities, the poor and the natives, are affected more than others, because their families often do not have the necessary and sufficient ability to compensate the material and spiritual damage to them, and sometimes they are even deprived of simple health facilities and equipment.

On the other hand, children are always in a weak position when it comes to environmental issues. They often do not have access to basic information and transformational and quality training in this area and there are rarely mechanisms for children to participate in decision-making. For example, in dam projects, road construction or mining projects that mainly affect their lives, none of the necessary considerations related to children are considered. Even when children talk or protest about the impact of environmental issues, they may face severe criticism, intimidation, harassment, revenge, and violence from officials or corporations.[1]

Children also face major problems in receiving compensation for violations of their rights caused by environmental damage. The UN Special Rapporteur on Toxic Pollution has referred to this issue. For example, children or their family are responsible for proving that a chemical has harmed children, which is often very difficult to prove.[2] For this reason, in the first step, the obligation of governments to prevent children from being contaminated with chemical pollutants is very important.

2.1. The Right to Education and Cultural Rights

Under Article 28 of the Convention on the Rights of the Child, States undertook to recognize the right of children to education. The right to education as a principle of human rights in the field of

1 . UNHRC, RES 40/11, (2019), The UN Human Rights Council has called on States to "provide a safe and enabling environment for initiatives by young people and children to defend human rights relating to the environment"

2 . A/HRC/33/41, (2016), UN Special Rapporteur on Toxics and Human Rights, Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes, Para12 https://www.undocs.org/A/HRC/33/41

children, including rights such as the right to access educational facilities, the right to quality and standard education, respect for the dignity of the child, education without discrimination in all stages of childhood, the provision of educational facilities and equal opportunities in education.[1]

According to a report released by UNICEF in 2019, climate change is also affecting children's right to education including the destruction of schools or the destruction of transportation infrastructure, access to educational facilities due to events such as floods and earthquakes. Another interesting point is that it has recently been proven that rising temperatures even affect and reduce children's learning ability.[2]

For this reason, it is said that beyond children's life and health, climate change and related challenges, such as biodiversity loss and ecosystem loss, pose another type of threat to children's rights. The destruction of schools and children's homes is a gross violation of the right to education and a sufficient standard of living. Children who are displaced because of this and are forced to move away from their families are at increasing risk. Such as exploitation, violence, sexual abuse and. Also, the destruction of ecosystems and the loss of biodiversity alone can foster livelihoods, deprivation and inequality among children, and potentially lead to forced migration especially in the case of traditional life, which is highly dependent on land and climate.

Interestingly, environmental crises also damage children's cultural rights[3]. Lack of access of children to green and safe spaces in cities and interaction with the natural world, deprives them of the right to play and entertainment, and overshadows their social, mental, emotional and physical health and a serious obstacle to their progress and development.[4]

2.2. The Right to Freedom of Expression and the Right to be Heard

Among the rights recognized for children in the Convention on the Rights of the Child are the right to freedom of expression (Articles 12, 13) and the right to freedom of association (Article 15). According to it, on one hand children have the right to comment on all issues that concern them and to express their wishes and, on the other hand, governments are obliged to respect and guarantee these rights. To this end, opportunities should be provided for children to be able to participate in each of the stages of the judicial and administrative proceedings to exercise their rights directly or through a representative.

> *"The right of children to be heard and to express themselves freely" is a new concept in international law that has challenged many countries around the world since its advent. Because until then, the culture of listening to children was not pervasive or even acceptable. Over the past twenty years, many governments, along with civil society and organizations, have begun to grapple with this new concept*

1 . Thomas Tanner, Mercedes Garcia, Jimena Lazcano, Fatima Molina, Jesusa Molina, Gonzalo Rodríguez, Baltz Tribunalo, Fran Seballos, 'Children's participation in community-based disaster risk reduction and adaptation to climate change' (2009) Participatory Learning and Action 54.

2 . UNICEF, an Environment Fit for Children, UNICEF's Approach to Climb Change, (2019), https://www.unicef.org/meedia/73331/file/An-Environment-Fit-for-Children-2019.pdf

3 . Davis J. Young children, environmental education and the future. Education and the environment, (1998), 141-55.

4 . UNEP, children' right and the environment, (2020), https://wedocs.unep.org/bitstream/handle/20.500.11822/34181/CRE.pdf?sequence=1&isAllowed=y

of recognizing children as citizens, participants, and decision-makers in their lives and in society.[1]

In the field of environmental issues and crises, in recent years, children around the world take part in climate change protests, shouting that the environment is important for their life and survival. This is an important and clear message from children to the world's governments and politicians to take more effective measures for the citizens of their countries and the world to protect the climate. Children consider this right in the context of freedom of expression and the right to be heard for themselves. In many cases, the views, interests and rights of children in the field of environmental decisions have not been fully heard, and this is a reason for the unfavorable and inefficient of some of the results of these decisions.

This global movement, backed by children and youth, who have become the main defenders of environmental rights today, has led to numerous lawsuits Including 16 children who have lodged complaints with the Committee on the Rights of the Child against five major exporting countries (Argentina, Brazil, France, Germany and Turkey) for their failure to protect children's health and well-being in response to climate change.[2]

According to a report submitted to the Committee on the Rights of the Child by the United Nations Environment Program in 2020, to clarify the various relationships between environmental rights and children's rights, it is vital to consider the wants and needs of children in macro-environmental decisions.[3]

As well as ever since children and young people around the world turned to the judiciary for the right to be heard and to seek redress for their rights in relation to environmental issues, they have called for the protection of their fundamental and vital rights And challenged governments and international institutions, Many related organizations and civil society supported them and helped make them more heard, Including the United Nations Environment Program (UNEP) in its ongoing efforts to raise awareness of environmental issues that affect society, called on parliaments around the world to take this into account when drafting their environmentally friendly laws.[4]

3. States' Obligations to Respect and Guarantee the Rights of the Child in Environmental Crisis

As children are particularly vulnerable to environmental damage and are unable to protect themselves, governments need to be more assertive of their human rights obligations regarding the environment and children's rights. According to a 2018 report by the former UN Special Rapporteur

1 . Gerison Lansdown, 'every child's right to be heard, a resource guide on the un committee on the rights of the child general comment no.12' (2011) Published by Save the Children UK on behalf of Save the Children and UNICEF https://www.unicef.org/files/Every_Childs_Right_to_be_Heard.pdf

2 . GRETA THUNBERG AND ELLEN-ANNE And Others V ARGENTINA, BRAZIL, FRANCE, GERMANY & TURRKEY, 23 September (2019), Communication on the Committee on The Rights Of The Child, http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190923_Not-available_petition-1.pdf

3 . UNEP, children' right and the environment, (2020), https://wedocs.unep.org/bitstream/handle/20.500.11822/34181/CRE.pdf?sequence=1&isAllowed=y

4 . American Youth to bring US Federal Government to Trial in Ground-breaking Climate Change lawsuit,10 Nov (2016), https://www.unep.org/news-and-stories/story/american-youth-bring-us-federal-government-trial-ground-breaking-climate

on Human Rights and the Environment, there are three types of commitments for governments in this context.[1]

- **Commitment to protect children from environmental damage** - Among the effective measures that governments can take in this regard are: 1-Assess the impact of environmental projects or related policies on children's rights. 2- Adopt and implement environmental laws, standards, policies and action plans, taking into account all the ways in which children are exposed to these pollutions and the obstacles to the realization of their fundamental rights. 3- Paying attention to plans and programs that can threaten the rights of vulnerable children during the development and implementation of international environmental treaties
- **Commitment to education, public awareness, access to information, participation in environmental decisions and compensation**-To fulfill this commitments governments must:1-provide sufficient information to all, especially children, about specific environmental hazards for children and how to protect against them.2-ensure the content of curricula, increase children's understanding of environmental issues, and increase their capacity to meet environmental challenges by considering the culture, language, and environmental status of specific groups of children. 3- Support the right of children to freedom of expression and freedom of association in environmental matters. 4-Provide a safe and enabling environment for environmental rights activists and advocates. 5- Facilitate the process of equitable participation of children in environmental decisions. 6-Remove barriers that children face in defending their rights on environmental issues in the courts
- **Commitments related to the trade sector -** Governments should adequately monitor the conduct and performance of private actors in international law, including corporations, to ensure that they comply with all rules and regulations of international environmental law and in particular, do not abuse issues related to children's rights. The Committee on the Rights of the Child explicitly states that governments should oblige their business sectors to respect and protect the rights of the child, and to identify the impact of activities and trade relations on the rights of the child at the national and international levels and, as far as possible, reduce It's destructive effects.[2] governments should also ensure that business owners concerned with child health and welfare provide the necessary information to the public, and that victims of occupational environmental damage have access to effective and adequate redress.[3]

Undoubtedly, the responsibility of governments as the largest and most effective element of the international community - which on the one hand have a primary role in producing pollution and causing environmental damage, and on the other hand the most effective tool and factor to control, guide and reduce incidence and compensation-is one of the most important

1 . A/HRC/37/58, (2018), UN Special Rapporteur on Human Rights and the Environment, 2018 report to the UN Human Rights Council on Child Rights and the Environment

2 . UN Committee on the Rights of the Child (2013), General Comment 16: State obligations regarding the impact of the business sector on children's rights

3 . UNSR Human Rights and the Environment, 2018, p.16, op. cit.

issues that international organizations, civil society and human rights organizations try to hold governments accountable By holding meetings, conferences, lectures and reporting. The efforts of the Human Rights Council, UNICEF, the Committee on the Rights of the Child and other international non-governmental organizations are noteworthy in this regard.

In particular, governments' commitment to accountability can be seen in periodic reports to the Committee on the Rights of the Child. Examples of these reports from 2018 to 2021 related to 12 countries have been examined, which indicates that half of these countries have mentioned their environmental obligations towards children in their reports:

- **Ireland**- This country mentions in paragraph 83 of its report in 2021."The Environmental Protection Agency is responsible for overseeing enforcement of environmental law; regulating Ireland's greenhouse gas emissions, managing waste, and protecting people from the harmful effects of radiation. They grant licenses for waste facilities, intensive agriculture, and large-scale industrial activities, so are at the forefront of standard regulation through annual audits and inspections of premises and the prosecution of breaches of the regulations."[1]
- **Sweden**- The report of the Swedish government is also significant regarding the right to freedom of expression and the right to be heard by children in environmental issues." Ahead of the Stockholm+50 high-level meeting in June 2022, the Government is hosting a youth council each term to discuss sustainable development. The aim is to have continuous dialogue with youth organizations in the work involved in Stockholm+50 and in connection with an additional ongoing environmental or climate policy process. Climate change was discussed in autumn 2020, and biodiversity was discussed in spring 2021. The Swedish delegation to the UN Framework Convention on Climate Change includes two youth representatives appointed by the National Council of Swedish Youth Organizations."[2]
- **Kuwait-** Paragraph 24(a) of the report of the Kuwaiti government is also important in that it points to the environmental obligations of governments in industrial sectors." The Public Authority for Industry undertakes periodic fields surveys of industrial businesses that breach environmental standards. A mobile station is tasked with monitoring air pollution and assessing the quality of the air in different locations. There is a laboratory that measures water pollution and analyses samples of industrial and wastewater from industrial areas in order to ensure that they meet the environmental standards approved by the Public Authority for the Environment**."**[3]
- **Germany-** In paragraph 50 of its report, the German government has paid attention to the commitment of governments to education and public awareness. According to this paragraph: The Federal Government is also addressing the health significance of

1 . CRC/C/IRI/5-6, (2021), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fIRL%2f5-6&Lang=en

2 . CRC/C/SWE/6-7,(2021), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fSWE%2f6-7&Lang=en

3 . CRC/C/KWT/3-6, (2020), retrieved from https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fKWT%2f3-6&Lang=en

environmental pollution in relation to its particular impact on children. The German Environment Agency (UBA) furthermore surveyed the exposure of children and juveniles in the period from 2014 to 2017 in the latest German Environmental Health Study. Once the quality assurance process has been completed and the data have been evaluated, these will be published, including recommendations for action with regard to the protection of children and juveniles.[1]

- **Azerbaijan-** This country has also paid special attention to environmental education in schools and raising the general awareness of students in this regard. Paragraph 195 of the 2018 report stipulates: "Application of democratic procedures in the schools, cultivating in children culture of peace and the values that exclude violence, promotion of respect for environment is included in the content of the "State Standards and Programs (Curriculums) of General Education Level" as skills cultivated in the students as a result of teaching of different subjects."[2]

In addition to the reports sent by the countries, the Committee on the Rights of the Child itself also provides suggestions regarding the environmental rights of children to the countries, as an example, we can refer to the 2016 report of this committee to the Islamic Republic of Iran. Paragraphs 73 and 74 of this report state that: " The Committee is concerned about the adverse environmental effects of the river diversion program, sugar-cane farming and industrial pollution in Khuzestan province and about the negative impact that this has on the enjoyment by Ahwazi Arabs of their rights to an adequate standard of living and health and The Committee recommends that the State party take urgent steps to counter the impact of river diversions and industrial activity in Khuzestan on agriculture and human health, which includes environmental pollution and water shortages."[3]

Among other measures is the Human Rights Council resolution of 5 October 2020, which reminds governments of their environmental commitments under multilateral agreements, particularly on climate change and Encourages them to consider their commitments on child rights and intergenerational justice in adapting to climate change.[4] Also the Committee on the Rights of the Child, in its 69th session, also decided to dedicate its 2016 General Day discussion to the issue of child rights and the environment. These meetings are important because governments, NGOs, UN human rights bodies, specialized agencies of the organization, national legal bodies, the trade sector and as well as children and experts are present in them separately. The meeting was held on September 23 in Geneva, Switzerland, in part to address the responsibility of governments on environmental issues.[5]

1 . CRC/C/DEU/5-6, (2020), retrieved from https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fDEU%2f5-6&Lang=en
2 . CRC/C/AZE/5-6, (2020), retrieved from https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fAZE%2f5-6&Lang=en
3 . CRC/C/IRAN/CO//3-4,(2016), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&CountryID=81
4 . A/HRC/45/L.48/Rev.1, (2020)," Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development", https://undocs.org/A/HRC/45/L.48/Rev.1
5 . Committee on The Right of The Child, Report of the (2016) Day of General Discussion, Children's Rights and the Environment,https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2016/DGDoutcomereport-May2017.pdf

Conclusion

Undoubtedly, environmental crises can be called the crisis of children's rights. Because not only children have no role in creating them but these crises hinder the realization of many of children's basic rights such as Their impact on the right to life, survival and development (Article 6), The right to the highest standard of health (Article 28), The right to an adequate standard of living and well-being (Article 27), The right to education (Article 28) of the Convention on the Rights of the Child.

A statement issued by the UNICEF Executive Director on 18 July 2017 referred to the risk of famine and the death of millions of children around the world from starvation, poverty and the spread of infectious diseases due to poor sanitation in crisis areas of Yemen, Sudan, Somalia and Nigeria.[1]

There is no doubt that issues such as the conflict crisis, severe environmental and climatic events including drought, climate change, loss of livelihood and poverty lead to irreparable crises and as long as the entire international community do not confront, there will be repetition and continuation of these crises in the world for children. This means that countries around the world and the international community must make greater efforts to prepare for and build resilience to environmental crises, climate change and drought.

It is clear that the entire international community is responsible for protecting the rights of the child in the context of climate change, especially action to address all factors that impede the full realization of children's rights, and a collective commitment to creating a sustainable, clean and safe for children and future generations. In fact, this is the first time that a global generation of children has grown up in a dangerous and insecure world caused by environmental change and this is another reason why serious action must be taken to protect children from climate change and environmental crises.

The devastating effects of climate-environmental phenomena and crises are so widespread that it can be argued that they alone violate all the rights of children, including their civil, social and cultural rights, and severely affect their lives, development and well-being. The issue is very serious and experts believe that by 2030, annual climate change will cause 250,000 deaths due to heat alone and an increase in diarrhea and malaria, with children and women accounting for the largest share.[2] (World Health Organization, 2015) . To these statistics must be added illness, disability, deprivation of education and welfare, displacement and psychological trauma for children. Clearly, shifting energy and technology investments to clean fuels will lead to an annual reduction in millions of deaths and disease from air pollution. Such investments in reducing carbon emissions and the use of clean and flexible renewable energy are more beneficial and effective than investing in health.

Also, the protection of children's right to be heard and the extension of international environmental law to the field of fundamental human rights, and in particular the rights of children

1 . Justin Forsyth, Statement by UNICEF Deputy Executive Director, To the Senate Foreign Relations Subcommittee on Multilateral International Development, Multilateral Institutional Economic, Energy and Environmental Policy, (2017) https://www.foreign.senate.gov/imo/media/doc/071817_Forsyth_Testimony.pdf

2 . WHO, New Climate Accord Could Save Lives and Health Costs from Both Climate and Air Pollution, (2015), https://www.who.int/news/item/11-12-2015-new-climate-accord-could-save-lives-and-health-costs-from-both-climate-and-air-pollution

- as the most vulnerable human group - pave the way for children to be more influential in government decisions and oversight. If in the past few people thought that the movements and lawsuits of children and adolescents against the negligence of governments in harming and destroying the environment will be considered, today we are witnessing not widely but effectively forcing rulers and commanders and politicians to answer. A study report on children's rights and environmental protection in 2016 also recommends that "strategic lawsuit and litigation to jointly protect children's rights and environmental rights should be promoted. Lawyers who make such claims, especially on behalf of children as plaintiffs, must define and determine an appropriate legal basis for them in their country's legal system."[1] in a report published by UNEP in 2017, The number of lawsuits filed on climate change is 884 in 28 countries, of which 654 in the United States and 230 in other countries. The report shows how climate litigation is forcing governments, organizations, and corporations to pursue more realistic goals of mitigating or modifying climate change.

In addition, requiring governments to report regularly to the Committee on the Rights of the Child on children's environmental rights, raises standards and their responsiveness to children's environmental harms. The Convention on the Rights of the Child is one of the few international treaties that explicitly addresses environmental issues However, reports of environmental damage to the Committee on the Rights of the Child are very limited and interrupted and need to be strengthened.

But the most important issue in this regard is the role and responsibility of governments. Governments that, on the one hand, play an important role in creating environmental crises or lack of adequate oversight to prevent them, and on the other hand are the strongest means of protecting the rights of children against these harms. Clearly, governments efforts to reduce carbon emissions, reduce seasonal fuel consumption, prevent deforestation and ecosystems, avoid the use of toxic chemicals in products, and monitor the behavior of large corporations are the first effective step that affects the guarantee of children's rights.

Also, governments can help protect children's rights by assessing environmental impacts, creating relevant public information, facilitating public participation in decision-making, protecting the right to express and establish associations, and providing access to ways to compensate for environmental damage. When there is a lack of awareness, mutual understanding and cooperation between environmental and child rights activists, especially at the decision-making level, A deep gap is created in monitoring, acting and reporting on the effects and measures needed to realize children's rights that in the long run will not be able to meet the needs of the current and future generations.

Adoption of domestic laws by governments to protect human rights, including the rights of children, against environmental harms, and special protection for children with disabilities and the poor who are more vulnerable, are other steps that governments can take.

Nevertheless, despite all efforts, governments' adherence to human rights and environmental rights commitments is slow, and many multilateral environmental agreements are still in the

1 . Vana Savić, LL.M., Supervision: Prof. Dr. Ton Liefaard, Kids rights Report (2016)-Cleaning up the Mess, Children's Rights and Environmental Protection, p17, https://files.kidsrights.org/wp-content/uploads/2019/08/15135250/KidsRights-Report-2016-Cleaning-up-the-Mess.pdf

soft and non-binding legal stage. Or they are not in line with the human rights approach and especially the rights of children but one must be hopeful.

Undoubtedly, what protects the threatened rights of children in the face of environmental crises is the commitment and responsibility of governments. As long as governments and large commercial and economic companies do not start effective and preventive measures to protect children's rights against environmental damage and stop the widespread destruction of ecosystems and natural and biological resources, Severe and widespread violations of the rights of children and future generations will continue, and practically nothing but a name of children's rights in the specific sense and human rights in the macro sense will remain.

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Examining the Biosafety of Living Modified Organisms from a Human Rights Perspective

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ABSTRACT

Biotechnology as a modern-day phenomenon has had profound effects in various fields such as agriculture, health, and the environment. However, there are some concerns among scientists about the potential impacts of products resulting from the technology of living modified organisms (LMOs) on biodiversity and human health. This has led to the development of a set of rules and regulations known as biosafety to ensure the safety of these products under the Cartagena Protocol to the 1992 UN Convention on Biological Diversity. Biosafety can be considered as an approach to protect biodiversity and human health from potential threats while benefiting from the benefits of biotech products. From a human rights perspective, there seems to be a direct link between this field and biosafety, and there are many common concepts in both areas. The article seeks to examine the role of biosafety in human rights protection and examines how human rights can be protected to answer this question. In this analytical study, through studying the literature and primary sources, the role of biosafety in the protection of human rights has been analyzed and criticized from different aspects. The results show that biosafety can be considered a way to balance between different human rights and socio-economic considerations and the way of applying the precautionary principle have an important role in achieving this goal.

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Introduction

Modern biotechnology can be considered as a creative solution to major problems in a variety of areas, including health and agriculture. Increasing the nutrient quality of crops, increasing crop resistance to harsh, reducing the need for water, fertilizer, labor and less pressure on land and the environment, and ultimately more productivity in the agricultural production process, are some of the results of the great and enormous revolution of biotechnology in agriculture. The findings of researches mention the potential of this technology to solve the problem of food insecurity and malnutrition in developing countries.[1] In the field of the environment, reducing the use of herbicides in the agricultural process and also using lower energy, and waste and even the recycling of waste are some of the effects of using biotech and its recombinant products.[2] So far everything has gone well. But that is not the end of the matter. Concerns are raised about the possibility of resistance to herbicides, the creation of weeds, and most importantly, horizontal gene transfer through pollination. From the critics' point of view, this poses a threat to biodiversity and possible causes of genetic contamination. Opponents of the use of LMOs also emphasize the potential risks of transgenic products to human health and the adverse effects such as allergies, poisoning, and antibiotic resistance. However, there is no consensus on these effects,[3] and advocates of using living modified organisms believe that there is no credible evidence on the threat of LMOs to the environment and health.

The U.S. Food and Drug Administration (FDA), the U.S. Environmental Protection Agency (EPA), and the U.S. Department of Agriculture (USDA) ensure that GMOs are among them.[4]Therefore, due to the uncertainty regarding the use or non-use of these products on the

1 . Alexander F McCalla, Lynn R Brown, 'Feeding the Developing World in the Next Millennium: A Question of Science?' (Agricultural Biotechnology and the Poor: Proceedings of an International Conference, Washington DC, 21-22 October 1999) 35.

2 . David Zilberman, Tim G Holland and Itai Trilnick, 'Agricultural GMOs—What We Know and Where Scientists Disagree' (2018) 10 Sustainability 1, 5.

3 . Angelika Hilbeck, Rosa Binimelis, Nicolas Defarge, Ricarda Steinbrecher, Andras Szekacs, Fern Wickson, Michael N. Antoniou, Philip L. Bereano, Ethel Ann Clark, Michael Hansen, Eva Novotny, Jack A Heinemann, Hartmut Meyer, Vandana Shiva, Brian Wynne, 'No Scientific Consensus on GMO Safety' (2015) 27 Environmental Sciences Europe 1, 1.

4 . US Food and Drug Administration, 'How GMOs Are Regulated in the United States' (2022); available at: https://www.fda.

one hand, as well as the lack of scientific certainty about the potential adverse effects of these products on the other hand, a variety of measures, guidelines, rules, and regulations have been developed for the use of these benefits, called Biosafety. The Cartagena Protocol on Biosafety has been developed based on the use, transportation, transit, export, and import of these products. These rules and regulations rely on the key principle of the precautionary principle, which implies that scientific uncertainty does not preclude the risk of a phenomenon from taking precautionary measures. Accordingly, biosafety is based on measures such as risk assessment and management that monitor the safety of these products before, during, and after the release of transgenic organisms. The precautionary principle is the heart and the axis of biosafety. According to the precautionary principle of biosafety, the product must be proven to be safe and, merely lack of certainty about the risk of these products to the environment and human health is not enough to authorize the use and release of these products. This conception of the precautionary principle in Article 10(6) of the Cartagena Protocol is inferred.

The most important effect of this principle is that the burden of proving that transgenic organisms are harmless lies with the one who claims that they are harmless.[1] However, from a human rights perspective, different views on the use or non-use of transgenic products can be seen as two different approaches to protect two sets of human rights. Protecting the right to food and development versus protecting the right to health and the right to the environment. Therefore, accepting any of these different views can be considered as a threat to the front side set of human rights. The question now is whether biosafety is capable of integrating diverse views on transgenic products? Can it be seen as a solution to balance human rights in different ways? To be more precise, what kind of approach to biosafety can guarantee compliance with these rights? It is important to examine the relationship between recombinant products and human rights because explaining this relationship can be effective in the humanistic goals of environmental law.

1. Right to Food and the Role of LMOs

The concept of right to food is generally considered to be part of the right to life at a standard level of living,[2] and therefore LMOs are a double-edged sword and determine how to properly deal with these products at the discretion of their potential effects on these standards. Such an approach contradicts any interpretation that restricts the right to food to the mere intake of calories, protein, and minerals needed by the body.[3]

In general, modern definitions of human rights are based on the concept of human dignity, and recent generations of human rights can be defined as generations based on dignity, and the right to food must be achieved by observing this important component. Accordingly, the mere provision of food does not comply with human dignity and the provision of this important right.

gov/food/agricultural-biotechnology/how-gmos-are-regulated-united-states

1 . Abdelnaser Zeyad Hayajneh, 'Civil Liability for Environmental Damage: A Comparative Study Between Jordanian and English Legal Systems' (DPhil thesis, Newcastle University 2004) 22.

2 . Asbjørn Eide, Catarina Krause and Allan Rosas, Economic, Social and Cultural Rights: A Textbook (Kluwer Academic Publishers 1995) 119.

3 . FAO, Right to Food, Making It Happen; Progress and Learned Lessons through Implementation (FAO 2011) 3.

Therefore, the mere definition of the right to food as freedom from hunger is inconsistent with such an approach and the concept of dignity needs to be taken into account in this definition.

The role of LMOs in maintaining food security and subsequently protecting food rights is significant. Experts believe that the future is promising for LMO crops to overcome food shortages and create a sustainable food chain.[1] The results of scientific research emphasize the efficacy of adopting modern biotechnology to increase the quantity and quality of food and that this improvement in quality and quantity may be considered as the realization of the objectives of the right to food as described in the documents above mentioned.[2]

Of course, it should not be overstated about the abilities of LMOs. Even though certainly no one can consider crop biotechnology and its recombinant crops as a miracle survivor of widespread social, economic, and environmental crises, major analysts emphasize the effective role of these crops in future food security strategies.[3] Based on such an approach as well as scientific data, the use of transgenic seeds can be considered a way of protecting the right to food, a right that has been explicitly emphasized in international instruments such as article 25 of UDHR and article 11 of ICESCR.

On the other hand, however, the potential danger of these organisms to food security and the right to food should not be ignored. Accordingly, the theory that the relationship between food security and transgender is merely a positive one is hardly in doubt. Nor should the risk be ignored that this technology would act like a boomerang by reducing biodiversity and disrupting the food chain and subsequently reducing food quality.[4]

2. Right to the Environment and the Role of LMOs

The concept of the right to the environment has been raised by the third generation of human rights as solidarity rights and is now accepted by many countries around the world, notwithstanding doubts about the recognition of the third generation of human rights. Neither the European Convention on Human Rights nor the European Social Charter guarantee any degree of protection for the environment.[5] However, they accepted some other human rights (to life, private life, and family, property, information, etc.) as supporting environmental rights.[6] Despite the difficulty of providing a precise definition of the right to environment, in a comprehensive definition, it can be regarded as “a human right that protects human quality as well as the destruction of the biosphere and nature”.[7]

Whatever the definition, it seems that the core of the right to environmental protection is the protection of the human, animal, and plant environment. The important point is that the most significant threats from LMO products is two different elements of environment and biodiversity. That is why Article 19 of the Convention on Biological Diversity forms the basis of the

1 . Oliver Melvin J, ‘Why We Need GMO Crops in Agriculture’ (2014) 111 Missouri Medicine 492, 506.
2 . Mala Trivedi, Rachana Singh, Manish Shukl, Rajesh Kumar Tiwari, ‘GMO and Food Security’, in Omkar (ed) Ecofriendly Pest Management for Food Security (Elsevier Inco 2016) 706.
3 . Matin Qaim and Shahzad Kouser, ‘Genetically Modified Crops and Food Security’ (2013) 8 PLOS ONE 1, 7.
4 . Rashmi Patowary, ‘Scrutinizing the Impact of GMOs Through the Prism of Human Rights’ (2014) 7 OIDA International Journal of Sustainable Development 79, 81.
5 . Council of Europe, Manual on Human Rights and the Environment (second edition, Council of Europe Publishing 2012) 7.
6 . Ibid, 17-22.
7 . Ali Mashhadi, The Right to Environment (Iranian-French Model) (Mizan Publication 2013) 55. [In Persian]

Cartagena Protocol and this Protocol is also concerned with protecting the environment taking into account the threats posed by LMOs to human health. Opponents argue that the main danger posed by the LMOs which threatens the environment is the loss of biodiversity.[1] Contamination of major habitats, plant sites, and gene centers can be too catastrophic by destroying the plant's biodiversity. On the other hand, pest resistance to transgenic plants is also a potential hazard and the pest may also sometimes resist the LMO plant itself.[2]

Genetic contamination is also one of the dangers that transgenic living organisms may have to the environment. Genetic contamination means transferring the LMO gene to the natural plant and producing its traits in the recent plant. This genetic contamination is done through horizontal gene transfer, that means translocation and transfer of genes (via transformation, transduction, and conjugation) which may cause new characteristics in the receiving organism and, as a consequence, may ultimately lead to potential damage to the environment.[3]

Undoubtedly, the above reasons can be considered as the main motivation for the creation of Article 19 of the Convention on Biological Diversity. Genetic contamination can significantly jeopardize biodiversity and may limit farmers' scope of choice and the seed selection cycle. The saturation of the market with transgenic seeds and the scarcity of organic seeds limit the farmers' right to choose the required seeds. Regardless of the economic monopoly for large companies such as Monsanto and their strategic dominance over food security, undoubtedly reducing biodiversity and reducing the diversity of selected seeds for farmers are undesirable effects the need for control and management of which is obvious.

It seems that the balance between the possible and potential side effects of transgenic seeds is in adopting an approach that does not simultaneously protect the environment, the right to development, and food. In fact, irrational and extremist precaution prevents the combination of conflicting rights. The use of appropriate methods for cultivation, such as cultivation on special farms and under proper supervision, with a rational approach, can be helpful in this regard. We must keep in mind that the precautionary principle, in any case, has a pessimistic and not necessarily a realistic basis.

3. Right to Development and Role of LMOs

Development should be considered as a multidimensional concept that includes progress in various political, economic, and social areas. The Declaration of the United Nations General Assembly on December 4, 1986 stated the right to development as follows in Art. 1:

> *"The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."*

1 . Thomas Bøhn, 'Invasion of exotic species: Lessons for GMOs?', in Terje Traavik and Lim Li Ching (eds), Biosafety First: Holistic Approaches to Risk and Uncertainty in Genetic Engineering and Genetically Modified Organisms (Tapir Academic Press 2007) 200.

2 . Salehi Jozani, Gholamreza, Tohidfar, Masoud and Sadeghi Akram, Biosafety of Transgenic Crops (Modir-e-Fallah Publication 2011) 45. [In Persian]

3 . Dhan Prakash, Sonika Verma, Ranjana Bhatia, Bhupendra N Tiwary, 'Risks and Precautions of Genetically Modified Organisms' (2011) 2011 International Scholarly Research Network 1, 2.

The economic and developmental effects of transgenic organisms are the main motivations to use these crops and it can be found in economic and development-oriented results of cultivating the LMOs.

Studies emphasize the usefulness of these products for farmers and consumers. For example, the positive effects of products such as BTs on reducing poverty and increasing income can be considered as an incentive to use these seeds.[1] For the same reasons in 2008, LMO crops were being grown on 125 million hectares in 25 countries. The countries which have the biggest share of the LMO crop area were the United States (50%), Argentina (17%), Brazil (13%), India (6%), Canada (6%), and China (3%)[2] of which approximately 55 million hectares were in developing countries and 70 million hectares in developed countries. Statistics in 2017 marked a significant change: first, an increase of about 64 million hectares over nine years, and secondly, a shift in the balance between developing and developed countries. 189/8 Million hectares of land were under transgenic cultivation while 100/6 million hectares of them were in developing countries and 89/2 of them were in developed ones.[3]

Statistics also demonstrate that between 1996 and 2016, a total of $ 186.1 billion was generated from planting these crops, and the revenue from these crops in 2016 totaled $ 18.2 billion. Significantly, the developing countries share $ 10.2 billion of total revenue in 2016. These statistics can well illustrate why there is a significant trend, especially in developing countries, for the use of agricultural biotechnology.[4]

Development is a necessity to eradicate or reduce poverty, and the use of transgenic crops in developing and poor countries can be effective in achieving this. It is important to note that most poor economies are weak and are usually based on agriculture and seventy-five percent of the world poor are smallholder farmers or rural workers, and the use of LMO seeds can play an important role in increasing income and development in these countries.[5]

As a result, the figures show well that development is the main driving force, especially in developing countries in increasing and utilization of LMOs. Therefore, the role of public opinion especially in rural and agricultural societies in claiming the right to development is a significant factor in the enthusiasm of these countries to increase transgenic agriculture. In fact, we have to admit that so far, according to available statistics, the positive effects of these technologies on the development and improvement of the lives of people in developing countries have been more than the negative effects. While it is not clear what percentage of biodiversity loss is related to the use of these technologies, it is generally difficult to assess the extent of such damage.

4. Right to Health and the Role of LMOs

The right to health as a human right is fully established in international law[6] in several international documents such as the Universal Declaration of Human Rights (1948), the International

1 . Matin Qaim, The Economics of Genetically Modified Crops’ (2009) 1 The Annual Review of Resource Economics 665, 685.
2 . International Service for the Acquisition of Agricultural Applications, Global Status of Commercialized Biotech/GM Crops: 2008 (ISAAA 2008) 11.
3 . International Service for the Acquisition of Agricultural Applications, Global Status of Commercialized Biotech/GM Crops in 2017: Biotech Crop Adoption Surges as Economic Benefits Accumulate in 22 Years (ISAAA 2017) 4.
4 . Ibid, 106.
5 . Qaim (no 18) 673.
6 . World Health Organization, Advancing the Right to Health: The Vital Role of Law (World Health Organization 2017) 7.

Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), and several international treaties of human rights law has recognized it including article 24 of the Convention on the Rights of the Child (1989). Among others, article 12(1) of (ICESCR) states that:

> *"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health".*

The above definition of health does not appear to be a comprehensive one. It is for certain that the concept of physical and mental health and its standards is vague and incomprehensible, and it is necessary to specify precisely what these standards include.

An appropriate definition of this right can include a number of factors that ensure a healthy life which in the Committee on Economic, Social and Cultural Rights view include a wide range of factors related to water, food, environment, and socio-economic issues.[1] Accordingly, the right to health has a broader meaning, and in this respect a more complex relationship between the transgenic crops and the right is conceivable. Therefore, it seems unlikely that a one-sided approach can be put forward and merely hypothesized. However, given the more precise definitions, the quality and quantity of food that has always been claimed by transgenic crop supporters should be considered, including factors affecting the protection of health. Thus, this approach can be seen as a dichotomy concerning the transgenic crops and the aforementioned right and can justify the opposition to or approval of either group of supporters and opponents of the use of the transgender in the context of defending the right to health. This claim has been repeatedly made by both groups before.

On the one hand, improving the quality of food and its nutritional richness has been proposed as an important factor in the field of health, and art. 24 of the Convention on the Rights of the Child also addresses the issue of proper nutrition and its relationship with children's health. In this respect, the scales are heavier in favor of the supporters of LMOs, and the claim that food products are richer in minerals needed by the body with the help of LMOs can be proven.

However, as mentioned earlier, potential health risks have been among the claims of opponents of these products. Potential risks of diseases such as cancer, gynecological diseases, allergies, etc. The veracity of such a claim has always been denied by the other side. Accordingly, human rights are facing a difficult dilemma. How to take advantage of the benefits and facilities of this new technology to strengthen the right to health and at the same time protect human beings from the potential (but worrying and frightening) dangers of this technology.

5. The Relationship Between Biosafety and Human Rights

Although the Cartagena Protocol is an environmental document, it still has significant human rights values. The preamble of this protocol emphasizes that "modern biotechnology has great potential for human well-being if developed and used with adequate safety measures for the environment and human health". In general, the Cartagena Protocol is a way to use biotechnology while protecting the health and the environment. From a human rights standpoint, the document seeks a solution to the right to food, the right to development, the right to health, and the right to

1 . UN Committee on Economic, Social and Cultural Rights, 'General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)' (2000) E/C.12/2000/4, para. 4.

the environment. However, there are significant problems with implementation. The first is that the potential dangers of these organisms to health and the environment or life are not entirely certain. Research has not been able to pinpoint the exact reasons for these effects. On the other hand, despite the uncertainty, there will be significant damage to the environment and health if the idea comes true that LMO's are harmful. Therefore, the decision on the release and implementation of biosafety regulations in this regard faces a major challenge as to what level of risk should be considered serious and what level of risk is acceptable to the community from a human rights perspective. Which one is more important, development and the right to food or health and the environment? In other words, what is the primacy of other rights? It is also difficult to answer the question of which rights can be prioritized?

Different communities appear to have adopted different approaches in this regard. A notable example is the United States. It is the largest producer of transgenic products in the world and has not yet joined the Cartagena Protocol. US law seems to have shown a positive approach to increasing the cultivation of transgenic crops. The absence of any federal law banning or restricting the cultivation of these crops indicates that the country's legislature is willing to make the most of the economic benefits of this technology. The above approach, on the other hand, has caused the domestic markets of this country to face a lot of consumer products based on this technology and to occupy about 75% of the processed products market.[1] From a human rights perspective, such an approach can be attributed to the insignificance of ESCRs in the United States. Clearly, the US approach to human rights is almost entirely civil and political, and ESCRs are often subjugated by economic considerations. In fact, the United States has not recognized these rights as real human rights for decades,[2] and these capitalist-based economic considerations can be considered as the basis for such an approach.

Another example is Argentina, the third-largest producer of these products in the world after the US and Brazil.[3] It signed the Cartagena Protocol in 2000 but has not ratified it so far. However, there are no significant restrictions on the release of these organisms, whether in enclosed or non-enclosed environments. It may be attributed to the country's significant profit from the production of these products. However, the strong influence of US policies on these two countries cannot be ignored. Statistics clearly show the effective role of transgenic agriculture in the Argentine economy. Billions of dollars in economic benefits, along with about one million jobs between 1996 and 2006, provide a good incentive to develop the cultivation of these crops in the country.[4] The statistics well illustrate the reason for the development of transgenic use in Argentine agriculture.

Contrarily, the EU approach is the most interesting one. The cultivation of LMOs in the EU is limited. According to EU regulations, its members must restrict or prohibit the cultivation of LMOs plants on the EU declaration. Regulation No. 1829/2003 prohibits placing on the EU

1 . Alice Yuen-Ting Wong, Albert Wai-Kit Chan, 'Genetically Modified Foods in China and the United States: A Primer of Regulation and Intellectual Property Protection' (2016) 5 Food Science and Human Wellness 124, 130.
2 . Gillian MacNaughton, Mariah McGill, 'Economic and Social Rights in the United States: Implementation Without Ratification' (2012) 4 Northeastern University Law Journal 365, 406.
3 . International Service for the Acquisition of Agricultural Applications (no 20) 5.
4 . Moisés Burachik, 'Experience from Use of GMOs in Argentinian Agriculture, Economy, and Environment' (2010) 27 New Biotechnology 588, 591.

market a GMO for food use, or a portion of food containing or consisting of GMOs or food products produced “from” GMOs unless an authorization is granted. The EU’s strict approach in this regard is due to the way the precautionary principle is implemented in EU regulations. The precautionary principle is one of the most important and emphasized principles in article 191 of the consolidated version of the Treaty on the Functioning of the European Union. The EU is so strict that even in the case of C-442/09: Karl Heinz Bablok and Others v. Freistaat Bayern, the EU Court ruled that even in the event of unintentional contamination of honey and pollen with a transgenic gene, special permissions are required to continue the work.

In general, the precautionary principle can be considered a tool for the protection of human rights. This is a matter endorsed by the European Court of Human Rights. In addition to the European Convention on Human Rights in its jurisprudence, the Tatar v. Romania case is an example of the Court’s emphasis on the use of precaution in the protection of human rights.[1] Therefore, it is clear that the approaches of different countries are not the same, as this difference seems to be strongly influenced by economic, cultural, and social conditions. It is the condition that determines the conflict between different rights and interests. Which one would you prefer?

However, protecting one group of human rights should not be in a way that deprives people of the interests of other groups. So, biosafety seems to be the answer to this, and the preamble of the Cartagena Protocol on Biotechnology reflects that. The question now is what biosafety processes can be a determinant in this volatile and buoyant situation. Do biosafety rules have a determining factor in determining what approach should be used in each country? The necessary explanation that the basic rule of biosafety is the precautionary principle that implies that the scientific uncertainty about the potential dangers of a phenomenon does not preclude the appropriate decision being made. It also forms the heart of biological safety risk assessment, which, according to the precautionary principle, puts the burden of the proof about the product’s safety on its operator. The question now becomes a bit more complex. How can biosafety principles based on the precautionary principle of different seemingly inconsistent rights be safeguarded?

Part of this answer should be sought in the social approach and understanding of the precautionary principle. The precautionary concept and scientific uncertainty regarding the scientific findings in the field of transgenic products have got widespread. Although the Cartagena Protocol and the Codex Alimentarius can be helpful, however, these concepts must be defined and applied in the cultural, social, and economic contexts of any society. Accordingly, it may be necessary to define the precautionary principle and concepts such as scientific certainty and the level of risk tolerance. Accordingly, any community with a biosafety approach should decide on this field of biosafety[2] and such definition can be a key to solve the problem of how we can integrate these rights and with the social needs and conditions.

6. Socio-Economic Considerations

Article 26 of The Cartagena Protocol provides for the possibility of taking social and economic considerations into account in the risk assessment process. Accordingly, applying the socio-eco-

1 . Council of Europe (no 12) 155.
2 . Janet Elizabeth Blake, Komail Sadeghi, ‘Study of Precautionary Principle in the Light of Biosafety Act’ (2019) 9 Bioethics Journal 87, 98. [In Persian]

nomic considerations during risk assessment can include potential harm of these organisms to agriculture and the economies of the communities resulting from the reduction of biodiversity. Reductions may pose a pervasive risk not only based on product characteristics but also according to economic and social conditions. Such an approach may be considered as a step toward the good governance of modern biotechnology.[1]

Social and cultural considerations can be discussed from two approaches in this area. The first is a pragmatic approach and the second is a human rights-based approach. From a pragmatic point of view, paying attention to indigenous biological cultural values can provide an understanding of how to manage and protect the environment in different communities. Paying attention to the species and plants that are sacred and respected by the communities as well as the traditions that are somehow related to natural resources is part of the environmental management process.[2] From a human rights perspective, this is seen as a protection of the right to identity. The right to identify as a kind of collective right implies the identity of various values such as cultural values as mentioned in art. 29 of the Convention on the Rights of the Child, and also protection of cultural rights as recognized in art. 5 of the 2001 UNESCO Declaration on Cultural Diversity.

The importance of social and economic considerations in the risk assessment and management process is not hidden from anyone. Cultural and economic components are influenced by decisions in this area on the one hand, and on the other hand, these considerations may affect the final decision on the use of transgenic products. In fact, the insistence of developing countries on the inclusion of socio-economic considerations in the preliminary negotiations of the Cartagena Protocol stems from these issues.[3]

In practice, most developing country members of the Cartagena Protocol have taken this consideration into account in the risk assessment process. For example, art. 30 of the Burkina Faso Biosafety Act emphasizes that licensing for LMOs is subject to certain conditions, including proving that the LMO "ne nuit pas à l'environnement socio-économique" (does not harm the socio-economic environment). Paragraph 3 of art. 53 of the Colombian Biosafety Act explicitly speaks about the dangers of food security and considers it necessary in the risk assessment process. Paragraph 1 of art. 2 and art. 63 of the Mali Biosafety Act have a significant approach to social and economic considerations and even the liabilities arising from them and include the following conditions:

> *Article 2 (l): "Socio-economic impact' means the direct or indirect effects of a genetically modified organism or a product derived from a genetically modified organism on the economy or socio-cultural conditions or the lifestyle or systems or techniques of knowledge of one or more indigenous communities, including the economy of the country.*

1 . Lindsey Fransen, Antonio La Vina, Fabian Dayrit, Loraine Gatlabayan, Dwi Andres Santosa, Soeryo Adiwbowo, Integrating Socio-Economic Considerations into Biosafety Decisions: The Role of Public Participation (World Resources Institute 2005) 1.
2 . Bas Verschuuren, 'Integrating Biocultural Values in Nature Conservation: Perceptions of Culturally Significant Sites and Species in Adaptive Management', in Gloria Pungetti, Gonzalo Oviedo and Della Hooke (eds), Sacred Species and Sites: Advances in Biocultural Conservation (CUP 2012) 233.
3 . Ruth Mackenzie, Françoise Burhenne-Guilmin, Antonio G.M. La Viña, Jacob D. Werksman, An Explanatory Guide to the Cartagena Protocol on Biosafety (International Union for Conservation of Nature and Natural Resources and FIELD 2003) 163.

Article 63: "Liability and redress will also extend to socio-economic considerations:

- nuisances and damage caused directly or indirectly by the genetically modified organism or the

product derived from a genetically modified organism to the economy;

- social and cultural conditions, including negative effects on lifestyles, traditional knowledge or

technologies of one or more communities;

- damage and loss caused by public disturbances caused by the genetically modified organism or the

product of a genetically modified organism;

- total or partial destruction of industrial or agricultural production systems, loss of crops, soil contamination;

- damage to biological diversity, the economy of a region and any other indirect damage and interests."

These are some of the issues related to economic and social considerations that can be seen in food security concerns from the effects of transgenic products. Therefore, considering the mechanism of Article 26 of the Cartagena Protocol can be considered an appropriate approach to safeguarding human rights, and it seems that this issue has been addressed primarily by developing countries based on these concerns. But we must notice that the ability to use this mechanism is restricted and it looks like that it cannot be removed from its domain. A strict interpretation of the text in the Cartagena Protocol seems to show a narrow implementation scope that is limited to effects on biodiversity, and not the broader human rights implications (both potentially positive and negative). However, countries can and have included socio-economic considerations in their decision-making utilizing national legislation.[1]

7. The Precautionary Principle and Risk Assessment

The precautionary principle is defined to be "taking preventive action in the face of uncertainty; shifting the burden of proof to the proponents of an activity; exploring a wide range of alternatives to possibly harmful actions, and increasing public participation in decision making".[2] Risk assessment and its management are at the heart of the rules on biosafety and are sometimes the most important manifestation of the implementation of the environmental precautionary principle in the Cartagena Protocol.[3]

Risk assessment based on the precautionary principle seems to be the first way to safeguard people's rights. Making a risk assessment based on the precautionary principle can also protect the environment and human health while developing biotechnology, and thus the precautionary principle can weigh the scales positively in favor of the environment and human health. Apply-

1 . Daniela Horna, Patricia Zambrano and Jose Falck-Zepeda (eds), Socioeconomic Considerations in Biosafety Decisionmaking: Methods and Implementation (International Food Policy Research Institute 2013) 9.

2 . David Kriebel, Joel Tickner, Paul Epstein, John Lemons, Richard Levins, Edward L. Loechler, Margaret Quinn, Ruthann Rudel, Ted Schettler, Michael Stoto, 'The Precautionary Principle in Environmental Science' (Commentaries) (2001) 109 Environmental Health Perspectives 871, 871.

3 . Blake, Sadeghi (no 28) 92.

ing this principle in the risk assessment process can be seen as safeguarding the right to health and the right to a healthy environment. Of course, it is necessary to apply this principle to the extent that it does not contradict the main purpose of these rules and the Carthage Protocol, which is the sustainable development of biotechnology.[1] But how we must balance the different rights in this way and in such a way that none of these rights is violated and in case of conflict, what is the way to identify the priority between different rights?

Obviously, what is stated in the Cartagena Protocol on the need to apply the precautionary principle in the article is quite vague. On the one hand, the appendices to the protocol also state precisely how strict a precautionary risk assessment should be. What the authors maintain is a balance in respect for the diverse rights of people in the field of transgenic crop cultivation; put it another way, how the standards for risk assessment are set and standardized based on the precautionary principle. The concepts of risk, scientific certainty, and uncertainty have considerable flexibility, and this flexibility provides the conditions for considering economic and social conditions. Internal laws and frameworks appear to have the capacity to provide some flexibility and a range of interpretations to the extent that they do not depart from the objectives of the Protocol. The Protocol also addresses the specific conditions of developing countries in how they implement the Protocol, which confirms that its drafters have regard to the specific conditions of developing countries and the possibility of adopting measures to address them and have been aware of the conformity of the provisions of the Protocol with their particular requirements.

Conclusion

Biosafety can be seen as a solution to integrate multiple human rights and to balance the demands underlying these rights. Biosafety can, therefore, be a scientific approach based on risk assessment and management and on the precautionary principle, while also relying on related social values and necessities. The generality and comprehensiveness of the concept of precautionary principle imply that there is considerable flexibility in defining and applying this principle, and it seems that this flexibility is itself an appropriate capacity to consider and evaluate human rights values and considerations in the process of risk assessment and management to protect these rights. In this regard, it seems prudent to provide precise definitions of the precautionary principle in every society and in national biosafety rules and frameworks to protect human rights. Providing a definition and scope of this principle within national frameworks and regulations can guarantee its implementation as well as respect for human rights. The precautionary principle is the heart of biosafety regulations and plays the axis role in them, and any definition of it can have an impact on the fate of human rights related to the right to food, health, development, and environment. In fact, the positive impact of the precautionary principle on the protection of human rights is an issue that has also been endorsed in the case-law of the European Court of Human Rights in Taskin and others v. Turkey and also in Tatar v. Romania. In the end, it should not be overlooked that the relationship between human rights and biosafety can

1 . Komail Sadeghi, 'The Legal Dimensions of Biosafety: Meet Iran as a Case Study' (MA Dissertation, Shahid Beheshti University 2016) 33. [In Persian]

be considered as the starting point for incorporating and introducing the precautionary principle from biosafety and the environmental law to the scope of human rights. In fact, it is not unlikely that in the near future we will see the manifestation of the effects of the precautionary principle in the field of human rights.

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Turkey's Gap Project from the Perspective of International Water Law

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ABSTRACT

The Turkish government has had the greatest impact on the flow of the Tigris and Euphrates rivers by implementing huge development projects through the construction of large-scale dams under the Southeast Anatolia Development Project (GAP) and this has affected the access and use of Tigris and Euphrates rivers in other countries. On the other hand, the division and distribution of the water of these two rivers have been regulated with few and basic treaty provisions. Turkey refuses to recognize the international nature of these rivers and considers these rivers as national rivers; however, Syria and Iraq consider these rivers as international rivers and this has led to conflicts between the countries on the banks of these rivers.This article focuses on the effects of the GAP project, especially the effect of the Atatürk Dam and Ilisu Dam on the Euphrates and Tigris rivers, and examines their compliance with international law, including existing international treaty law and customary principles of international water law. The research utilizes library-documentary sources and employs a descriptive and analytical approach. It is concluded that the effects on the Tigris and Euphrates rivers are against the aforecited rules and laws. These effects lead to the violation of the principle of non-harmful utilization of territory, as well as the principle of equitable and reasonable utilization.

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Introduction

The Euphrates River originates from the northeastern mountains of Turkey,[1] and the main branches of this river are connected in the Keban region and form the river. After the Kaban region, this river flows southwards and enters Syria in the Jarabulus region. Along the territory of Syria, this river joins the three rivers of Sajur, Balikh and Khabour and then enters the territory of Iraq in the region of Al-Qaim. Finally, in the south of Iraq, it joins the Tigris River and forms the Arvand River (Shatt al-Arab), which forms a part of the border between Iran and Iraq in the southwest of Iran and flows into the Persian Gulf. The Euphrates River passes through 10 degrees of latitude (31 and 41 North) and through Turkey, Syria and Iraq for a length of about 2700 km, of which 520 km is in Turkey, 780 km is in Syria and 1400 km is in Iraq. The area of the Euphrates river basin is 444,000 square kilometers.[2]

The Tigris River originates from the southern slopes of the Taurus Mountains in eastern Turkey and covers an area of 472,606 square kilometers, which is shared between Turkey, Syria and Iraq.[3] Iraq's share is 78%, Turkey's share is 20% and Syria's share is 2% of the area of this river.[4] One of the characteristics of this river is the strong seasonal and even annual flow changes.[5]

The sources of these two rivers are only 30 kilometers apart, both of them flow towards the south and southeast of Turkey, and after crossing the territory of Turkey, they enter the countries of Syria and Iraq. Over the past 50 years, riparian states have significantly developed their utilization of the Tigris and Euphrates rivers and continue to do so. The Turkish government with the Southeast Anatolia project, which consists of 22 large-scale dams, Syria with 3 large dams built on the Euphrates River, Iraq with 15 large dams on the Tigris and Euphrates Rivers, are

1 . Hussein Omar Ahmed, Mohamed Khadijah, 'Legal Rights of International Water Resources: A Case of Tigris and Euphrates Rivers' (2021) 6 International Journal of Law, Government and Communication 131.

2 . John F. Kolars, William A. Mitchelell, the Europhrate River and the Southeast Anatolia Development Project (SIU Press 1991) 145.

3 . Ibid, 102.

4 . Mostafa Dolatyar, Tim S. Gray, Water Politics in the Middle East: A Context for Conflict or Co-Operation? (Macmillan Press, Basingstoke 2000) 121.

5 . Philipp Williams and Associates (PWA), 'A Review of the Hydrological and Geomorphic Impacts of the Proposed Ilisu Dam' (2001) Report for the Corner House, San Francisco, 88.

examples of this development.[1] Being aware of future changes in water resources and possible political conflicts over it, Turkey has been implementing a huge dam construction project since 1970, which is estimated to be the fifth largest dam construction project in the world. The implementation of this project has bad effects on the ecosystem of Turkey's neighboring countries, including the Islamic Republic of Iran, Iraq and Syria, and it has been done without considering the water rights of other countries and international conventions. Dams can be built for several purposes, in particular, guaranteeing and providing drinking water reserves in dry areas is one of the main purposes. The most important purpose of building a dam on the Tigris and Euphrates rivers is to provide fresh water for irrigation and agricultural programs.[2]

In addition to building dams, extensive irrigation programs require extensive infrastructure in the field of water transfer, canal construction and irrigation, and many irrigation programs in the Euphrates and Tigris rivers still suffer from inadequate infrastructure.

Considering the strong demand for water from the riparian states and the increasing utilization of these rivers, improper use of water is one of the important issues.[3] According to the evaluations, the amount of water demand of Turkey, Syria and Iraq for the water development project exceeds the amount of water flowing in the Euphrates River.[4] The condition of the Tigris River is slightly better than the Euphrates River in this respect.[5] Irrigation is not the only use of dams in this region. The seasonal flows of these two rivers can fluctuate greatly since their peak in spring, so flood control is still one of the applications of dams. However, compared to other applications and goals, energy production is considered a new application, and due to the ever-increasing human need for energy, many dams today are equipped with electricity production projects; However, the main goal in most cases is something else. Although there are various electric energy production projects related to dams, but all the hydroelectric projects in the Tigris and Euphrates rivers are of the type of electricity generation by means of water storage.[6]

The Tigris and Euphrates rivers are among the most important freshwater resources in the Middle East. Turkey's GAP[7], including large-scale dams that provide extensive irrigation programs and hydroelectric power projects, has greatly impacted the flow system and water quality of these rivers. neighboring governments, especially those of Syria and Iraq, have consistently objected to this matter.[8]The GAP is one of Turkey's endeavors to solve water problem and empower Turkey to play a greater political and economic role in the Middle East. It is noteworthy that Turkey receives a lot of encouragement and support from European countries to strengthen its position in the region, and the fact is that international actors acknowledge this project. Former US President Richard Nixon highlighted this and said, "We should encourage Turkey to

1 . Nicolas Bremer, the regulation of the non-navigational use of the Euphrates and Tigris river system international (Nethers lands: Eleven International Publishing 2017) 100.
2 . Ibid, 102.
3 . Bouhedda Kheireddine, 'Water Conflict Looming in the Twenty-First Century' (2023) 16 Journal of law and humanities Sciences 1201.
4 . Nurit Kliot, Water Resources and Conflicts in the Middle East (Routledge, 1993) 135.
5 . Ibid, 141.
6 . Ibid, 143.
7 . (GAP) is derived from the name of this project in Turkish (Guneydogu Anadolu Projesi).
8 . Yetim Muserref, 'Domestic institutions and international collective action problems: international water rights conflicts' (2023) Water Policy 9.

use its historical and cultural advantages to play a major economic role in the Middle East, and if the Arab-Israeli conflict is resolved, the water problem will be the most important problem in the region.” This project is one of the biggest and most ambitious projects in Turkey and the world, proposed by Suleyman Demirel, former Turkish prime minister. Time magazine has described this project as one of the nine great projects of the world or one of the Seven Wonders of the World.

This project started as an idea in a book titled “The Euphrates River and the Development Plan for Southeast Anatolia” in 1971 by Dr. Kollars, Professor of Political Geography and Near Eastern Earth Sciences at the University of Michigan, USA. The first serious studies of this project date back to the 1930s, but the nature of the political conditions and the economic, social and military developments caused by World War II prevented the implementation of this project. In the 1960s, the implementation of some projects gained momentum and the huge capacity of the region was absorbed, and at first individual projects were connected in the form of a comprehensive plan. Then, in the 1980s, Turkey began to develop a detailed and comprehensive plan that connected a number of hydro projects, paving the way for the Southeast Anatolia Project, which included a series of dams, reservoirs, irrigation tunnels, and a power plant.[1]In this year, the Turkish army appointed Turgut Özal, a hydrological engineer known as one of the best economists in Europe, as the head of the state planning agency. Considering the merits of this engineer and economist and his personal desire to establish an economically and militarily powerful Turkey in this region of the world, Turgut Özal provided the opportunity to present the case of GAP. In this way, with the support of Özal, what was merely a project to develop agricultural production in the region became a reality and its purpose is to prepare an integrated and large-scale program with the aim of doubling electricity generation, efficient management of water resources and creating infrastructure to attract industrial and agricultural investors.[2]

According to Özal's orders, this development would diminish or eliminate the most imł portant reasons for the rebellion of the local people (Kurds) in the southeastern Anatolia region against the central government and prevent them from seceding from Turkey. In addition, the influx of the non-Kurdish population that comes from all over the country drowns the Kurds among the masses of people and turns them into a minority.[3]

GAP is the most important and largest development project of Turkey in the Southeast Anatolia Plateau, which is a poor plateau where the Kurdish minority lives, with an area of about 7400 square km, which constitutes 10% of Turkey’s area, and The Tigris and Euphrates rivers pass through it. This project is for exploiting the waters of the Tigris and Euphrates and covers all the lands of Orfa and Mardin provinces, as well as large parts of other provinces in the region, such as Gaziantep, Yaman Valley, Diyarbakir, etc.[4]

This project includes the construction of 22 dams, including 17 dams on the Euphrates

1 . Cemal Ozkahraman, ‘Waterpower: the domestic and geostrategic dimensions of Turkey’s GAP Project’ (2017) 17 Conflict, Security & Development 417.

2 . Arda Bilgen, ‘the Southeastern Anatolia Project (GAP) in Turkey: An Alternative Perspective on the Major Rationales of GAP’ (2018) 21 Journal of Balkan and Near Eastern Studies 64.

3 . Ibid, 70.

4 . Dogan Altınbilek, Hande Akçakoca, ‘Innovative Approaches in Water Resources Development in Southeastern Anatolia Project (GAP)’ (1997) 13 International Journal of Water Resources Development 174.

River and its tributaries, and 8 dams on the Tigris River, and includes the construction of 19 hydroelectric stations with the aim of irrigating 1.7 million hectares and generating 25 billion kilowatts annually. The storage capacity is 128 billion cubic meters.

This project is characterized by its size, volume of expenses and financial need. Therefore, the Turkish government finances a large part of the project and is looking for other financial sources. Turkey has appealed to foreign countries and financial institutions to help provide financial aid to complete its projects.[1] The World Bank refused to finance several projects in the GAP because it adopted a policy of not financing projects related to international rivers unless the following conditions are met: A) All riparian countries agree to it. B) That none of the coastal countries object to it. C) As the World Bank has considered that the interests of the coastal countries will not be affected by this project and the objection is baseless. In addition to Iraq and Syria, the negative effects of the GAP also extend to Iran. 56% of Tigris water is imported from Turkey and if the GAP is completed, there will be many changes in Iran's environment, which will cause serious damage. In fact, upon completion of this project, Iraq's Mesopotamian wetlands, whose water originates from the Tigris, will dry up quickly. In this way, with the drying up of the central wetlands of Iraq and Syria, the Horul Azim wetland in Khuzestan will become the biggest center of micro dust crisis in the region, affecting 25 western and central provinces of Iran. The aggravation in this issue is due to the removal of the water rights of Syria and Iraq from the Tigris and Euphrates. Based on this, today, experts believe that the foreign origin of micro dust in the southwest and west of Iran is mainly the deserts of Arabia, Iraq and Syria, which is especially caused by the dry bed of Tigris and Euphrates due to the dam construction policies in Turkey. Therefore, the completion of the GAP will cause the Tigris River in Iraq and the Horul Azim Wetland in Iran to face dryness and water scarcity. Also, this will lead to the production of fine dust in the country of Iraq and its transfer to the border provinces of Iran.[2]

This article seeks to find out what effect the GAP has had on the Tigris and Euphrates rivers and what legal consequences these effects have created.

1. GAP from the Perspective of International Treaty Law

In this part, the international treaty laws governing the Tigris and Euphrates rivers, the compatibility of the Atatürk Dam on the Euphrates River and the Ilisu Dam on the Tigris River as two examples of the biggest dams of the GAP with the international treaty laws are discussed.

1.1. International Treaty Rules Governing the Tigris and Euphrates Rivers

The only convention governing the non-navigational use of international rivers at the international level is the United Nations Convention on the Law of the non-navigational Uses of International Watercourses 1997. Turkey is not a party to this Convention; therefore, its provisions are not applicable to the subject matter of the GAP. There is no comprehensive treaty between the riparian countries of the Tigris and Euphrates rivers that regulates the participation and exploitation of the

1 . Among these countries and institutions: Canada, Japan, France, America, Switzerland, Austria, and International Agricultural Development Fund.

2 . Ahmad Reza Tohidi, Mahdi Keykhosravi, 'The Absence of Treaties: The Need for Investigating States, International Obligations in the Dam Construction Process from the Perspective of International Law' (2019) 36(61) International Law Review 39.

water of these rivers between them. However, bilateral agreements have been concluded between the countries along the Tigris and Euphrates rivers regarding the non-navigational use of the Tigris and Euphrates Rivers. These agreements are limited only to the quantitative distribution of water and the exchange of information related to the utilization of the Tigris and Euphrates rivers, but they do not contain binding regulations regarding water quality.

The first water talks in the Tigris and Euphrates basin began with the Paris Agreement of December 23, 1920, between Britain and France. After the Second World War, Iraq and Syria gained independence, and subsequently, these talks and agreements were followed by Turkey, Syria and Iraq. The relations between these countries were relatively calm in the first half of the 20th century. However, bilateral or tripartite meetings between Turkey, Syria and Iraq began in the mid-1960s. Since 1980s, with the beginning of the competition over the exploitation of water resources, as well as Turkey’s focus on completing the GAP, the relations between these countries has become tense over water resources.[1] In this section, the most important agreements concluded between the three countries will be mentioned.

1.1.1. Treaty of Friendship and Good Neighborliness between Iraq and Turkey, 1946

This is the first bilateral treaty between Iraq and Turkey regarding the Tigris and Euphrates rivers after the end of the British protectorate over Iraq.[2] It is a friendship treaty between Turkey and Iraq, one of the main instruments which helped foster political consensus between the monarchy in Iraq at that time and the Turkish government.

This treaty contains six protocols. The first protocol stipulates the regulation of the water of the Tigris and Euphrates rivers and their tributaries in such a way as to guarantee the right of the two countries to share the water of the rivers and exchange experiences between them in accordance with the common interests of the two countries.Under this protocol, Iraq was required to send experts to Turkey to conduct research, surveys, and collect hydrological, geological data, etc., in order to select sites for dams, measuring stations and other works and develop pertinent plans. These endeavors should correspond the needs of the Tigris and Euphrates rivers and their branches. Turkey organizes the maps prepared for review and Iraq bears all the costs of carrying out the works.[3]Iraqi experts work jointly with Turkish experts, and Turkey allows them to visit the necessary places and provides them with all the information, assistance and facilities in this respect.[4]

Turkey establishes and maintains permanent stations for water measurement and its discharge; Iraq bears the operating costs equally in the implementation of this protocol, and Iraqi or Turkish experts at regular intervals inspect the measuring stations. At the time of flooding every day at 8:00 a.m., the river level is informed by telegraph to the competent authorities designated by Iraq. This is the time when telegraph is available, and at other times, the river level is reported to the same authorities through monthly text reports.[5]

1 . Nicolas Bremer, Op.cit, 46.
2 . In 1932.
3 . Euphrates-Tigris Protocol – Treaty of Friendship and neighbourly Relations (Iraqi-Turkish) 1946, art.1
4 . Euphrates-Tigris Protocol – Treaty of Friendship and neighbourly Relations (Iraqi-Turkish) 1946, art.2
5 . Euphrates-Tigris Protocol – Treaty of Friendship and neighbourly Relations (Iraqi-Turkish) 1946, art.3

In principle, the Turkish government agrees to create works that appear necessary because of research, and each work is subject to an agreement on its location, cost, operation and maintenance. In addition, its utilization by Turkey for irrigation and electricity generation is held separately.[1] Turkey is required to inform Iraq of any projects that it might decide to establish on either of these two Rivers or their tributaries to ensure mutual benefits.[2] After signing this protocol, each contracting party should appoint a representative, and the representatives will consult on all matters necessary for the implementation of the protocol.[3]

It is worth noting that this treaty, with its protocols, has led to the recognition of Iraq's water rights in the Tigris and Euphrates basin by Turkey, and gave Iraq important rights that Iraqi monitoring experts were present at Turkish stations and all data and water parameters were provided to Iraq. The construction of dams in Turkey was according to the studies of Iraqi and Turkish experts, and that the location and purpose of each dam in Turkey was agreed upon by Iraq and it ensured that Iraq was informed about all the projects in order to secure its interests.

What is remarkable about this protocol is that it does not include Syria. Although this protocol is attached to the Treaty of Friendship and Good Neighborhood between Iraq and Turkey, it targets the important water issues of the three riparian countries, so it was necessary for Syria to be present in it. Another important aspect of this additional protocol is that it emphasizes the need for cooperation, information exchange and consultation in order to maintain the common interests of the two countries. However, no specific criteria were defined in the framework of these cooperations.

The goal of the aforementioned protocol is that Türkiye does not take more river water than it needsBecause of Turkey's overexploitation of the water of these two rivers, the relationship between the two countries changed, and in fact, the planned measures contained in this treaty and its additional protocols were never completed. Therefore, this treaty lost the importance of its implementation and ended up apparently ineffective.[4]

Turkey has violated this protocol several times by building the Atatürk Dam, Berjik Dam and Qaramish Dam without agreement with Iraq. While the Turkish embassy in Baghdad sent a note to the Iraqi government in 1957, which included the announcement of Turkey's desire to regulate the drainage of the Euphrates River, develop the river's resources and electric energy, as well as its intention to build the Keban Dam[5]. It is noted that Turkey's note corresponds to the first protocol of the 1946 Treaty of Friendship and Good Neighborliness.

1.1.2. Technical and Economic Cooperation Protocol between Turkey and Syria, 1987

Syria and Turkey signed a comprehensive technical and economic cooperation protocol in 1987, which sought cooperation in various fields of oil, gas, electricity, banking, communications, trade and transportation. Articles 6 to 10 of the protocol are related to water issues.

During the filling period of the Atatürk Dam and until the final distribution of Euphrates

1 . Euphrates-Tigris Protocol – Treaty of Friendship and neighbourly Relations (Iraqi-Turkish) 1946, art.4
2 . Euphrates-Tigris Protocol – Treaty of Friendship and neighbourly Relations (Iraqi-Turkish) 1946, art.5
3 . Euphrates-Tigris Protocol – Treaty of Friendship and neighbourly Relations (Iraqi-Turkish) 1946, art.6
4 . Adel.J.Kischner, Katin Tiroch, 'the Water of Euphrates and Tigris: An International Law Perspective' (2012) 16 Max Planck Yearbook of United National Law 346.
5 . The construction of Kiban Dam started in 1965 and ended in 1974.

water between the three countries, the Turkish side undertakes to guarantee an annual water rate of more than 500 cubic meters per second on the Turkish-Syrian border. And in cases where the flow of the Euphrates River is is less than 500 cubic meters per second, the Turkish side will compensate the difference in the following month.[1]

The two sides are cooperating with the Iraqi side to distribute water from the Tigris and Euphrates rivers as quickly as possible, and the two sides agreed to activate the work of the joint technical committees for water.[2] The two countries also agreed to establish joint projects in the Euphrates River for the purpose of irrigation and electricity generation, provided that technical and economic studies are carried out with the cooperation of experts from the two countries.[3]

The protocol also discussed the Peace Pipeline project, where Turkey informed Syria of the details of the project, and Syria agreed, provided that an international consulting firm conducts a technical and economic feasibility study. Syria also agreed to facilitate feasibility studies in the Syrian part of the project, and if the results of the studies are positive, Syria will enter into negotiations to establish this project.[4]

In 1993, Syria registered this protocol in the United Nations to guarantee the minimum rights of Syria and Iraq to the waters of the Euphrates River. This protocol is considered temporary until a final agreement is reached to divide the water of the Euphrates River between the three countries, and the final agreement to divide the Euphrates water has not yet been reached.[5]

Iraq opposed this protocol because it was not a party to it and it should have been trilateral, and Iraq did not agree to 500 cubic meters per second because the amount reaching Iraq would be less than half of the minimum requirement.

1.1.3. Joint Minutes Concerning the Provisional Division of the Waters of the Euphrates River between Iraq and Syria

In 1989, an agreement was signed between Iraq and Syria under the auspices of the Arab League, in which the two sides agreed to temporarily divide the water of the Euphrates River. Based on that, the two countries agreed that Iraq's share of the water of the Euphrates River on the border between Turkey and Syria will be 58%, and Syria's share will be 42% until the final agreement to divide the waters of the Euphrates.[6] In this agreement, the formation of a technical committee was also established to monitor the implementation of the technical and administrative details of the agreement.[7]

It is noted that according to this agreement, the amount of water in the Euphrates River is divided between Syria and Iraq based on what Turkey allows on the border between Syria and Turkey. But due to the different amount of water flow from Turkey from month to month or even day to day; There was no other than percentage sharing of water flow between the two

1 . Protocol on Economic Cooperation (Syrian-Turkish) 1987, art. 6
2 . Protocol on Economic Cooperation (Syrian-Turkish) 1987, art. 7
3 . Protocol on Economic Cooperation (Syrian-Turkish) 1987, art. 8
4 . Protocol on Economic Cooperation (Syrian-Turkish) 1987, art. 10
5 . Adele J. Kirscbner and Katrin Tirocb, Op.cit, p 371.
6 . Aysegül Kibaroglu, Ramazan Caner Sayan, 'Water and 'imperfect peace' in the Euphrates–Tigris river basin' (2021) 97 International Affairs 146.
7 . Iraqi-Syrian Joint Minutes Concerning Provisional of the Water of the Euphrates's River, 1989, art. 2

countries. In other words, the percentage of water flow between two countries is constant, but the amount of water flow is uneven.

In this agreement, it can be seen that the issue of the amount of water in the Euphrates River's tributaries in Syria has not been addressed. considering that these tributaries are part of the Euphrates river network, the amount of water should be calculated.

The difference between the 1987 protocol and the 1989 agreement is significant, and both agreements are in favor of Syria. The 1987 protocol carries the risk for Turkey of not being able to provide sufficient water, as it is obligated to guarantee the average annual flow based on a fixed share. In the case of the 1989 agreement, Syria agreed with Iraq on a more flexible mechanism for transferring risks to Iraq through Syria's commitment to provide a certain percentage of available water. Therefore, if Euphrates water is low in Syria, Iraq will receive less water. Regardless of what has been said, it can be noted that these two agreements in the water-related sections only dealt with the issue of water sharing among the countries sharing the Euphrates River, but did not discuss water quality issues or other environmental problems.[1]

With the exception of the 1993 Syria-Turkey Joint Statement on Cooperation, which barely addressed the water issue, no agreement on water issues was reached between the three countries during the 1990s.[2] . At the beginning of the 21st century, this cooperation witnessed a new movement that led to various memorandums of understanding, joint statements and other agreements on water issues. In 2009, Turkey and Syria signed two memoranda of understanding, one in the field of improving water quality and the other in the field of effective exploitation of water resources and dealing with drought.

1.1.4. Memorandum of Understanding in the Field of Remediation Quality of Water between Syria and Turkey (2009)

In this memorandum, the necessity of technical, scientific and technological cooperation is specified in order to reduce water pollution and improve water quality in order to maintain the well-being of the current and future generations. This memorandum has expressed the necessity of cooperation in several fields, including joint measures to prevent pollution caused by residential, agricultural and industrial areas, as well as the comparison of legal and institutional structures in the field of water quality. Cooperation between the two countries is carried out through joint scientific research, exchange of environmental technologies, exchange of experts and any other type of cooperation with the agreement of the parties.[3]

Each party will appoint a national coordinator who will be responsible for managing cooperative activities based on this memorandum. The coordinators prepare annual programs that contain a detailed description of the joint actions to be taken, and they may meet at any time to discuss the activities included in this memorandum or to discuss environmental cooperation.[4]

Any dispute arising from the interpretation or implementation of this memorandum will be resolved by negotiation between the parties, and this memorandum should not be interpreted in

1 . Adele J. Kirscbner and Katrin Tirocb, Op.cit, 372.
2 . Ibid, 373.
3 . Memorandum of Understanding in the Field of Remediation Quality of Water (Syrian-Turkish) 2009, art. 2
4 . Memorandum of Understanding in the Field of Remediation Quality of Water (Syrian-Turkish) 2009, art. 6

such a way as to harm the rights and obligations of the parties resulting from other agreements concluded by the parties in accordance with international law.[1]

This memorandum shall remain in force for a period of five years and will be automatically renewed for subsequent five-year terms, unless either party notifies the other party of its intention to terminate the memorandum in written at least six months before the memorandum expires.[2]

1.1.5. Memorandum of Understanding in the Field of Efficient Utilization of Water Resources and Combating of Drought between Syria and Turkey (2009)

This memorandum aims to optimally use water resources and deal with drought through the cooperation of the parties with the transfer of knowledge, experience and technology between the two parties. Both parties should seek financial resources for projects related to optimal use of water resources and drought reduction through new technologies. In this memorandum, the necessity of cooperation in several fields is emphasized, including the use of modern water purification techniques, the creation of early warning systems for floods, and cooperation in the development of early warning systems for drought.[3]

Each party will appoint a national coordinator who will be responsible for managing cooperative activities based on this memorandum. The coordinators prepare annual programs that contain a detailed description of the joint actions to be taken, and they may meet at any time to discuss the activities included in this memorandum or to discuss environmental cooperation.[4]

Any dispute that may arise from the interpretation or implementation of this memorandum will be resolved by negotiation between the parties, and this memorandum should not be interpreted in such a way as to harm the rights and obligations of the parties resulting from other agreements concluded by the parties in accordance with international law.[5]

This memorandum shall remain in force for a period of five years and will be automatically renewed for subsequent five-year terms, unless either party notifies the other party of its intention to terminate the memorandum in written at least six months before the memorandum expires.[6]

Unlike the 1987 protocol, which focused on the water sharing of the Euphrates River, these two memoranda emphasize the patterns of water development, use and management, especially drought management and environmental protection. However, due to regional instability and increasing political tensions between these countries, the implementation of these bilateral memoranda has become impractical. the Syrian conflict has further contributed to a stagnation in Euphrates water relations.[7]

1 . Memorandum of Understanding in the Field of Remediation Quality of Water (Syrian-Turkish) 2009, Art. 8
2 . Memorandum of Understanding in the Field of Remediation Quality of Water (Syrian-Turkish) 2009, Art. 10
3 . Memorandum of Understanding in the field of efficient utilization of water resources and combating of drought (Syrian-Turkish) 2009, art. 2
4 . Memorandum of Understanding in the field of efficient utilization of water resources and combating of drought (Syrian-Turkish) 2009, art. 5
5 . Memorandum of Understanding in the field of efficient utilization of water resources and combating of drought (Syrian-Turkish) 2009, art. 7
6 . Memorandum of Understanding in the field of efficient utilization of water resources and combating of drought (Syrian-Turkish) 2009, art. 9
7 . Aysegül Kibaroglu, Ramazan Caner Sayan, Op.cit, 150.

1.1.6. Agreements for the Construction of a Water Pump Station on the Tigris River

In 2002, Syria concluded an agreement with Iraq for the construction of water pumping stations on the Tigris River and a similar agreement with Turkey in 2009. These agreements included specific provisions of the allowed amount of water output for Syria. Instead, Syria was required to report all the stages of project implementation as well as the amount of water received. In the aforementioned cases, the parties agreed to jointly monitor the amount of water released from the Tigris River by establishing monitoring stations. It was also decided that a joint technical committee would regularly record the amount of water pumped out by the pumping devices.[1]

Under article 4(1) of the 2009 Syria-Turkey agreement regarding the pumping center on the Tigris River, Syria was granted the right to withdraw a maximum of 1.25 cubic kilometers of Tigris water every year using the pumping center. In spite of this general share, Syria has the right to receive a specific share of water on a monthly basis. The minimum monthly amount Syria has the right to withdraw from the Tigris water is 0.027 cubic meters in December and the maximum amount occurs in May, which reaches 0.268 cubic meters. Article 4(2) of the Agreement has limited the Syrian right of of withdrawal of the amounts stipulated in Article 4(1).[2]

Article 6 of the Agreement stipulates: "When Syria, Turkey and Iraq reach an agreement regarding the final allocation of water from the Tigris and Euphrates rivers, the total amount of water allocated to Syria from these two rivers will be reduced from Syria's share of the Tigris River in accordance with Article 4 of the agreement."

The Eastern Anatolia Project (DAP), a dam construction complex in Turkey, has planned to build more than 10 large dams, including the Karakurt Dam and the Süylmaz Dam. If implemented, the project will lead to a severe reduction of approximately 50% of water flowinto the Aras River.

1.2. Compliance of Atatürk Dam Impact on the Euphrates River with International Treaty Law

The initial dewatering of the Atatürk Dam reservoir had a serious impact on the amount of Euphrates water flow. The initial dewatering of the reservoir began in the beginning of 1990 and continued until 1992, and the initial dewatering of the reservoir seriously reduced the water flow of the Euphrates River on the border between Turkey and Syria and reached about 65 cubic meters per second from January 14 to January 31, 1990, and to an average of 50 cubic meters per second from February 1 to February 12, 1990.[3]

Atatürk Dam serves as a tool for implementing irrigation programs on a large scale and the largest hydroelectric power plants in Turkey. In order to irrigate a land with an area of 706,281 square kilometers connected to the dam, a large amount of water must be withdrawn from the Euphrates.[4]

Hydroelectric power plants are designed to store water and primarily to meet the peak energy demands; therefore, they do not produce energy continuously; rather, they store poten-

1 . Agreement on a Syrian Pumping Station on the Tigris (Iraqi-Syria) 2002, art. 5(5)
2 . Memorandum of Understanding on a Pumping Station on the Tigris (Syria –Turkey) 2009, art. 4
3 . Erdem Mete, 'The Tigris-Euphrates rivers controversy and the role of international law' (2003) 8 Perceptions: Journal of International Affairs 10. .
4 . Ibid, 11.

tial energy by keeping water behind the Atatürk Dam.[1] The water that has been stored can be released from the path of the turbines and the energy of water movement is converted into electrical energy at the time of high-energy demand. Subsequently, the amount of water released from the Atatürk Dam reservoir is largely dependent on the energy demand in Turkey. Because energy demand is generally higher in autumn and winter, it is expected that more water will be released from the dam reservoir in these seasons.[2] The natural flow of Euphrates water is low between September and February; therefore, the operation of the Atatürk dam and its hydroelectric power plant fundamentally changes the natural flow pattern of the Euphrates water. In addition, the energy demand is also different during each day; therefore, the activity of Atatürk dam hydroelectric power plant disrupts the flow of river water.[3]

The availability of fresh water is not solely limited to the reduction in the quantity of water. The effluents that enter the Euphrates River from agriculture, industry and domestic uses affect its quality. Both Iraq and Syria have stated that Turkey’s developments on the Euphrates River have led to its pollution. Apart from the issue of pollution of the Euphrates, which is a dispute between these countries, the issue of salinization of the water of the Euphrates River is certain. The main cause of salinization of the Euphrates River is improper irrigation.

Water salinization is particularly important for both drinking and for agricultural purposes. Water with a salinity of more than 1000 parts per million is unsuitable for human consumption according to the standards of the World Health Organization.[4] When the water salinity is more than 2000 parts per million, it cannot be used for irrigation, and when the water salinity concentration reaches more than 3000 parts per million, it is unusable for most animals to use as drinking water.

The salinity level of Euphrates river source water is very low and has about 260 parts per million.[5] At the border between Turkey and Syria, the salinity of Euphrates water reaches more than 1040 parts per million.[6] The reason for this salinity is mainly improper and extreme irrigation as well as the drying of the infrastructure in the project area (GAP) of Turkey. As a result, we find that the Atatürk Dam affects the quantity and quality of Euphrates water entering Syria.

The Syria-Turkey Economic Cooperation Protocol 1987 contains several sections that Turkey and Syria have agreed upon. Article 6 of this protocol specifically refers to the distribution of Euphrates water. In Article 6(1) of this Protocol, the Turkish side undertakes to guarantee an annual waterflow rate of more than 500 cubic meters per second on the Turkish-Syrian border, during the filling period of the Atatürk Dam and until the final distribution of Euphrates water between the three countries. In cases where the flow of the Euphrates River is less than 500 cubic meters per second, the Turkish side is obligated to compensate for the difference in the following month.

Article 6(1) of the Protocol explicitly obligates Turkey to allow a minimum water flow of

1 . Nicolas Bremer, Op.cit, 260.
2 . Ibid, 262.
3 . Bagis Ali Ihsan, ‘Southeastern Anatolia Project’ (1989) the cradle of civilisation regenerated, Istanbul 47; Beaumont Peter, ‘Restructuring of Water Usage in the Tigris-Euphrates Basin: The Impact of Modern Water Management Policies’ (1998) Middle Eastern Natural Environment 168.
4 . WHO, Guidelines for Drinking-water quality(2011) 228
5 . Al-Layla MA, Fathalla LN, ‘Impact of Lakes on Water Quality’ (1989) 182 IAHS-AISH publication 169.
6 . Ibid, 171

500 cubic meters per second to flow towards Syria on an annual average basis. During the initial dewatering of the Atatürk dam reservoir, the water flow towards Syria on January 14 and February 12, 1990 has decreased from this amount.[1] In addition, paragraph 2 of Article 6 of the Protocol does not consider any limited period for measuring and calculating the average annual flow. This paragraph only requires Turkey to compensate for any decrease in water flow of less than 500 cubic meters per month, so that the average reaches 500 cubic meters per month.

The total water flow of the Euphrates River, which was sent to Syria in January 1990, was about 349 cubic meters per second, and therefore the initial withdrawal of water from the Atatürk Dam reservoir was a violation of Article 6 of the Syrian-Turkey Economic Cooperation Protocol. Atatürk Dam can be considered to be in violation of the economic cooperation protocol between Syria and Turkey due to the effect of its activity on the water flow of the Euphrates River. That is if the amount of water entering the Euphrates River into Syria is less than 500 cubic meters per second on an annual average basis.

Only the memorandum of understanding between Syria and Turkey in 2009 regarding water quality directly refers to the issue of water quality in the shared rivers between Syria and Turkey. In order to reduce water pollution, Syria and Turkey have agreed in Article 2(3) of this memorandum to cooperate with the establishment of pollutant emission standards and transition to environmental quality standards. Syria and Turkey have never established the standard of emission of the relevant pollutant after concluding this memorandum. These two countries have definitely not agreed on mutually binding standards. In addition, other objective provisions related to water quality are not included in the memorandum. Therefore, due to the absence of treaty provisions, the effect of Atatürk Dam on the water quality of the Euphrates River does not violate international treaty law.

1.3. Compliance of the effect of the Ilisu Dam on the Tigris River with International Treaty Law

The condition of the Tigris River is not as bad as the situation of the Euphrates River. This situation is because many tributaries of the Tigris River are added to it in the downstream and there is less development activity on it in the upstream.

Tigris River flows mostly originate from mountainous areas in Turkey; Therefore, Turkey has exploited the Tigris River less intensively. Syria is the only country on the banks of the Tigris River, where about 44 km of this river flows in its border areas, and therefore this river is not considered as an important source of fresh water for it. Iraq is dependent on the water of the Tigris River and about half of the water of the Tigris River reaches the territory of Iraq.[2]Despite all these, the utilization of Tigris water has consistenly been a source of conflict between Iraq, Syria and Turkey.[3] The focal point of the dispute is Turkey's Iliso Dam. Unlike other disputes over the Euphrates and Tigris rivers, the dispute regarding the Ilisu dam was not only raised and debated between the countries along the river and other countries in the region, but it was also

1 . Dogan Altinbilek, 'Development and Management of the Euphrates–Tigris Basin' (2004) 20 International Journal of Water Resources Development 19.

2 . Harris Leila M, Samer Alatout, 'Negotiating hydro-scales, forging states: Comparison of the upper Tigris/Euphrates and Jordan River basins' (2010) Political Geography 151.

3 . Tinti Alessandro, 'Scales of justice. Large dams and water rights in the Tigris–Euphrates basin' (2023) Policy and Society4 .

discussed with countries outside the region. For example, Iraq, Syria, and people from these two countries also protested some European countries that were involved in the construction of this dam.[1]

The construction of the Ilisu Dam would reduce the Tigris River water by 47% and deprive 50% of the residents of Mosul of access to water resources in the summer.[2] The construction of this dam will also cause 696 thousand hectares of Iraqi agricultural lands to be deprived of irrigation.[3]

Apart from the pollution caused by toxic substances and the problems caused by the discharge of fertilizers into the Tigris through the return flow from the irrigated areas, salinization can also add to the problems. Although the Tigris suffers from less salinity than the Euphrates, river salinity is an issue that will cause more problems in the future.[4]

There is no comprehensive treaty regulating and distributing Tigris river water between Iraq, Syria and Turkey. However, there are bilateral agreements related to the uses of this river. The agreement between Syria and Turkey regarding the pumping center on the Tigris in 2009 has regulated the quantitative distribution of the Tigris water flow between Syria and Turkey regarding the pumping center in the Syrian territory. Iraq and Syria have resolved the situation regarding this pumping center in the agreement of 2002. The only treaty governing non-navigational uses of the Tigris between Iraq and Turkey is the 1946 Turkey-Iraq Protocol on the Tigris and Euphrates.

In Article 4(1) of the Memorandum of Understanding on a Pumping Station on the Tigris between Syria and Turkey 2009, it was agreed that Syria could withdraw a maximum of 1.25 cubic kilometers of water from the Tigris River every year using the pumping center. Despite this general share, Syria has the right to receive a specific share of water on a monthly basis. The minimum amount that Syria is authorized to withdraw from Tigris water is 0.027 cubic meters per month in December and the maximum amount is 0.268 cubic meters in May. Clause 2 of Article 4 of the agreement between Syria and Turkey has limited this right of Syria and has limited the withdrawal of Syrian water to the amounts stipulated in Clause 1 of Article 4.

Article 4(1) of Memorandum of Understanding on a Pumping Station on the Tigris between Syria and Turkey 2009 states that the maximum amount that "Syria should use" is 1.25 cubic kilometers of water from the Tigris River annually, with monthly allocations specified in the accompanying table. The Article provides Syria with a certain monthly amount of water. The interpretation of this paragraph is that the quantitative distribution of Tigris water is completely binding due to the mandatory language of this Article. Therefore, paragraph 1 of Article 4 of this agreement is legally binding. It is unlikely that the operation of the Ilisu Dam violates Paragraph 1 of Article 4, of the Turkey-Syria Agreement due to the effect of its operation on the

1 . Elver Hilal, 'Peaceful Uses of International Rivers. The Euphrates and Tigris Rivers Dispute' (Brill 2021) 382.

2 . Mc Glade Katriona, Behnassi Mohamed, Environmental Change and Human Security in Africa and the Middle East (Springer Publisher 2017) 245; Ahmad Reza Towhidi, Mahdi Keykhosravi, 'The Absence of Treaties: The Need for Investigating States, International Obligations in the Dam Construction Process from the Perspective of International Law' (2019) 36(61) International Law Review 393

3 . Every cubic kilometer of the Tigris River's annual water flow decreases, an area of 625 square kilometers of agricultural land in Iraq cannot be used for agricultural purposes due to the reduction of water for irrigation. In addition, abandoning these areas can increase the speed of desertification in Iraq

4 . Al-Layla M.A., and Fathalla, L.N., Op.cit, 167.

quantity of Tigris water flow, because the expected annual flow of Tigris water on the border between Turkey and Syria during the operation of the Ilisu Dam exceeds 1.25 cubic kilometers.

The agreement between Syria and Iraq regarding the Syrian pumping center on the Tigris in 2002 is the same as the agreement between Syria and Turkey regarding the pumping center on the Tigris River. In clauses 1 and 4 of article 3 of this agreement, Iraq gives some of the Tigris water to Syria on a monthly basis. The wording of these clauses is mandatory and therefore regulates the distribution of Tigris water between the two countries of Syria and Iraq since 2002. Turkey has never adhered to this agreement, and therefore the Ilisu Dam or other Turkish projects for the Tigris are not subject to this requirement.

The only treaty governing the Tigris River between Iraq and Turkey is the protocol established by these two countries in 1946. This protocol is mainly related to the collection and sharing of data related to the development of Tigris and Euphrates. However, the protocol does not establish any specific regulations regarding the quantitative distribution of the Tigris water flow between Iraq and Turkey.

The only agreement concluded by the countries along the Tigris River that refers to the issue of water quality is the 2009 agreement between Syria and Turkey regarding water quality. Clause 3 of Article 2 of this agreement stipulates that the parties Syria and Turkey should cooperate in setting standards for pollutant emissions and environmental quality, but these two countries have not agreed on this issue. In addition, this document does not extend to Iraq either; Because Iraq is not a member of it. Therefore, due to the absence of treaty provisions, the effect of the Ilisu Dam on the water quality of the Tigris River is not a violation of international treaty rights.

2. GAP from the Perspective of Customary Principles of International Water Law

In this part, I will deal with the conformity of the effect of the Ilisu Dam on the Tigris River and the effect of the Atatürk Dam on the Euphrates River with the customary principles of international water law.

2.1. Compliance of the Effect of the Ilisu Dam on the Tigris River with the Principles of International Water Law

The most important principles of international water law are the principle of non-harmful utilization of territory and the principle of equitable and reasonable utilization.

2.1.1. Compliance with the Principle of non-Harmful Utilization of Territory

This principle means preventing harm to other riparian countries through activities related to an international river; As a result, damage may be caused by pollution or reduction of water volume.[1] The principle of non-harmful utilization of territory is often related to the rule of no harm[2], good neighborliness, or abuse of rights.[3]

1 . Stephen C. McCaffrey, The Law of International Watercourses – Non-Navigational Uses (second edition, New York: Oxford University Press 2007) 409.
2 . Use yourself in such a way that you do not harm others
3 . Gunther Handl, 'Transboundary impacts' (2008) The Oxford Handbook of International Environmental Law 533.

From the legal point of view, the harm must reach a degree of importance that it disturbs the interests of other governments. Therefore, the downstream government should ignore the minor negative effects of its neighbor's activities, because these are inherent and inevitable problems. For this reason, the plan of the International Law Commission includes significant losses, but choosing real and desirable criteria to recognize these losses is not so easy.The principle of non-harmful utilization of territory does not include an absolute standard. Several factors must be considered. First, the principle of non-harmful utilization of territory requires that the damage reach a customary threshold, meaning that it must be serious or significant enough.[1] The significance of harm caused is a central property of the no-harm rule. However, a number of treaties including the no-harm rule do not incorporate it. Still, the bare fact that these treaties do not limit the obligation not to cause harm to or on another state's territory to significant harm does not necessarily mean that such a limitation could not be an element of the no-harm rule as it is recognised as of international customary law. Therefore, these treaties would have to represent a quasi-universal state practice supported by a quasi-universal opinio iuris. Yet, there are a large number of agreements, merely providing for an obligation not to cause transboundary significant harm, and a variety of state explicitly stated they considered the no-harm rule as limited to significant harm. Thus there is a quasi-universal consensus in state practice and opinio iuris regarding the no-harm rule being binding international customary law; however, consensus only exists insofar as this rule is limited to prohibiting states to cause significant transboundary harm. Judicial decisions and legal scholars support this view.[2]

Second, the standard of proportionate behavior is an issues of concern, which means that the responsibility is not only in the event of a result, but the government must take all the conventional measures so as not to cause significant harm. The necessary specific measures should be determined by considering the facts and conditions of each specific situation as well as the capacities of the government in question.[3] according to state practice and opinio iuris, the no-harm rule is binding international customary law regarding non-navigational uses of freshwater. Numerous states regulated non-navigational uses of international freshwater systems in treaties including the no-harm rule. Also, many states explicitly declared to consider the no-harm rule as binding under international law. Judicial decisions and the vast majority of legal scholars also support this view.[4]

The United Nations Convention on the Law of the non-navigational Uses of International Watercourses 1997 refers to the rule of not causing significant and lasting damage to other countries.[5] Prohibition of non-harmful utilization of territory has its roots in the customary rule of international law that prohibits harm and harm to others. According to this customary principle of international law, governments are obligated not to use their territory for purposes that are contrary to international law. Article 21 of the Stockholm Declaration also states that, "[a]

1 . Owen McIntyre, 'The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Freshwater Resources' (2006) Natural Resources Journal 93.
2 . McCaffrey, Op.cit, 415.
3 . McIntyre, Op.cit, 102.
4 . McCaffrey, Op.cit, 417.
5 . Convention on the Law of the Non-navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) Art. 7

ccording to the United Nations Charter and principles of international law, governments have sovereign rights regarding the extraction of their resources, according to their environmental policies, and are responsible for ensuring or controlling activities within their territoriess in a manner that does not harm the environment of countries or regions outside their territorie.”مُحَرَّمٌ

Based on the principle of non-harmful utilization of territory, every government must exercise due care when taking action in its territory to ensure that such an action does not lead to substantial transboundary damage. Therefore, this the principle obligates Turkey not to deprive other states of the water of the Tigris River due to its action and in fact not to cause them substantial damage.[2] Therefore, if Turkey takes all necessary measures to prevent transboundary fundamental damage, and yet the flow of Tigris water decreases due to the initial dewatering of the dam reservoir, Turkey has not violated the no-harm rule.

Iraq uses the Tigris extensively and has implemented extensive development projects on the Tigris River, which are related to large-scale irrigation and the operation of the hydroelectric power plant connected to the Mosul dam. Tigris is also considered as an important source of drinking water for Iraqi people. Decreasing Tigris water can cause serious damage to Iraq. It is predicted that if every cubic kilometer of Tigris water flow decreases, 625 square kilometers of agricultural lands will be deprived of irrigation. This action will lead to desertification. In addition, the Mosul dam hydropower plant cannot operate and there will be a shortage of drinking water in Nineveh and Mosul.[3] All these cases undoubtedly constitute substantial damages.The statement of the Minister of Resources of Iraq has predicted that if the GAP and the Ilsiu Dam, which is a part of it, are active, the amount of water in the Tigris River on the border between Turkey and Syria will decrease from 16.72 cubic kilometers to about 11.14 cubic kilometers per year. Given Syria’s low reliance on the Tigris River, this reduction will not harm Syria, and this amount of water will allow Syria to operate its own pumping station. According to this forecast, the amount of Tigris water flow will be about 69.63% of its natural flow.[4]

Iliso Dam will have a fundamental effect on the Tigris River flow regime. Especially in the months of March to May, the amount of water decrease due to Ilisu Dam is much lower than the natural flow and may have some negative effects on Iraq. For example, it is possible that the Mosul dam and its reservoir, which is designed to hold water during high water flows so that the dam’s hydroelectric power plant can work, will not be able to work for months with low water flows due to the Ilisu dam.[5]

The daily fluctuations of the Tigris River will be very variable due to the construction of Ilsio Dam.[6] Of course, the imbalance due to the water flow affected by the Ilisu Dam will affect the plant and animal life of the riverbed downstream.[7] As a result, it can be said that Ilsiu Dam

1 . Principle 21, Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration, 1972).
2 . Hasan Qaraman, A trans-national analysis of equitable utilisation and minimisation of environmental harm under environmental laws at international, federal and national levels. (PhD Thesis. The University of Waikato2023) 13.
3 . Bagis, Ali Ihsan, Op.cit, 49.
4 . Ibid, 52.
5 . WCD (World Commission on Dams), Dams and Development: A new Framework for Decision-Making, (The Report of the World Commission on Dams, London 2000) 78.
6 . Stuart E. Bunn, Angela H. Arthington, ‘Basic Principles and Ecological Consequences of Altered Flow Regimes for Aquatic Biodiversity’ (2002) 30 Environmental Management 493.
7 . Nicolas Bremer, Op.cit, p 274.

can lead to considerable damage to the countries of Syria and Iraq due to the influence on the quantity of Tigris river flow.Regarding the water quality of the Tigris River, the principle of non-harmful utilization of territory requires that Turkey, when doing something in its territory, act in such a way that the water quality of the Tigris River is not affected in a way that causes severe damage to other countries along the river.

The effluents from the construction site of Ilisu Dam will affect the environment of the region, and therefore it is necessary to establish a facility to manage these effluents. Heavy metals that enter the Tigris River from industrial and municipal wastes are the main reason for concern.[1]

The presence of heavy metals in drinking water can severely affect human health. The amount of nitrogen and phosphorus that flows into the Tigris River from effluents and return flows from land irrigation leads to an effect on the biological mass of the river and a decrease in the level of oxygen in the water. These works may be considered as severe cross-border damage according to the principle of non-harmful utilization of territory.[2]

Apart from the pollution of the Tigris through effluents and return flows caused by irrigation, the changes in the Tigris water flow that will occur due to the activity of the Ilisu dam can affect the quality of the Tigris water. Changing the river flow regime not only causes a change in the dynamics of the river flow, but can also affect the water quality. The reduction of floods due to the balance of natural water flow can lead to sedimentation, which ultimately leads to the reduction of water depth and the filling of pores. Low summer flow and evaporation can lead to the concentration of nutrients, chemicals and salt in the water pits, which will affect the life of the fish living in those pits.[3] Such changes in the biological cycle of the river can affect its uses, which are closely related to the river's habitat dimension, such as the possibility of fishing and aquaculture farms. Because none of these uses exist in the Tigris, the change in the dynamics of the river and its biological cycle does not cause economic damage; rather, it leads to environmental damage. Because the principle of non- non-harmful utilization of territory is not limited to material damage, the change in the natural pattern of the Tigris flow can violate this principle.

The main reason for the salinization of rivers is improper and excessive irrigation. Therefore, because there is no irrigation program connected to Ilisu Dam; therefore, this dam will have a small effect on the salinity of the Tigris water. As a result, it can be said that the developments of the GAP on the Tigris River have an important effect on the quality of the Tigris water. The increase of nitrogen and phosphorus produced in urban sewage and the return of land irrigation flows in particular can cause significant transboundary damage.[4]

2.1.2. Compliance with the Principle of Equitable and Reasonable Utilization

One of the important and fundamental principles of contemporary international water law is the principle of equitable and reasonable utilization of resources. The principle of fair use of the in-

1 . Ibid, 276.
2 . Ibid, 278. .
3 . Stuart E. Bunn, Angela H. Arthington, Op.cit, 492.
4 . Nicolas Bremer, Op.cit, 297.

ternational river is based on the balance between the sovereign rights of the government over the waters of its territory and the interests of the downstream country in using these waters.[1]

From the legal point of view, the mentioned principle is a customary rule and it is included in various documents, including the 1966 Helsinki Rules, the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes, the 1997 United Nations Convention on the Non-Navigational Use of International Waterways and the 2004 Berlin Rules. The principle of equitable and reasonable utilization has also been repeatedly recognized and emphasized by international judicial and arbitration authorities.[2]

According to Article 5 of the 1997 United Nations Convention on the Non-Navigational Use of International Waterways, riparian states must exploit the resources located in their territory in a reasonable and fair manner. Article 6 of this Convention provides several methods and ways of working in order to apply this legal principle. According to this Article, the riparian states of the river must protect the environmental resources of the river by observing the natural features and characteristics, economic and social needs[3] and considering the impact of these different uses of the resources shared with other countries.

According to this principle, every government along the river has the right to use a reasonable and fair share of the river's water flow. This reasonable and fair share must be evaluated through a comprehensive assessment of data related to distribution and use. There exists no universally binding catalogue of factors relevant to determining the riparian states' equitable and reasonable shares of an international freshwater system's water on grounds of the doctrine of equitable utilisation. This is not surprising. Since it is generally accepted that what is an equitable and reasonable share has to be determined on grounds of the specific circumstances of the individual case, a universally binding catalogue cannot be established as it could never be applicable to the specific circumstances of every individual case. Hence a catalogue of relevant factors can only be used as a guideline or to point out specifically important factors. This interpretation also is supported by the fact that the catalogues provided for in treaties and non-binding declarations are never conclusive. Thus, they remain open for specific factors and issues relevant in an individual case.[4]

As a result, the initial withdrawal of water from the Iliso dam reservoir can violate the principle of equitable and reasonable utilization if the amount of Tigris river water that is supposed to be stored behind the Iliso dam is more than Turkey's reasonable and fair share of the Tigris water. In other words, if the amount of water released from the Ilsio Dam cannot compensate the reasonable and fair share of Syria and Iraq, the Ilsio Dam's use will be an unreasonable and unfair. Therefore, an equitable and reasonable utilization share of the waters of the Tigris River must be determined for the countries of the Tigris River Basin. In order to determine if the initial extraction of water from the Ilsio Dam constituted a violation of principle of equitable and reasonable utilization. This work requires the evaluation of many data such as the climate

1 . Mete Erdem, Op.cit, 12.
2 . Nicolas Bremer, Op.cit, 155.
3 . Marcus D. King, 'Weaponizing Water: Water Stress and Islamic Extremist Violence in Africa and the Middle East' (2023) Lynne Rienner Publishers 15.
4 . McCaffrey, Op.cit, 406.

of the Tigris region, the water status of the Tigris River, the population dependent on the river, people's development and the availability of freshwater in general in the region.The GAP in Turkey is mainly for setting up hydroelectric power plants and providing energy needed by the population of certain regions of Turkey. With this explanation, Tigris is very important for Turkey from the perspective of human and urban development. On the other hand, the irrigation of many agricultural lands from the project area (GAP) helps the economic development of this country in the Southeast Anatolia region, creating jobs in the Ilisu dam power plant and the necessary trainings related to it are all other aspects of development in Turkey.[1]

Compared to Turkey, the Tigris River is less important for Syria. Only 44 km of the Tigris River flows in Syria. In the areas where the Tigris crosses Syria, there are only 30 inhabitants per square kilometer. However, Iraq depends on the Tigris as the most important source. Large urban areas in Iraq use the Tigris River as the only source of fresh water, especially in Baghdad and Mosul. Irrigation programs for areas of about 22,000 square kilometers, which constitute about 67% of the total arable areas of Iraq, are located along the Tigris. About half of the Tigris water flow is used in Iraq. The most important project in Iraq that depends on Tigris river water is the Al Jazeera project, spanning an area of about 1300 square kilometers. This region has a dry climate. This project is also related to agriculture, so the development of agriculture in Iraq is very dependent on the Tigris River. Mosul dam hydroelectric power plant with higher energy production capacity is also located upstream of the Tigris in Iraq, which is very dependent on the Tigris water coming from Turkey. Based on all available data, including human, economic, cultural and development, it can be said that Turkey and Iraq are more dependent on that Tigris than Syria.[2]

According to the principle of equitable and reasonable utilization, Syria has a small share of the Tigris river's water; Therefore, reducing the water flow of the Tigris River does not deprive Syria of its reasonable and fair share; However, the reduction of the Tigris water flow due to the development of the GAP will have a strong impact on Iraq. About 6960 square kilometers of Iraqi agricultural land will be deprived of water and 53% of the energy production capacity of the Mosul Dam power plant will be reduced.[3] These works will make Turkey's utilization of the Tigris River unfair and unreasonable.

2.2. Compliance of Atatürk Dam's Impact on the Euphrates River with the Principles of International Water Law

The most important principles of international water law are the principle of non-harmful utilization of territory and the principle of equitable and reasonable utilization.

2.2.1. Compliance with the Principle Non-harmful Utilization of Territory

Article 6 of the Economic Cooperation Protocol between Syria and Turkey only refers to the issue of the quantitative distribution of Euphrates water, and therefore it cannot be claimed that it has

1 . Nicolas Bremer, Op.cit, 90.
2 . Adele J. Kirscbner , Katrin Tirocb, Op.cit, 352.
3 . Ali Ihsan Bagis, Op.cit, 55.

abandoned the principle of non-harmful utilization of territory regarding the quality of Euphrates water.

The effect of the Atatürk Dam on the water quality of the Euphrates River and as a result the effect on Iraq and Syria can be a major damage, and therefore, it is considered a violation of the principle of non-harmful utilization of territory. Although water with a salinity level of 1000 parts per million can only be used for agricultural purposes and according to the standards of the World Health Organization, it is not suitable for human consumption. Subsequently, when the salinity of the sources of the Euphrates is taken into consideration, the increase of its salinity to about 1040 at the border of Turkey and Syria can be considered as a fundamental transboundary damage in what the principle of non-harmful utilization of territory has in mind.

Considering the fact that the Euphrates is considered as a very important source of fresh water for Syria and Iraq, the salinity occurring in Turkey should be considered more than a significant transboundary effect. Syria supplies 42% of its fresh water from the Euphrates; therefore, this source of water is the most important source of fresh water in Syria. In addition, about a third of Syria's agricultural areas are located along the Euphrates and its branches.[1] About 87% of the water entered into Syria is consumed in the agricultural sector. Agriculture is the most important factor regarding the use of fresh water in Syria. Due to Syria's arid and semi-arid climate along the Euphrates, irrigation is critical in Syria. In addition, the Euphrates provides the water needed for large urban centers such as Aleppo.[2]

Iraq gets only 12% of its fresh water from the Euphrates and is therefore less dependent on the Euphrates water flow. Of course, a large percentage of Iraq's population lives along the Euphrates and an important part of the agricultural production in Iraq is obtained along the Euphrates. Due to the dry weather in the vicinity of the Euphrates River in Iraq, these agricultural areas must be irrigated continuously. In fact, about 30% of artificial irrigation in Iraq is provided by Euphrates water; As a result, Euphrates water is considered an important source for agriculture and domestic consumption in Iraq.[3]

Since the Euphrates is a source of fresh water for irrigating crops and meeting the needs of animals, as well as human drinking, it is of special importance for both Iraq and Syria. Euphrates water salinization is considered a significant component for use in both countries; Since Euphrates water has a salinity of about 1000 parts per million at the border of Turkey and Syria, it is not suitable for human consumption according to the standards of the World Health Organization and is only limited to agricultural uses in the downstream. Such a reduction in the usability of Euphrates water should be considered more than a significant effect; In particular, the Euphrates is very important as a source of fresh water for agriculture and the interior of Iraq and Syria. As a result, the increase in water salinity in Turkey is a fundamental transboundary damage in a way that is considered the principle of non-harmful utilization of territory.

1 . Adele J. Kirscbner and Katrin Tirocb, Op.cit, 347.
2 . Mete Erdem, Op.cit, 11.
3 . Adele J. Kirscbner, Katrin Tirocb, Op.cit, 360.

2.2.2. Compliance with the Principle of Equitable and Reasonable Utilization

The headwaters of the Euphrates are comparatively low in salinity, with about 260 ppm. On the Syrian-Turkish border, however, the Euphrates's salinity rises to 1,040 ppm. This is mostly due to improper and excessive irrigation and insufficient irrigation and drainage infrastructure in the Turkish GAP region[1].The salinization of the Euphrates water at the border between Turkey and Syria has made this water only suitable for agricultural purposes. While the Euphrates is considered as a source of drinking water in Iraq and Syria, Turkey's extensive interest in using Euphrates water for agriculture in the Atatürk Dam area is undeniable. Consequently, it can be said that the Atatürk Dam activity has led to the violation of the principle of equitable and reasonable utilization.

Conclusion

The nature, scope and goals of the Turkey Southeast Anatolia Project (GAP) shows that Turkey seeks to bolster its economic and political power at the expense of ignoring the interests of the countries along the Tigris and Euphrates rivers. Despite the opposition from Syria and Iraq and the violation of international laws related to the exploitation of international rivers, Turkey insists on its approach in implementing water programs. Turkey's GAP entails political, economic and security implications.

The Turkish government introduces the GAP as the key to the future development of its economy. Nevertheless, the governments of Syria and Iraq, respecting the right of the Turkish government to develop, have expressed immense concerns about this project; they contend, the completion of the GAP will lead to severe impacts downstream. there are few treaty regulations regarding the distribution and allocation of the Tigris and Euphrates rivers. Article 6 of the Turkey-Syria Economic Cooperation Protocol of 1987 and Article 1 of the Iraqi-Syrian Joint Minutes Concerning Provisional Devision of the Water of the Euphrates's River of 1989 and Article 4 of the Turkey-Syria Memorandum of Understanding of 2009 regarding the Tigris River pumping station are the only provisions in this field.

No agreement has been concluded between the countries sharing the Tigris and Euphrates rivers regarding the water quality. The only existing regulation related to water quality is Article 3 of the Turkish-Syrian Memorandum of Understanding in the Field of Remediation Quality of Water 2009, which obligates these two countries to cooperate in establishing pollutant release standards.Due to the lack of comprehensive treaty provisions and the ineffectiveness of the existing treaty provisions between the riparian countries, the customary principles of international environmental law play an important role as the main source in the distribution and utilization of the Tigris and Euphrates rivers. Contrary to the Turkish government's position, Tigris and Euphrates are international rivers subject to the rule of international law without any restrictions.

The formation of two important principles in customary international law, i.e. the principle of equitable and reasonable utilization and the principle of non-harmful utilization of territory,

1 . Nicolas Bremer, Op.cit, 235.

are based on the concept of limited territorial sovereignty. Today, these principles are generally accepted in the international arena. The principle of not causing significant harm prohibits certain harmful actions and behaviors and provides certain minimum standards for cross-border actions by governments. The principle of equitable and reasonable utilization also provides a comprehensive distribution of the waters of an international river, which obligates governments to consider the interests of other riparian states when utilizing the river. Equitable and reasonable utilization mandates certain conditions of each river and a comprehensive evaluation of all criteria related to the non-navigational uses, such as the dependence of the population on the river as the source of that type of water, the availability of other fresh water sources, the climatic conditions of the region and the existing and potential pollution. The effects of the GAP on the Tigris and Euphrates rivers have some differences with the customary principles of international water law, leading to the violation of the principle of non-harmful utilization of territory and the principle of equitable and reasonable utilization.

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‘Humanitarian Reasons’ in the Debt Relief of Natural Persons in Contemporary Polish Insolvency Law in the Light of Judeo-Christian Tradition and Philosophy

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ABSTRACT

The study refers to the competence given to commercial courts in Poland to be guided by “humanitarian reasons” in matters regarding the debt relief for insolvent natural persons. Humanitarian reasons allow the omission of general legal standards. The general clause „humanitarian reasons” can be clarified by referring– inter alia– to the Judeo-Christian traditional concept of debt relief and philosophy. However, Poland is a secular state. In Mosaic law, the debt relief was systemic in nature due to the construction of the sabbath and jubilee years. In Christian ethics, human dignity, forgiveness and mercy have an important place. The influence of Judeo-Christian tradition in Poland on the concept of humanitarianism is a fact. Irrespective of the personal beliefs of the body applying the law and the specific addressee of the court ruling, Judeo-Christian tradition allows for the formulation of directives as to the judicial interpretation of the term „humanitarian” in a secular state.

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Introduction

The research objective of this paper is to consider (1) how the Judeo-Christian tradition and philosophy treated debtors and (2) how presently in Poland the Judeo-Christian tradition (and therefore certain moral canons) still influences the application of the Polish state law on contemporary debt relief in consumer bankruptcy proceedings. It seems that the following qualifications of morality can be distinguished: autonomous morality (ethics of conscience), ethics of religious systems and finally social ethics and universal morality.[1] The ethics of religious systems is therefore one of many possible qualifications of morality. The ethics of religious systems transcend the boundaries of the given social group or nation. Nevertheless, in contemporary Europe, societies are multicultural in terms of worldview *and* pluralistic.

It should be noted that Polish law and Polish judiciary are strictly secular. The legal bases of administrative or judicial decisions cannot be based on the rules of religion. In some special situations the law directly refers to the canons of morality. This morality is shaped, inter alia (not exclusively), by the culture and religious tradition, including the Judeo-Christian philosophy. The preamble of the Polish Constitution contains the following phrase „we, the Polish Nation - all citizens of the Republic of Poland, both believers in God which is the source of truth, justice, good and beauty, as well as not sharing this faith, and these universal values derived from other sources, equal in rights and obligations towards the common good – Poland". In the present times, the dominant religion in Poland is the Roman Catholic Church. The remaining religious associations are in a significant minority: the Greek Catholic Church, Old Catholicism, Orthodoxy (mainly: the Polish Autocephalous Orthodox Church), Protestantism and non-Christian: Islam[2] and Judaism. Pursuant to Art. 25 of the Constitution, churches and other religious asso-

1 . Anthony Kość, ‚Relacja prawa i moralności we współczesnej filozofii prawa (The relationship of law and morality in contemporary philosophy of law)' (2001) vol.11 Roczniki Nauk Prawnych 24; Tomasz Przesławski, ‚Rola Etyki w systemie prawnym (The role of ethics in the legal system)' (2011) Profilaktya Społeczna i Resocjalizacyjna 38.

2 . The history of Islam in Poland, which continues to the present day, starts in the fourteenth century, with the beginnings of Muslim settlement in the Grand Duchy of Lithuania, connected with Poland under the royal union. The first Muslims were the Tatars of the Golden Horde. They were prisoners of war, taken prisoner as a result of the wars of the Lithuanian Dukes with the Golden Horde, and voluntary emigrants. The first historically confirmed case of Tatar settlement took place in 1397. Poland was not the initiator of the Crusades in the Middle Ages. Moreover, the Teutonic Order of the Blessed Virgin Mary, brought in 1226 by the district prince Konrad of Mazovia (the Polish state was then experiencing a regional breakdown), became the main

ciations have equal rights. Public authorities in the Republic of Poland shall be impartial in matters of religious, philosophical and philosophical beliefs, ensuring the freedom to express them in public life. Relations between the state and churches and other religious associations are shaped on the basis of respect for their autonomy and mutual independence in their own scope, as well as of cooperation for the good of man and the common good. The relations between the Republic of Poland and the Catholic Church are defined by an international agreement concluded with the Holy See (*Sancta Sedes*) and by statutes. The relations between the Republic of Poland and other churches and religious associations are defined by laws adopted on the basis of contracts concluded by the Council of Ministers with their respective representatives.

In the analyzed case, the legal provision of the Polish law, refers directly to moral canons as premises for the application of specific legal effects which is the debt relief. However, the above observation is a significant simplification. The theory of law has been dealing with the relationship between law and morality for centuries. Many views were expressed on this matter. According to one of them, law and morality are essentially and functionally completely different, and therefor completely separate from each other.[1] According to another concept, law and morality are identical.[2] Among such extreme views there are compromise concepts: law and morality are neither identical with each other, nor are they entirely separated. They are in relation to each other where there are only some problems in the area of law. They are problems of morality and vice versa. Much of the problem belongs to either the law alone or only morality.[3] Nevertheless, purely theoretical considerations are not the subject of this study.

1. Humanitarian Reasons in Polish Insolvency Law

„Consumer bankruptcy” is one of the parts of the Act of February 28, 2003. Bankruptcy law allows for debt relief in bankruptcy proceedings after meeting a number of conditions. Their omission when applying debt relief is possible precisely because of „reasons of equity” or „humanitarian reasons”.[4] The bankruptcy law does not define the general clause „humanitarian reasons”. In the legal system, reference to humanitarianism takes place primarily when human dignity is

threat to the Polish state over years. Crowned as King of Poland, Władysław Jagiełło, the Lithuanian prince, defeated the troops of the Teutonic Order in the greatest battle of medieval Europe at Grunwald (15 July 1410). After Martin Luther’s reformation - when bloody religious wars broke out in Europe - it was a country of religious pluralism and freedom.

1 . Hans Kelsen, The Pure Theory of Law (Berkeley: Los Angeles-London 1970) 8; Herbert L.H. Hart, ‚Positivism and the Separation of Law and Morals’ (1958) 71 Harvard Law Review 593, 599-601.

2 . Max Scheler, Der Formalismus in der Ethik und die materiale Wertethik (Bern 1954); Nicolai Hartman, Ethik (München 1962); Lon L. Fuller, ‚Positivism and Fidelity to Law-A Reply to Professor Hart (1958) 71 Harvard Law Review 630; Arthur Scheller, ‚Law and Morality’ (1953) Vol.36 Issue.3 Marquette Law Review 319; Jerzy Wróblewski, ‚Słuszność w systemie prawa polskiego (Righteousness in the system of Polish law) (1970) No.1 Ruch Prawniczy, Ekonomiczny i Socjologiczny 97; Strukrura Grzybowski, ‚Struktura i treść przepisów prawa cywilnego odsyłających do zasad współżycia społecznego (Structure and content of civil law provisions referring to the principles of social coexistence (1965) Vol. VI Studia Cywilistyczne, Kraków 17, 19, 25, 48.

3 . Anthony Kość, ‚Relacja prawa i moralności we współczesnej filozofii prawa (The relationship of law and morality in con-temporary philosophy of law)’ (2001) vol.11 Roczniki Nauk Prawnych 27.

4 This text is based on a scientific paper published in Polish: R. Adamus, „Judeochrześcijańska koncepcja darowania długów a >względy humanitarne< przy oddłużeniu osób fizycznych”, „The Judeo-Christian concept of forgiveness of debts and> humanitarian considerations <in the discharge of natural persons” [in:] „Człowiek – Państwo – Kościół. Księga Jubileuszowa dedykowana księdzu profesorowi Arturowi Mezglewskiemu”, „Man – State – Church. Jubilee Book dedicated to Father Professor Artur Mezglewski „ P. Sobczyk, P. Steczkowski (editors), Wydawnictwo Academicon„ Lublin 2020, p. 13-30.

particularly vulnerable.[1] Therefore, the criminal law[2] and international public law regulating the principles of conducting armed conflicts refer to the principles of humanitarianism. Civil law protects human personal rights such as his dignity and honor (e.g. Article 23 of the Polish Civil Code).

In the document „Dignity and rights of the human person", the International Theological Commission, established by John Paul II, an argument was postulated that human dignity is the highest good. Therefore, it should be adequately expressed in all created laws.[3] „The fundamental and necessary values certainly include the dignity of every human person and respect for their inalienable rights." In contemporary ethics, a distinction is made between the personal dignity that is inherent in man due to his humanity and personal (personality) dignity as acquired. In colloquial language, „humanitarianism" is „an attitude characterized by respect for people and concern for their welfare."[4] Humanitarianism is a broad concept, encompassing legal, moral, religious and interpersonal elements.[5]

The Judeo-Christian tradition can influence the understanding of the term „humanitarian considerations" as used in the Bankruptcy Law. In my opinion, the problem should be considred on two levels. First, the area of law-making. The Act refers to „humanitarian considerations". The Constitution of the Republic of Poland, as mentioned before, guarantees the separation of church and state. The legislator must take into account the multiculturalism of society, and thus, both Christian morality and secular ethics. The legislator, however, should not exclude Chris-

1 . Miroslaw Sadowski, ,Godność człowieka – aksjologiczna podstawa państwa i prawa (Human dignity – the axiological basis of the state and law) (2007) Studia Erasmiana Wratislaviensia – Wrocławskie Studia Erazmiańskie, Zeszyt naukowy studentów, doktorantów i pracowników Uniwersytetu Wrocławskiego – Wrocław 14; Junusz F. Mazurek, ,Godność osoby ludzkiej jako wartość absolutna (Human dignity as an absolute value) (1993) Roczniki Nauk Prawnych Lublin 266; Junusz F. Mazurek, ,Godność osoby ludzkiej jako źródło praw człowieka i obywatela (The dignity of the human person as the source of human and civil rights) (2014) 1 Civitas et Lex 43. Human dignity is a normative concept. In the preambule to the Universal Declaration of Human Rights of December 10, 1948, it was argued that recognition of inherent dignity is the basis of freedom, justice and peace in the world. Similar content was included in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights, signed on December 19, 1966. Art. 30 of the Constitution of the Republic of Poland. Dariusz Dudek, ,Zasada przyrodzonej godności człowieka (Principle of the inherent human dignity) [in:] Dariusz Dudek (editor), Zasady ustroju III Rzeczypospolitej Polskiej (Principles of the political system of the Third Republic of Poland) (Warszawa 2009) 54; Miroslaw Granat, ,Godność człowieka z art. 30 Konstytucji RP jako wartość i jako norma prawa (Human dignity under Art. 30 of the Polish Constitution as a value and a norm of law) (2014) 6 Państwo i Prawo 32.

2 . Alicja Grześkowiak, ,Znieść karę śmierci (Abolish the death penalty) (1982) 26 (10) Palestra 59-67; Magdalena Budyn-Kulik, ,Prawa człowieka w kontekście represyjnej funkcji prawa karnego. Przyczynek do rozważań o proporcjonalności w prawie karnym (Human rights in the context of the repressive function of criminal law. A contribution to considerations on proportionality in criminal law) [in:] Zasada proporcjonalności w prawie karnym", „The principle of proportionality in criminal law, T. Dukiet-Nagórska (editor), (Warszawa 2010) 147; Leszek Bosek, ,Prawo podstawowe do godności ludzkiej w Konstytucji RP (Fundamental right to human dignity in the Constitution of the Republic of Poland) [in:] Państwo prawa i prawo karne. Księga Jubileuszowa Profesora Andrzeja Zolla (The rule of law and criminal law, Jubilee Book of Professor Andrzej Zoll) vol. I, P. Kardas, T. Sroka, W. Wróbel (editors), (Warszawa 2012) 96–98; Marek Bielecki, ,Ochrona godności osoby skazanej w prawie karnym wykonawczym. Wybrane aspekty (Protection of the dignity of the sentenced person in executive criminal law, Selected aspects) (2018) 60 Zeszyty Naukowe KUL 159.

3 . Hubert Izdebski, Godność i prawa człowieka w nauczaniu Jana Pawła II. Wykład inauguracyjny roku akademickiego 2005/2006 na Wydziale Prawa i Administracji UW (Dignity and human rights in the teaching of John Paul II. Inaugural lecture of the 2005/2006 academic year at the Faculty of Law and Administration of the University of Warsaw) (2006) XLV Studia Iuridica 301; Leszek Buller, Godność osoby ludzkiej wymiarem podmiotowości człowieka w gospodarce (The dignity of the human person as a dimension of human subjectivity in the economy) [in:] Annales. Etyka w życiu gospodarczym, (Annales, Ethics in economic life 2012) 49.

4 . Jan Paweł II, Evangelia Vitae (Kraków 1995), 34.

5 . Krzysztof Wiak, Godność człowieka jako podstawa aksjologiczna polskiego prawa karnego (Human dignity as the axiological basis of Polish criminal law) [in:] Aksjologiczne podstawy polskiego prawa karnego w perspektywie jego ewolucji (Axiological foundations of Polish criminal law in the perspective of its evolution) A.Grześkowiak, I. Zgoliński (editors), (ydgoszcz 2017) 10 -11; Wiktor Osiatyński, ,Prawa człowieka i ich granice (Human Rights and Their Limits) (Kraków 2011) 109.

tian values. This has a deep historical and cultural justification.[1] Bankruptcy law is a law that pursues the economic interests of creditors and a debitor. The phrase „humanitarian reasons" is alien to this area of law. It undoubtedly refers to the acquisition of human rights. In the international (global as well as regional) as well as domestic legal order, economic rights are among the human rights. However, the act only uses the general clause: „humanitarian considerations". Therefore, a second area should be distinguished: law enforcement. How will judges in bankruptcy courts rule on specific bankruptcy cases?

Under Mosaic law, the principle of debt relief was the norm of law. In the New Testament, the moral imperative is the forgiveness of sins. Nevertheless, humanism can also be derived from beyond religious sources of value. These are universal values. They can be important from the point of view of the structure (axiology) of many legal systems as well as from the point of view of the practice of applying the law in different countries.

2. Mosaic Law in the Context of Debt Relief

Debt relief is not an invention of modern times. The institution of debt relief was known in antiquity. The Mosaic law provided for systemic, common debt relief for the entire Hebrew community. Researchers indicate that it referred to an earlier Old Babylonian tradition of cyclical debt relief with royal edicts, dating back to at least the first half of the second millennium BCE. Mosaic law regulated this institution about 1000 years later. Documented practice of cyclical debt relief also took place in the Syrian countries of the Middle Bronze Age.[2] Famines and wars could impoverish the entire society.

The general liberation of the Hebrews from economic debts took place in a 7 and 50 year cycle (every 7 years and after 7x7 years). The Mosaic law introduced a year of interruption in sowing the land following the six-year cycle, the so-called a sabbath year also referred to as „the solemn sabbath for the Earth"[3] or „the year of forgiveness of debts"[4]. At the same time, as

1 . Polish-Lithuanian Commonwealth in the era of religious wars in Europe (16th century) was a country without religious persecution. The area of the multinational Jagiellonian monarchy was inhabited by Catholics, Protestants, Greek Catholics, Orthodox Christians, followers of Judaism and the followers of Islam (Tatar settlement). Henryk Walezy, the elected king, involved in the slaughter of the Huguenots, by assuming the Polish throne, he guaranteed freedom of conscience and religion. The seventeenth century is the age of great wars for the Commonwealth: with Sweden, Turkey, Russia, the uprising of Bohdan Chmielnicki in Ukraine (Cossack wars). They were devastating for the state, and due to the fact that the rivals were largely non-Catholic, the Roman Catholic majority was consolidated. The eighteenth century, along with the Northern War (1700-1721), brought dependence on Moscow. In 1717, the „Mute Seym" debated. The Parliament - without a word - accepted the laws imposed by Peter I the Great (Tsar of Russia), under the bayonets of Russian soldiers. The first partition of Poland took place in 1772. Three neighboring countries took part in it: Russia, Prussia and Austria. The next two partitions led to the loss of statehood (1793, 1795). The most brutal action of denationalizing Poles and Russification was carried out in the Russian partition. The next great national uprisings were mainly launched against Russia (1794, 1830, 1863). The Catholic Church was a support for over a hundred years of resistance and the preservation of identity. After Poland regained independence in 1918, the young state had to face the Bolshevik onslaught. Catholicism played an important role in the resistance. The Polish-Bolshevik war (culminating in the Battle of Warsaw in 1920, called the „Miracle on the Vistula") was also an ideological clash between the Catholic state and materialistic nihilism. The Second World War brought a double occupation of Poland: by Nazi Germany and the Stalinist USSR. A resistance movement arose in Poland and the largest underground state in Europe. Again, the Catholic Church was the backbone of the resistance movement. In 1945, Poland, although formally regaining statehood, was a satellite country dependent on the USSR. Resistance against the regime policy of the authorities was organized at the Catholic church. The Church played a political role in the fall of communism in Poland in 1989. Thus, Catholicism played no small part in the survival of the nation. Hence, the great historical and cultural influence of Christian thought on legislation followed.

2 . Gościwit Malinowski, 'Geneza Pięcioksięgu Mojżeszowego (Genesis of the Pentateuch)' (2011) 6 Theologica Wratislaviensia 67; Edward Lipiński, 'Rok szabatowy (Sabbath year)' (2009) 1 Scripta Biblica et Orientalia 18.

3 . Liber Leviticus 25, 4,5.

4 . Liber deuteronomii, 31,10.

indicated by prof. Edward Lipiński loans were then granted for short periods of time, for about a year. In addition to the Sabbath year, the Pentateuch referred to the so-called jubilee year. These institutions are treated not only as the nucleus of modern debt relief structures, but also of limitation[1]. The sabbatical year referred to its symbolism to the second commandment of the Decalogue (and therefore the foundation of the law) dealing with the sanctity of the seventh day.[2]

In ancient Rome, the law of the XII tables allowed the body of a debtor to be divided among several creditors (*tertis nundinis partis secanto*).

While the Mosaic law permitted the debt bondage of the Hebrews, it did require the humane treatment of such persons.[3] In the seventh year of captivity, however, the commandment was to grant the Hebrews personal freedom. This law, according to the content of the Exodus, was given to a community that had recently itself been in collective bondage to Egypt („I am the Lord your God, who brought you out of the land of Egypt, out of the house of bondage"[4]). It becomes especially important on the eve of the next great tragedy of the Hebrew community. The book of Jeremiah mentions the following event: "The word that the Lord addressed to Jeremiah after King Zedekiah had made an agreement with all the people of Jerusalem to proclaim universal freedom. Each one was to grant freedom to his Hebrew slave and his Hebrew slave. (...) Having given their consent, they released them. But then they changed their minds and brought slaves and slaves whom they had granted freedom, forcing them to become slaves and slaves again."[5] The book of Jeremiah, in this violation of the law, explained the Babylonian captivity of all the Hebrews following the conquest of Jerusalem by the Babylonian king Nebuchadnezzar and the destruction of the first temple.[6] „Thus says the Lord: You did not obey me to proclaim freedom to each one his brother and fellow man; here I am setting you free - against the sword, pestilence and famine. Moreover, I will make of you an object of terror to all the kingdoms of the Earth."[7] For comparison: it was only in 326 B.C.E. Lex Poetelia improved the status of an insolvent debtor in Rome. The debtor remained dependent on the creditor until the debt was paid off or forgiven.[8]

The Old Testament treated paying its own debts as a virtue.[9] At the same time, the Mosaic law introduced a universal (for members of the community), obligatory, cyclical legal mechanism of debt relief for the entire society, independent of the scale (individual and global) or the causes of indebtedness. It should be emphasized that it was not an *ad hoc* institution introduced

1 . S. Grzybek, „Rok jubileuszowy w Piśmie Świętym", „Jubilee year in the Holy Scriptures", Ruch Biblijny i Liturgiczny, 1974/3, XXVII, p. 109.
2 . Liber Exodus 20, 8-11, Liber deuteronomii 5, 12-15.
3 . Liber Leviticus, 25, 39-43. There was a legal dualism in dealing with non-Hebrews : Liber Leviticus 25, 44 -46.
4 . Liber Exodus 20,2.
5 . Prophetia Ieremiae 34, 8-11.
6 . Prophetia Ieremiae 34, 2.
7 . Prophetia Ieremiae 34, 17.
8 . Jozef Rosenberg, Geneza i rozwój postępowania upadłościowego w prawie rzymskim (The genesis and development of bankruptcy proceedings in Roman law) (Warszawa 1935), Jozef Rosenberg, ‚Postępowanie upadłościowe w prawie rzymskim (Bankruptcy Proceedings in Roman Law)' (1996) 2 Gazeta Sądowa 8; Kazi
mierz Kolańczyk, Prawo rzymskie (Roman law) (Warszawa 1976) 158; Marek Kuryłowicz, Adam Wiliński, Prawo rzymskie prywatne (Roman Private Law) (Kraków 2000) 79; Witold Wołodkiewicz, Maria Zabłocka, Prawo rzymskie (Roman law) (Warszawa 1935) 309.
9 . Prophetia Ezechielis 18,16. It is worth mentioning that the Mosaic law in relation to members of the community assumed the repayment of debts in face value: „You shall not charge interest or usury on him" Liber Leviticus 25, 36.

to relieve the negative social effects of some sudden emergency, but, in its assumption, it was to function systematically and continuously, even in times of economic prosperity. Undoubtedly, debt relief allowed the Hebrews to avoid debt bondage. First, the following legal injunction should be cited: „At the end of the seventh year, you shall perform debt forgiveness” for the sabbatical year[1]. Second, „You will celebrate the fiftieth year, declare deliverance in the land for all its inhabitants,” referring to the jubilee year.[2]

At the same time, the Deuteronomium contained an important hint regarding the mechanism of the institution of debt relief: „This will be the forgiveness of debts: every creditor will forgive a loan made to his neighbor, he will not demand repayment from his neighbor or his brother, because the donation in honor of the Lord is announced.” Nevertheless, debt relief was limited to the Hebrews: „From a stranger you can ask for return, but what is owed to you from a brother is given by your hand”[3] (Roman law also had double standards for citizens and non-citizens: *ius civile* and *ius gentium*; Athenian democracy was only for citizens). Debt relief was known in ancient civilization. Seisachteja or „shaking off burdens” was a collective one-off debt settlement carried out in 594 BCE. by Solon in ancient Athens.[4]

The Mosaic Law explained the purpose of the regulation as follows, „But yours should not be poor.”[5] Nevertheless, this was, of course, an idealistic assumption. Describing the people who gathered around David fleeing from Saul, the Old Testament mentions, *inter alia*, those who were „pursued by creditors.”[6] Debt would then have to be a noticeable social problem. With time, the rules of debt relief had to be abandoned because in the Book of Nehemiah, on the occasion of the so-called to renew the covenant, the following obligation is mentioned among the written obligations: „Also in the sabbath year we will waive the benefits and demand repayment from any debtor.”[7]

It can be argued that in the social dimension, debt forgiveness was aimed at protecting human (Hebrew) dignity.[8] Some passages from the Old Testament draw attention to this. Let’s start with the Book of Proverbs: „The rich direct the poor, the debtor is the servant of the creditor.”[9] In the Book of Wisdom of Sirach, one can find the sentence: „The insults of a creditor are heavy for a wise man.”[10]

The Mosaic law tried to prevent a situation in which debt relief would result in the failure to grant loans. „Take care that the wicked thought does not arise in your heart:” This is the seventh

1 . Liber deuteronomii 15,1.
2 . Liber Leviticus 25,1.
3 . Liber deuteronomii 15,2.
4 . Leon Dattner, Sejsachteja (oddłużenie) w świetle prawa własności (Seisachteja (debt relief) in the light of the ownership right) (Kraków 1934) 3; Joseph G. Milne, ‚The Economic Policy of Solon’ (1945) Vol. 14 No. 3 Hesperia: The Journal of the American School of Classical Studies at Athens 230–245.
5 . Liber deuteronomii 15,3.
6 . Liber Primus Samuelis 22,2
7 . Liber Nehemiae 10,32
8 . Georg Bulik, ‚Bliskość Boga i sprawiedliwość społeczna. Rozumienie deuteronomicznego prawa w okresie niewoli (Closeness to God and social justice. Understanding deuteronomic law in captivity) (1980) Vol. XXXIII Ruch Biblijny i Liturgiczny 301.
9 . Liber proverbiorum 22,7.
10 . Ecclesiasticus Iesu filii Sirach 29,28.

year, the year of donation „, lest you look at your poor brother with an evil eye without helping him. He will call upon the Lord against you, and you will be guilty of sin."[1]

The debt forgiveness of the Hebrews had, in addition to its positive social effects, also a deep religious meaning. Genesis indicates that man was created in the image and likeness of God.[2] Meanwhile, as the Book of Isaiah expresses it, God gives man much more than the creditor of debtors: „Even if your sins were like scarlet, they will whiten like snow; even red as purple, they will become like wool."[3] In turn, the book of Micah indicates that „He will have mercy on us again, wipe away our iniquities, and throw all our sins into the depths of the sea."[4]

The later rabbinical interpretation changed with time the original meaning of the debt forgiveness institution. In the 1st century BC Hillel[5] formulated the principle of the so-called „prosbol", whereby in the sabbatical year debts could not be canceled and the creditor could still recover his debt. For this purpose, the creditor deposited the script with the court, which - according to this interpretation - made the debt excluded from the operation of the debt relief institution.[6]

3. Christian Tradition in the Context of Debt Relief

While the Mosaic law was in its assumption a constructional state law organizing the theocratic state (in vertical relations) and social life in this state (in horizontal relations), with other standards for Hebrews and non-Hebrews, the New Testament is a set of moral norms in universal and spiritual dimension. Christian philosophy does not focus on temporality (and in this sphere economic debt should be located), but on spiritual values. The focus is on forgiveness of sins.[7] „And forgive us our trespasses as we forgive those who trespass against us."[8]

The New Testament did not introduce an *expressis verbis* command such as the Christian's obligation to liberate a slave. Paul of Tarsus wrote: "Everyone, therefore, should remain in the condition in which he was called. Were you called as a slave? Do not worry! Yes, even if you can become free, rather take advantage of [your slavery]! For whoever is called in the Lord as a slave is the Lord's liberator. Likewise, the one who is called free becomes Christ's slave."[9] It did not mean, however, praising the slave state but it was rather paying attention to a different level of value than the temporal. Like the words „If you want to be perfect, go, sell what you have and give it to the poor, and you will have treasure in Heaven. Then come and follow me! "[10]

1 . Liber deuteronomii 15,9.
2 . Liber Genesis 1,27.
3 . Prophetia Isaiae 1,18.
4 . Prophetia Micheae7,19.
5 . Jewish sage, foremost master of biblical commentary and interpreter of Jewish tradition in his time. He was the revered head of the school known by his name, the House of Hillel, and his carefully applied exegetical discipline came to be called the Seven Rules of Hillel". https://www.britannica.com/biography/Hillel
6 . Solomon Zeitlin, ‚Prosbol. A Study in Tannaitic Jurisprudence' (1947) Vol. 37 No. 4 The Jewish Quarterly Review 342.
7 . Evangelium secundum Matthaeum, 18, 21. Zob. np. Janusz Lekan, ‚Przebaczenie w optyce miłosierdzia (Forgiveness in the view of mercy) (2016) Vol.l0 Issue 2 Teologia w Polsce 59-77; Piotr Mazurkiewicz, ‚Przebaczenie czy miłosierdzie. Wokół pojednania w .polityce (Forgiveness or mercy. Around reconciliation in politics) (2016) XXIX/3 Warszawskie Studia Teologiczne 116 -129; Jacek Soiński, ‚Komu trzeba wybaczyć? Aspekty psychologiczne przebaczenia i pojednania' (2018) 28 Studia Franciszkańskie 115-138.
8 . Evangelium secundum Matthaeum, 6,12.
9 . Epistola beati Pauli apostoli ad Corinthios prima, 7, 20-22.
10 . Evangelium secundum Matthaeum 19, 21.

Nevertheless, forgiveness of material debts is a frequent opportunity to explain these most essential values for Christianity. The Evangelist Luke describes the following dialogue: "«A certain creditor had two debtors. One owed five hundred denarii, and the other fifty. When they had nothing to pay, he forgave both of them. So which of them will love him more?» Simon replied, „I think the one to whom he forgave more." He said to him, „You have judged right."[1] The forgiveness of economic debt appears here as the equivalent of forgiveness of sin. The parable of the dishonest steward is also known: „So he called each of his master's debtors to him, and asked the first," How much do you owe my master? „ He replied, „One hundred barrels of oil." He said to him, „Take your pledge, sit down quickly and write fifty." Then he asked the other, „How much do you owe?" The man said, „A hundred bushels of wheat." She tells him, „Take your pledge and write eighty."[2] Also in this case, economic debts are only a prop in the rhetorical figure. In the Gospel of Matthew there is the following passage „Then his master called him before him and said to him: „Wicked servant! I forgave you all this debt because you asked me. Should you not have had mercy on your fellow servant, as I had mercy? Above you?" And his master was angry and delivered him over to the tormentors, until he should pay back all the debt to him. My heavenly Father will do the same to you, if each one of you does not forgive his brother from the heart".[3] The use of such frequent examples of debt forgiveness is at least indicative of a certain cultural standard being in place.

However, the most famous example of the parable about restoring the dignity of a man who lost his property is the literary beautiful parable of the prodigal son. "A certain man had two sons. The younger of them said to his father, 'Father, give me my share of the estate.' So he divided the property between them. Soon after, the younger son, having taken everything, went to distant places and there he squandered his fortune, living wastefully". Does such a person have no right to dignity? „Quickly bring the best robe and put it on; give him a ring on his hand and sandals on his feet! Bring the fattened calf and kill it: we will feast and play because this son of mine was dead and is alive again; he disappeared and he was found."[4] Nevertheless, it is a parable, not a presentation of socio-economic rules.

John Paul II in „*Dives in misericordia*" wrote: „The world from which we will eliminate forgiveness can only be a world of cold, ruthless justice, in the name of which each one will claim his rights against the other, and life and coexistence of people in the system of oppression of the weaker by the stronger, or in the arena of constant struggle against one another."[5]

However, it would be wrong to assume that, in Christian doctrine, economic empathy did not matter. Paul of Tarsus, stigmatizing various moral dysfunctions of the members of the Corinthian church, points out that, inter alia, „Greedy" and „extortioners" will not inherit God's kingdom.[6]

Moreover, early Christian morality did not assume selectivity. In the Sermon on the Mount,

1 . Evangelium secundum Lucam 7, 41-43.
2 . Evangelium secundum Lucam 16, 5-7.
3 . Evangelium secundum Matthaeum 18, 32 – 35.
4 . Evangelium secundum Lucam 15, 22-24.
5 . Jan Paweł II,Encyklika o Bożym Miłosierdziu, Dives in misericordia (Encyclical on Divine Mercy, Dives in misericordia) (Kraków 2010) 14.
6 . Epistola beati Pauli apostoli ad Corinthios prima

there is the following moral imperative: „To him who wants to make law with you and take your robe, give up your cloak!."[1] The Gospel guides towards the value of spiritual goods by depreciating the value of material goods. If so, then the obligation to forgive debts selectively for the Hebrew community should also apply to Christians on a universal basis.

Christian philosophy is based on non-selective forgiveness. The universalism of this concept indicates that it cannot be directly applied in modern judicial decisions, which should balance the economic interests of creditors and the dignity of the debtor.

4. Contemporary Insolvency Legislation Relating to the Debt Relief of Natural Persons

The concept of debt relief is strongly present in the Judeo-Christian tradition. Contemporary bankruptcy legislation in Europe does not therefore grow out of a legal vacuum. However, contemporary legislation in Western countries arises from completely different calculations than the legal norms organizing the functioning of the theocratic state or moral norms constructing a universal world of Christian values. The contemporary Western culture of consumerism and living on credit gives rise to a negative social phenomenon in the form of mass indebtedness of the population.[2] Moreover, an obvious problem is the poverty of the middle class in the 21st century. The SARS-CoV-2 pandemic was an excruciating ordeal in terms of insolvency.[3]

Debt relief of natural persons is currently regulated by a large number of laws in the world. The approach of modern legislation to debt relief is varied.[4] The differences in the regulation of this institution are very often profitable culturally. At the same time, it is a field for many theoretical dilemmas as to the premises of debt relief, effects of debt relief, recidivism of insolvency, etc.[5] The concepts related to debt relief are essentially evolving towards the liberalization of

1 . Evangelium secundum Matthaeum 5, 40

2 . Marek Jaślikowski, ‚Podstawy ogłoszenia upadłości konsumenckiej w praktyce sądów powszechnych (Grounds for declaring consumer bankruptcy in the practice of common courts)' (2011) 10 (10) Prawo w Działaniu 44.

3 . Rafal Adamus, Oddłużenie w upadłości konsumenckiej i układzie konsumenckim (Debt relief in consumer bankruptcy and consumer arrangement) (Warszawa 2020) 25; Rafal Adamus, ‚Wybrane zagadnienia dotyczące nowelizacji przepisów o upadłości konsumenckiej (Selected issues regarding the amendment to the provisions on consumer bankruptcy)' (2020) Monitor Prawa Bankowego; Joanna Podczaszy, ‚Quo vadis homo debitor – rozważania na temat prawnego uregulowania upadłości konsumenckiej (Quo vadis homo debitor - considerations on the legal regulation of consumer bankruptcy)' (2011) Edukacja Prawnicza; Joanna Podczaszy, ‚Instytucja upadłości konsumenckiej jako warunek utrzymania systemu społeczno – gospodarczego opartego na długu (The institution of consumer bankruptcy as a condition for maintaining a socio-economic system based on debt)' (2017) No. 9 Przegląd Prawa Publicznego 61; Joanna Podczaszy, ‚Współczesny homo consumens jako homo debitor – instytycja upadłości konsumenckiej w dobie kryzysu finansowego gospodarstw domowych (Contemporary homo consumens as a homo debitor - consumer bankruptcy institute in the times of financial crisis of households)' (2015) Vol. XVI Issue. 8 Przedsiębiorczość i Zarządzanie Łódź–Warszawa 261; Ewa Całus, ‚Upadłość konsumencka – doświadczenia i perspektywy (Consumer bankruptcy - experiences and prospects) (2015) No. 3644 Przegląd Prawa i Administracji Wrocław 11; Włodzimierz Szpringer, Upadłość konsumencka. Inspiracje z rozwiązań światowych oraz rekomendacje dla Polski (Consumer bankruptcy. Inspirations from global solutions and recommendations for Poland) (Warszawa 2006) ٢٢; Włodzimierz Szpringer, Społeczna odpowiedzialność banków. Między ochroną konsumenta a osłoną socjalną (Social responsibility of banks. Between consumer protection and social protection (Warszawa 2009) ٢٦٢.

4 . Robert Anderson, Hans Dubois, Anne Koark, Gotze Lechner, Iain Ramsay, Thomas Roethe, Hans W. Micklitz, ‚Consumer Bankruptcy in Europe, Different Paths for Debtors and Creditors' (2009) 11 European University Institute Working Paper LAW; Robert W. Kalfas, ‚Upadłość osoby fizycznej nieprowadzącej działalności gospodarczej oraz prowadzącej działalność gospodarczą w ujęciu komparatystycznym (Bankruptcy of a natural person not conducting business activity and running a business in a comparative approach) (2018) 3 Radca Prawny Zeszyty Naukowe.

5 . Philip Schuchmann, ‚An attempt at a philosophy of bankruptcy' (1982) 21 University of California, Los Angeles Law Review 403–476; Barry Adler, Ben Polak, Alan Schwartz, ‚Regulating Consumer Bankruptcy: a theoretical inquiry' (2000) Vol. XXIX Journal of Legal Studies, The University of Chicago 595; Johanna Niemi-Kiesi-

this institution.[1] At the same time, too liberal concepts of debt relief may facilitate the attitudes of the so-called moral hazard. Hence, there are voices to tighten the provisions on debt relief.[2]

Contemporary legal culture aims to protect human dignity. Protocol No. 4 (enforced on May 2, 1968) to the European Convention on Human Rights, done in Rome on November 4, 1950 (enforced on September 8, 1953) prohibits imprisonment for debts.

5. Humanitarian Considerations in Judicial Practice in Poland

In judicial decisions in Poland, humanitarian considerations are treated as universal moral norms. Due to the separation of church and state, the courts do not refer directly to the Judeo-Christian tradition. According to the concept proposed in the jurisprudence, the recourse to humanitarian considerations in bankruptcy proceedings should concern: (1) Objective circumstances, and therefore beyond the control of the debtor, (2) Exceptional (above-average) circumstances, which means that the typical nuisance associated with being a debtor is irrelevant. Consequently, these are not circumstances that apply to everyone and in every case. So, there is no place here for the concept of „unconditional forgiveness.” The circumstances should be so important as to outweigh the economic interests of creditors. (3) Circumstances may relate to the debtor and his relatives.

In one of the rulings, the court explained that “the concept of (...) humanitarian considerations has not been defined in the act. These are the so-called general clauses, evaluative concepts that give the court some decision-making freedom and refer to extra-legal values. Due to their unclear meaning, they pose some interpretation problems, (...) humanitarian considerations concern the circumstances of the debtor. The court takes into account the assessment of the effects of a possible failure to conduct bankruptcy proceedings in a given case, assesses the degree of their severity, taking into account the personal conditions of the debtor (...) the above regulation allows the debtor to benefit from debt relief in situations where the insolvency was the result of objective circumstances (e.g. disability , illness, loss of income without fault and objective inability to return to the previous state), as well as when there are strong arguments of a social, just or humanitarian nature- resulting primarily from the consumer’s current situation (illness, old age, high level of poverty)”.[3]

In another ruling, the court explained that „humanitarian considerations (...) must be read as respecting human dignity. Humanitarian considerations should be interpreted in the context of the grossly poor financial situation (high level of poverty) and life (serious illness) of the

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lainen, ‚Consumer Bankruptcy in Comparison: Do We Cure a Market Failure or a Social Problem’ (1999) Vol. 37 Issue Osgoode Hall Law Journal 474; Roland J. Mann, Kathrine Porter, ‚Saving Up for Bankruptcy’ (2010) vol. 98 The Georgetown Law Journal 98; Rafal Adamus, ‚Importance of payment morality in the Polish bankruptcy law’ (2019) Vol.7 No. 1&2 Journal of Business Law and Ethics New York 9-15; Rafal Adamus, ‚Modes of debt relief for consumers in Poland’ (2019) 6 Economic problems and legal practice 137–142; Rafal Adamus, ‚Consumer arrangement under Bankruptcy Law Act in Poland’ (2019) 6 Sociopolitical Sciences 76–81; Rafal Adamus, ‚Debt relief thorough creditors, repayment plan in Poland’ (2019) 6 Economic problems and legal practice 130–136.

1 . Pamela Foohey, ‚A New Deal for Debtors: Providing Procedural Justice in Consumer Bankruptcy’ (2019) vol.60 Issue 8 Boston College Review 2298; Charles G. Hallinan, ‚The >Fresh Start< Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory’ (1986) Vol.21 Issue 1 University of Richmond Law Review 96; Loren G. Renner, ‚Debt Settlement: New Illinois Law Provides Significant Consumer Relief’ (2011) Vol.23 Issue 3 Loyola Consumer Law Review 440.

2 . Er Mevliyar, ‚The German consumer bankruptcy law and moral hazard – the case of indebted immigrants’ (2019) VI Journal of Financial Regulation and Compliance 19.

3 . Resolution District Court in Częstochowa - 5th Commercial Division of 15 July 2016 V Gz 123/16.

debtor. Humanitarian considerations will be circumstances in which failure to complete the debt relief procedure will expose the debtor to a level of suffering which is contrary to the sense of morality. In such a case, the possibility of satisfying the creditors is practically non-existent now and in the future, and thus even objectively unjustified (in the context of negative premises) debt relief does not infringe the economic interests of the creditors. Humanitarian considerations must focus not only on the person of the debtor, but also on the impact of debt relief or its absence on the situation of the persons closest to the debtor (especially those who are dependent on him)".[1]

In another case, the court stated that „'humanitarian considerations' is a human attitude aimed at respect for other people, characterized by concern for his good, forbearance, kindness, or generally aimed at not violating human dignity or aimed at restoring this dignity." Nevertheless, the court stated at the same time that "the amount of retirement benefits free from deductions [enforcement] is not contrary to humanitarian considerations. It does not follow from the above-mentioned circumstances that the debtor was in an extremely difficult life situation, e.g. in a serious illness or disability. The debtor's retirement age and the lack of prospects for repayment of the debt do not justify the existence of humanitarian reasons".[2]

The following rationale for the court's ruling is interesting: "When considering whether the conduct of bankruptcy proceedings is justified on humanitarian grounds, it was therefore necessary to take into account the debtor's family, property and health situation at the time of the ruling, as well as future prospects. When examining whether the conduct of bankruptcy proceedings is justified on humanitarian grounds, the Court took into account that the debtor is a young person, and has all basic living needs financed by his parents (even renting a flat, where he travels to school). The debtor is therefore not a person on the verge of poverty, since he can count on such a significant help. The Court is very surprised by the fact that the debtor does not take up any paid work and shows no willingness to undertake it. According to the certificate from the post-secondary school, education takes place on a weekend basis there. It should also be emphasized that the participant is a person who has many years of professional activity ahead of him. It is therefore not unrealistic to expect that thanks to income from gainful employment, he can satisfy his faith in the years to come cut even in part. On the other hand, the prospect of enforcement against the debtor (in the case of obtaining income subject to enforcement), as well as an increase in debt by interest and costs of proceedings, are typical consequences of the debtor's insolvency and do not make his situation worse than that of other debtors. To sum up, the family and life situation, health condition and age of the applicant do not allow us to assume that he is in an extremely difficult situation compared to the situation of many other insolvent debtors, among whom there are many people struggling with various types of health or family problems.".[3] Thus, when applying „humanitarian reasons", the court should be very critical of the debtor.

Not every disease justifies humanitarian reasons. According to the court, „there are no

1 . Resolution District Court in Toruń of 9 August 2017 VI Gz 154/17.
2 . Resolution District Court in Szczecin - VIII Commercial Division of 17 October 2018 VIII Gz 314/18.
3 . Resolution District Court in Bydgoszcz - VIII Commercial Division of 5 July 2019 VIII Gz 95/19.

humanitarian reasons which constitute a negative premise for the possibility of discontinuing bankruptcy proceedings (...)” in the following situation. „When analyzing (...) the debtor’s health condition, it should be noted that he has submitted medical documentation which shows that he has received psychiatric treatment and is taking antidepressants. At the same time, however, the debtor submitted a certificate (...) in which it was stated that he had suffered a depressive syndrome, he is currently in a balanced mental state and there are no psychiatric contraindications to return to his current position. Therefore, it is difficult to conclude that the health of a debtor who is able to work, is not elderly, does not suffer from any serious diseases and does not have a pronounced degree of disability, supports the continuation of bankruptcy proceedings”.[1] In another ruling, the court accepted that „caring for two children, a sick husband and the inability to find employment for a long time do not support humanitarian reasons”.[2] Another judicature referred to serious but temporary health problems „The bankrupts are currently in a difficult position due to the very serious illness of the bankrupt, where he is unable even to move, and is struggling with a strong inflammation. However, it cannot be unequivocally determined that the inability of the bankrupt to implement the repayment plan will remain permanently and this state will not change”.[3] Similary in another judicature, the court ruled that there were no fairness or humanitarian considerations, „The bankrupt is not a helpless person, and she does not suffer from an incurable disease”.[4]

Humanitarian considerations were applied to the following facts: “the personal situation of the bankrupt indicates that she is incapable of making any repayments under the repayment plan. The situation of the bankrupt and her child is extremely difficult, [the bankrupt] is chronically ill [suffers from kidney disease in the course of their polycystic degeneration, arterial hypertension, ventricular arrhythmia. Her daughter suffers from polycystic kidney disease, which affects, inter alia, the pathological increase in the volume of the left kidney], while the possible definition of a repayment schedule would give priority to the financial interest of creditors over humanitarian considerations. (...) debtor (...) used all available earning opportunities; she even took up additional employment. In the course of the proceedings, she duly performed her duties - she provided the trustee with information and documents regarding her assets and liabilities, which clearly proves her reliability”.[5]

Conclusion

It is possible to formulate the following final conclusions, underpinned by the analysis of the Judeo-Christian concept presented, as to the „humanitarian considerations” of the commercial courts in Poland in the context of debt relief for natural persons.

First of all, it is necessary to refer to „merciness” one of the central concepts of Christian doctrine. The ability to show mercy does not depend on one’s worldview[6]. Commercial courts

1 . Resolution District Court in Bydgoszcz - VIII Commercial Division of 11 March 2022 VIII Gz 14/22
2 . Resolution District Court in Toruń - VI Commercial Division of 14 June 2017 VI Gz 127/17
3 . Resolution District Court in Bydgoszcz – VIII Commercial Division of 18 March 2022 VI Gz 59/22
4 . Resolution District Court in Szczecin - VIII Commercial Division of 9 January 2019 VIII Gz 215/18
5 . Resolution Supreme Court - Civil Chamber of 25 May 2021 I CSKP 100/21
6 . In the parable of the Good Samaritan (Evangelium secundum Lucam 10, 30-37), neither the priest nor the Levite showed

with statutory powers to be guided by humanitarian considerations when reducing debt to natural persons should therefore apply the paradigm of the conduct of a merciful person. Nevertheless, the possibility of the court to use mercy in order to achieve certain legal consequences does not apply to every debtor. It only applies to a situation that is serious and unique. Next, the dignity of a person who is unable to pay his obligations is of a higher value than the economic interest of the unfulfilled creditors. The creditors' interest is not absolute. The debt relief instrument is only competitive with the legal effects of the statute of limitations and tight deadlines. If the debtor is a legal person, it may be removed from the register and thus lose his legal existence without paying his obligations before they expire. In the latter case, the creditor will also not be satisfied. The peculiar situation of economic „bondage" of the debtor should not be indefinite. If the debtor is unable to pay the liabilities, and despite the fact that the reason for incurring them deserves condemnation, the debtor should also be financially recovered. This study draws on the Christian concept of forgiving even those who are subject to negative moral evaluation. Finally, indebtedness should not deprive the debtor of the possibility of a decent existence. Everyone has the inalienable right to dignity. In the case of irresolvable factual doubts, it should be adjudicated in favor of the debtor (in dubio pro humanitate). This study is underpinned by the Christian concept of mercy.

In relation to the assumed research goals, I point out that (1) the institution of debt relief was well known in the Judeo-Christian tradition. It is not without significance that it did not contain an absolute order to pay off liabilities regardless of the circumstances. The cancellation of liabilities is therefore acceptable in this cultural circle. (2) The Judeo-Christian tradition has had a strong influence on the modern universal concept of morality. Therefore, if state law (such as Polish bankruptcy law) refers to „humanitarian considerations" in the aspect of debt relief, then the content of these „humanitarian considerations" can be constructed with reference to the Judeo-Christian tradition. However, it is not the exclusive source of understanding of the mentioned phrase and with regard to the separation of church and state in Poland - the jurisprudence cannot refer directly to the principles of religion.

mercy, but the Samaritan. In the cultural context of the time, the Samaritan was a person outside the community of the Hebrews. As the Gospel of John explains during the conversation between Jesus and the Samaritan woman, „the Jews avoid one another with the Samaritans" (Evangelium secundum Ioannem 4, 9). Due to the submission of this paper for publication in the journal published in Iran, I would like to include a short digression on mercy in the modern world. It is about the enormous support that Polish refugees have experienced from the Iranians. On September 1, 1939, Poland was invaded by Nazi Germany and on September 17, 1939 by the USSR. Both occupation states pursued a brutal policy towards Polish citizens. Hundreds of thousands of Poles were deported into Asia by the USSR. The situation changed when, on June 22, 1941, Germany invaded the USSR. The Polish government in London signed an agreement with the USSR to create a Polish army from exiles. In the face of mounting tensions, General Władysław Andres led the Polish army out of the USSR. The army was accompanied by civilians. Along with the Anders Army, 120,000 refugees reached Iran, including as many as 40,000 women and children. Wanderers were welcomed, among others, by Meszched, Qazvin, Isfahan, Ahwaz, Tehran. Most Poles found a roof over their heads in Isfahan, known as the „city of Polish children".

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Arbitrability of Foreign Investment Disputes in Iranian Law with a Glance to IPCs

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ABSTRACT

The issue of arbitrability in foreign investment treaties poses ongoing challenges for both host nations and foreign investors. Iranian law imposes constitutional constraints on resorting to arbitration, in addition to the provisions outlined in international commercial arbitration regulations. Persistent issues revolve around the requirement of parliamentary ratification of arbitration, the timeframe for such ratification, and the applicability of pre-existing doctrines to treaties concluded prior to the ratification of the Constitution. Despite the fact that Iranian Petroleum Contracts (IPCs) are among the most important foreign investment contracts in Iran, their intricacies create additional challenges. This article examines the legal theories and practices surrounding the arbitrability of contracts in the field of foreign investment, with a specific focus on IPCs, using a descriptive-analytical approach. At the end, Findings reveal that from a domestic standpoint, parliamentary approval must precede the signing of any treaty. The same approach can also be applied to IPCs However, this paper argues that this requirement does not apply to treaties enforced prior to the enactment of the Iranian Constitution. This approach finds support in existing laws and precedents established by the Iranian Court of Administrative Justice.

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Introduction

Arbitration serves as a widely utilized mechanism for resolving disputes within the realm of international law, particularly in the context of international investment agreements. However, certain developing nations harbor concerns that the utilization of arbitration may empower foreign investors to circumvent the jurisdiction of local courts. In Iranian law, Article 139 of the Constitution establishes several conditions that must be scrutinized in relation to arbitration.

Article 139 stipulates that, "[t]he settlement of claims relating to public and state property or the referral thereof to arbitration is in every case dependent on the approval of the Council of Ministers, and the Assembly must be informed of these matters. In cases where one party to the dispute is a foreigner, as well as in important cases that are purely domestic, the approval of the Assembly must also be obtained. Law will specify the important cases intended here."[1]

This paper examines decisions rendered by the Iranian Court of Administrative Justice,[2] the interpretive awards asserted by the Guardian Council,[3] and developments in constitutional law. After clarifying the concept of arbitrability and exploring the status quo, the paper delves into contemporary theories and perspectives. This analysis specifically focuses on the evolving landscape of Iranian oil contracts, particularly those falling under the purview of the new Iranian Petroleum Contract.[4]

1. The Conceptualization of Arbitration

Arbitration has been defined in a variety of ways, such as: "A method of settling disputes by private parties who agree to submit their differences to a third person or persons for final and binding determination"[5] a process for the resolution of disputes by one or more persons, called arbitrators, selected by the parties to the dispute or by an independent institution."[6] or "any arbitration

1 . Retrieved from https://irandataportal.syr.edu/wp-content/uploads/constitution-english-1368.pdf, accessed on February 19, 2024.
2 . ICAJ.
3 . GC
4 . IPC.
5 . Bryan Garner, Black's Law Dictionary (11th ed. St. Paul MN: Thomson Reuters 2019) 128.
6 . International Chamber of Commerce, International Court of Arbitration, Rules of Arbitration, 2022, Art. 1.

relating to differences between parties arising out of a legal relationship, whether contractual or not, whether commercial or not."[1] Similar definitions also exist in Iranian law. Arbitration is a well-established and widely used method of dispute resolution in Iranian law. It is governed by several laws, including the Civil Procedure Code,[2] the International Commercial Arbitration Act,[3] and the Arbitration Rules of the Iran Chamber of Commerce, Industries, Mines and Agriculture.[4] The Civil Procedure Code of Iran (CPC) provides the basic framework for arbitration in Iran. The CPC defines arbitration as "the process by which the parties to a dispute agree to submit their dispute to the decision of one or more arbitrators."[5] The CPC also sets out the requirements for a valid arbitration agreement, including the need for a written agreement signed by both parties that specifies the subject matter of the dispute and the number of arbitrators.[6]

The International Commercial Arbitration Act of Iran (ICA) provides for the specific rules governing international arbitration in Iran. The ICA is based on the UNCITRAL Model Law on International Commercial Arbitration. It applies to arbitrations that have a "commercial" element and provides for the enforcement of foreign arbitral awards in Iran. The Arbitration Rules of the Iran Chamber of Commerce, Industries, Mines and Agriculture (ICC Rules) are the most used rules for arbitration in Iran. These rules are based on the UNCITRAL Arbitration Rules and offer a flexible and efficient process for resolving disputes. They also provide for the appointment of arbitrators, the conduct of arbitration, and the issuance of arbitral awards.

2. The Conceptualization of Arbitrability

Arbitrability in international law refers to the determination of whether a specific dispute is eligible for resolution through arbitration. This concept is fundamental in international arbitration and is primarily rooted in the principle of party autonomy, which empowers parties to opt for arbitration as their preferred mechanism for dispute resolution. [7]

Nevertheless, instances exist where the arbitrability of a dispute may encounter challenges or be contested within the realm of international law. The following are common scenarios where arbitrability issues may arise:

1. Mandatory Legal Requirements: Certain disputes are deemed non-arbitrable due to their association with matters subject to compulsory legal requirements or considerations of public policy. [8] For instance, disputes involving criminal matters, specific

1 . United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, Art. 1(1).
2 . Civil Procedure Code: available at https://ameliarbitration.com/wp-content/uploads/2021/07/Ameli-Iranian-Civil-Procedure-Code-on-Arbitration-trans.pdf, accessed on February 19, 2024.
3 . Iran International Commercial Arbitration Act (available at https://www.international-arbitration-attorney.com/wp-content/uploads/2022/09/Iran-Arbitration-Act.pdf, accessed on February 19, 2024.)
4 . Arbitration Rules of the Iran Chamber of Commerce, Industries, Mines and Agriculture: available at https://rezvanianinternational.com/wp-content/uploads/2019/02/Arbitration-Rules-of-the-Arbitration-Center-of-Iran-Chamber-www.oveisrezvanian.pdf, accessed on February 19, 2024.)
5 . CPC, Art. 454.
6 . Ibid, Art. 454-501.
7 . See Stephen Makau, The Application of the Principle of Arbitrability and Public Policy in International Commercial Arbitration (July 29, 2022). Available at http://dx.doi.org/10.2139/ssrn.4176183, pp. 7-9.
8 . See Penny Madden, Ceyda Knoebel, Besma Grifat-Spackman, 'Arbitrability and public policy challenges' Global Arbitration Review 4-8, Retrieved from https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/arbitrability-and-public-policy-challenges, accessed on February 19, 2024.

family law issues, or antitrust violations might be regarded as non-arbitrable in many jurisdictions due to public policy concerns.

2. 2. Third-Party Rights: Situations may arise where third parties, not signatories to an arbitration agreement, possess rights or interests in a dispute. Questions may emerge regarding the binding nature of these third parties to the arbitration agreement and the arbitrability of their rights.[1]
3. 3. Jurisdictional Challenges: Arbitrability may face challenges on jurisdictional grounds, where parties contest the validity or scope of the arbitration agreement itself. Arguments may be presented asserting the invalidity of the arbitration clause due to fraud, duress, or unconscionability.[2]
4. 4. State Involvement: When a dispute involves a state or state entity, uncertainties may arise concerning the state's consent to arbitration. Some states might assert sovereign immunity as a defense, contending that arbitration cannot be imposed upon them without explicit consent.[3]
5. 5. Public Policy Concerns: Arbitrability may be contested based on public policy grounds. Should the enforcement of an arbitration agreement contravene a fundamental public policy, a court may decline to compel arbitration.[4]
6. 6. Exclusivity of Certain Forums: Certain disputes may fall under the exclusive jurisdiction of specific national courts or international tribunals. In such instances, parties may be precluded from resolving their dispute through arbitration.

In Iran, certain legal practitioners perceive the concept of arbitrability in a broad sense, employing the term "arbitrability capability" to discuss governmental limitations arising from a lack of capacity.[5] Some have even gone further and stated that in any case where an arbitration agreement is not enforceable, there is no arbitrability.[6] However, these interpretations of arbitrability are inaccurate. Contrary to the beliefs of many scholars and experts in the field of arbitration, arbitrability is confined to the referral of specific disputes to arbitration.[7] Consequently, delving into other restrictions on the arbitrator's authority under this title is not feasible, even if similar outcomes are yielded. Comparative law scholars have categorized arbitrability into subjective and personal, further dividing subjective arbitrability into absolute and relative. [8] Arbitrability pertains to the limitations each country imposes on using arbitration to resolve particular disputes, safeguarding its unique interests. These constraints may vary over time and

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1 . See Garry Born, 'Chapter 5: International Arbitration Agreements: Non-Signatory Issues' in Gary B. Born (ed), Internationa al Arbitration: Law and Practice (3rd ed.) (Kluwer Law International 2021) 116-119.
2 . William Rowley, The Guide to Challenging and Enforcing Arbitration Awards (London: Law Business Research Ltd 2019) 43.
3 . Penny Madden, op.cit, 8.
4 . Rowley, op. cit, 33.
5 . Javad Seyedi, 'Referability in International Commercial Arbitrations' (master's thesis Shahid Beheshti University 2011) 26. lleana M. Smeureanu, confidentiality in international commercial arbitration in international arbitration law library (Kluwer 2011).
6 . Javad Seyedi, op. cit, 26; Loukas A. Mistelis, Arbitrability: International and Comparative Perspectives (Vol 19, Hague: Kluwer Law International 2009) 3.
7 . Pierre Mayer, Audley Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003)19 Arb Int'1249, 255.
8 . La'ya Joneidi, Nastaran Ghiyasvand Qazvini, 'Arbitrability in the Legal System of Iran with Emphasis on Judicial Process' (2017) Vol 4 Issue 8 Journal of Comparative Law 26-31.

among communities, establishing the boundaries of free will in choosing a conflict resolution system.

In the realm of international law, jurists and attorneys have sought to define arbitrability.[1] One jurist posits that the question of arbitration referral serves as the nexus between the contractual and jurisdictional facets of international arbitration.[2] Consequently, arbitrators, irrespective of the contractual basis for their authority, may apply legal norms akin to national courts. To comprehend the origins of arbitration, the term "referring to arbitration" is employed. Though grounded in the parties' volition, this concept must not transcend the scope of legal statutes and restrictions. For the enforcement of arbitration, the parties' consent must be legitimate and legal. Two considerations arise in assessing the legality of this agreement:

1. Does the contract pertain to a matter amenable to arbitration?
2. Can the parties to the contract submit their dispute to arbitration? [3]

Thus, referability to arbitration encompasses two categories: objective (subjective) arbitrability and personal arbitrability. Objective arbitrability assesses whether the dispute can be arbitrated without violating legal rules or jurisdictional procedures.[4] Personal arbitrability examines whether the characteristics and powers of the parties permit them to refer specific disputes to arbitration.

3. Overview of Iran's New Oil Contracts

In this section we will have a brief look at two of the most important subjects in the field of oil contracts regarding Iran.

3.1. Legal Nature of IPC Contracts

The novel structure of the newly introduced oil contract model, known as the IPC, represents a paradigm shift towards a risk-based service agreement. Service contracts, recognized as one of the earliest forms of contractual engagements between individuals and communities, manifest in three distinct categories: pure service contracts, risk-based service contracts, and buyback service contracts. In the realm of risk-based service contracts, the contractor assumes the obligation of allocating financial resources, executing exploration and development operations, and bearing all associated risks during this phase. remuneration for services and loan repayments is fulfilled through cash payments or the resale of oil extracted from the field upon reaching commercial production. Consequently, given the nature of the oil company's commitment to the outcome, where commercial production does not materialize, the company is not entitled to reimbursement or cost refund. These contracts additionally stipulate the contractor's active involvement in the production phase. To facilitate the transfer of technical expertise and enhance domestic capabilities, an

1 . lleana M. Smeureanu, Confidentiality in international commercial arbitration (international arbitration law library Vol 22, Kluwer 2011).

2 . Loukas A. Mistelis, Arbitrability: International and Comparative Perspectives (Vol 19, Hague: Kluwer Law International 2009) 3.

3 . Philippe Fouchard, Berthold Goldman, Fouchard, Gaillard, Goldman on International Commercial Arbitration, (Hague: Kluwer Law International 1999) 312.

4 . Stephen W. Makau, 'The Application of the Principle of Arbitrability and Public Policy in International Commercial Arbitration' (July 29, 2022) SSRN, < https://ssrn.com/abstract=4176183>

indigenous company, endorsed by the National Iranian Oil Company, is initially designated as a technical partner alongside the foreign contractor. The principal distinguishing features of these contracts, in comparison to buyback contracts, encompass their protracted duration and the contractor's sustained presence throughout the production phase.

3.2. Changes in IPC Contracts Compared to Buyback Contracts

In Iran's oil contracts, efforts have been undertaken to address the deficiencies observed in buyback contracts. The new contractual model involves contractors in all three stages of exploration, development, and production. While previous contracts typically spanned 5 to 7 years, the duration has now been extended to approximately 25 years. The profit rate for international companies is also subject to flexibility and negotiation based on field risk. However, a crucial distinction between these contract generations lies in the potential inclusion of reserves in contractors' asset lists, a privilege reserved for joint fields or those deemed high-risk. Constitutionally and under Sharia law, oil reservoirs constitute part of the public resources and are State-owned, a feature evident in buyback contracts. Yet, in the new contracts, specifically in priority projects, excluding joint and high-risk fields where time sensitivity is paramount, contractors may register reserves, not fields, in their asset lists.

In addition to these amendments, the government's resolution on IPCs incorporates further measures to mitigate the issues associated with buyback contracts:

A: According to Article 8, there is no ceiling on capital expenditures, rendering IPC an 'OPEN CAPEX.' The annual determination of capital expenditure is delegated to the joint management committee under the annual operational financial plan.

B: Article 10 of the Resolution stipulates that all costs and bonuses will commence repayment from the time of initial production, with the repayment period outlined in the contract being neither fixed nor rigid. According to Article 3(c), if the production-assigned amount for cost repayment (up to 50% of the field's products) during the contract period proves insufficient, the outstanding expenses will be repaid over an extended period defined in the contract. Moreover, according to Article 6(p), the conclusion of the contract does not preclude the settlement of remaining costs under the conditions specified in the contract. Based on Article 10, in case of initial production, the National Iranian Oil Company (NIOC) is obligated to start repaying costs. If initial production is achieved and the contractor obtains permission to invest in the annual operational financial plan to achieve additional production over the initial production, and these costs are incurred during that year but the desired production is not achieved, NIOC will still be obligated to repay them from the 50% of the initial production.

C: In IPCs, the return on investment for the contractor is not specified and therefore no limitation is imposed on the contractor in this regard. Based on Article 1, it is not clear to what items the financing costs are related. It should be noted that the government resolution is the basis for action, not the draft contracts. The Ministry of Petroleum can design and implement various types of contracts from the authorizations it receives in the government resolution. Given that the return on investment for the contractor is not specified, the bank interest rate and the costs to which the financing cost is related are crucial and have a significant impact on the

profitability of the project for the contractor. The government resolution does not specify this matter and has authorized the negotiating team to decide in this regard.

D: Bonuses are dependent on production, and based on Article 6(b) of the Resolution, even the amount of bonus is proportional to the oil price.

4. Resolving Disputes in Iran's Oil Contracts

In this part we will examine two important factors in resolution of oil disputes with regard to Iran's oil contracts.

4.1. Conditions for Arbitration in IPC Contracts

Due to the confidential nature of IPCs, comprehensive information regarding their terms is not available. Article 14 of the Iranian Council of Ministers' Resolution on Upstream Oil and Gas Contracts, known as IPC, approved in 2016 and subsequently amended, stipulates that:

"In addition to observing the explicitly mentioned matters in this resolution, the rights, obligations, and responsibilities of the parties to the contract in various areas, such as accounting and auditing processes, payment or repayment methods, technical inspection, maintenance, production measurement methods, human resources training, health, safety and environment, import and export, insurance, confidentiality, termination and cancellation conditions, force majeure, release of the contractual area, dispute resolution methods, and the language of the contract, should also be clearly defined and specified in the aforementioned texts."[1]

An examination of the published draft texts of these contracts reveals that referral of disputes to arbitration is provided for in these contracts. Accordingly:

The Parties shall make their best efforts to amicably settle any case, controversy, or claim ("Dispute") arising out of or in connection with the Contract, or its breach, termination or validity or invalidity, within ninety calendar days by referring the Dispute to the management level. This period may be extended by mutual agreement of the Parties.[2]If no such settlement is reached within ninety days from the referral of the Dispute to the management level, the Dispute shall be referred to alternative dispute resolution (ADR) tribunals. The procedures for ADR shall be mutually agreed upon by the Parties. The Parties shall settle the Dispute accordingly within ninety days of the referral of the Dispute to the tribunal. ADRs may include negotiation, reconciliation, third-party expert determination, or mediation. This period may be extended by mutual agreement of the Parties.[3]

Any Dispute that is not settled within one hundred and eighty (180) days, as per Clauses 38.1 and 38.2, unless extended by the Parties as stated above, shall be finally settled by arbitration by three arbitrators in accordance with the "Agreement on Procedures for Arbitration, as set out in Appendix D" of even date herewith. This Agreement shall survive the termination or suspension of the Contract.[4]

The arbitral award shall be final and binding on the Parties. Either Party may seek enforce-

1 . General Conditions, Structure and Model of Upstream Oil and Gas Contracts, Cabinet Resolution No. 57225/T53367H dated 16/05/1395 (2016).
2 . Article 38.1. of IPC draft texts.
3 . Ibid, 38.2.
4 . Ibid, 38.3.

ment of the award in any court having jurisdiction over the Party against whom enforcement is sought.[1]

4.2. Challenges of Arbitration for Foreign Investors

With the exception of disputes over the commercial nature of an oil or gas project, which are resolved by experts, all issues arising in IPCs are settled through arbitration, with the arbitration proceedings based in Iran and subject to Iranian law. The lack of familiarity among many multinational oil companies with Iranian legislation poses a significant concern and risk, particularly for lenders providing project funding. It is essential to note that Article 139 of the Iranian Constitution mandates the approval of the Council of Ministers and the Islamic Consultative Assembly for any arbitration involving state assets and foreign parties. Additionally, in critical cases, the approval of the above two stakeholders is required, even if the two sides involved are Iranian. Although Iran is signatory to the New York Convention and other bilateral investment agreements, none of them necessitate such approval.

According to Article 2(2) of Iran's International Commercial Arbitration Law, "[a]ll persons entitled to file a lawsuit can refer their disputes to arbitration." Two crucial points must be highlighted. Firstly, non-Iranian nationals, including corporations, establish their legal competence based on their respective domestic laws. Secondly, the limitation on the ability of Iranian government institutions to submit their disputes to arbitration, as stipulated in Article 139 of the Constitution, remains in effect, as explicitly stated in Article 36(2) of this Law.

Article 139 of the Iranian Constitution specifies that referring disputes related to public property to arbitration requires the approval of the Council of Ministers and informing the Assembly, and in cases involving non-Iranian parties and significant domestic claims, the Assembly's approval is mandatory for arbitration referral. It is important to note that international arbitration procedures generally show little willingness to accept an objection of incompetence based on the laws of the country where the corporation is established or resides. This reluctance is justified by the principle of good faith, as objections are assessed against the principle of good faith during the initial referral to arbitration.

Legal debates exist regarding the concept of public order, which falls outside the scope of this study. However, Article 975 of the Iranian Civil Code states that the court cannot enforce foreign laws or private contracts contrary to good morals or public order.[2] Public order is closely tied to peremptory norms (jus cogens), which are enacted to protect public order. Although not all aspects of public order are addressed by executive legislation, most Law scholars consider private law principles supplementary and not related to public order.[3] Consequently, conflicts related to public order are not arbitrable. The common practice in Iran's judicial system, particularly in disputes involving public property, aligns with this perspective, as indicated in an award of the General Board of the Administrative Court of Justice.[4]

1 . Ibid, 38.4.
2 . Article 975 of the Civil Code: "The court cannot timely enforce foreign laws or private contracts that are against good morals or are considered to be contrary to public order by hurting the feelings of society or for any other reason, even though the enforcement of said laws is allowed in principle ".
3 . Nasser Katouzian, Introduction to the Science of Law (43rd edition, Paydar Publications 2005) 44.
4 . Date of petition: 11/06.2012, petition number: 138-139, case class: 376-654-90.

5. Critique of the Award of the General Board of the Iranian Court of Administrative Justice

In this section, we will examine the award of the Administrative Justice Court on the annulment of the Council of Ministers Resolution. However, before that, it is necessary to note that, while free trade zones are governed under certain laws, the implementation of Article 139 of the Constitution is also mandatory for foreign investment treaties concluded in free trade zones.[1]

The plaintiff in this case was the General Inspection Organization, and the subject matter of the complaint was the annulment of Council of Ministers Resolution 168692/T36959H-07/03/2007. The Council of Ministers, on March 4, 2007, approved the following based on Article 139 of the Constitution: “Kish Free Zone Organization is permitted to submit any disagreements arising in the interpretation and implementation of contract number 78267/17- 16/07/2006 and its subsequent amendments, concluded with Mr. Khodayar Alambeigi, to arbitration. This authorization is granted on the grounds that such disputes cannot be addressed within the framework of commercial-industrial free zone laws and regulations, as well as other relevant laws and regulations.”

There are Several critical issues surrounding this contract and its subsequent amendments:

1. Pursuant to the above contract, a piece of land measuring approximately 2,000,000 square meters located on Kish Island was transferred from the Kish Free Zone Organization to Mr. Khodayar Alambeigi for 32 billion Tomans for the implementation of the “Gol Sharq” project, as outlined in Article 1 of the contract. The payment is structured in 30-year installments, with the first installment due three years after commencement. Article 7 designates the “Paris International Chamber of Commerce” as the authority for dispute resolution.

2. According to the terms of the contract, the buyer undertakes to secure all necessary funding for the project within six months of contract signing and formally present the matter to the Organization with acceptable supporting documentation. Failure by the buyer to take appropriate measures within this timeframe may result in contract cancellation, with the parties forfeiting their right to object.

3. As stated by the Managing Director of Kish Free Zone Organization (in letter No. 46013/1187/M – 14.09.2008), the contracting party transferred its rights and obligations to a Kish-registered company in 2013. Investigations reveal that this company is owned by foreign nationals (Germans). However, Article 24(1) of the Free Zones Law prohibits the sale of lands to foreign nationals.4. The Kish Free Zone Organization terminated all contracts and addenda through notice number 460413/1187/M – 20/10/2008 (due to the passage of 6 years and three months from the date of contract conclusion), citing non-compliance with the provisions of Article 6.

5. The contracting party, Mr. Khodayar Alambeigi (Foreign-owned company), has filed an appeal with the Paris International Chamber of Commerce to resolve the dispute, citing Article 7 of the aforementioned contract.

The pivotal aspect in this matter lies in the authority designated for dispute resolution with-

1 . Abdullah Darzi Naftchali, Sajjad Soltanzadeh, ‘Article 139 of Iranian Constitution and foreign investment disputes settlement’ (2017) 32(9) Journal of Poverty, Investment and Development 11.

in the contract between Kish Free Zone Organization and Mr. Khodayar Alambeigi, namely, the "Paris International Chamber of Commerce." In the event of a disagreement, as previously mentioned, the Council of Ministers is obligated to authorize the referral of the matter to arbitration. However, first and foremost, in accordance with Article 139 of the Constitution and Article 457 of the CPC, a dispute involving public property cannot be submitted to arbitration unless it has obtained approval from both the Council of Ministers and, in significant cases, the Islamic Consultative Assembly. Due to the imperative nature of both laws and the gravity of the subject matter within its linguistic context, adherence to the aforementioned criterion is a prerequisite for accuracy, rather than an effectiveness, in both constitutional and procedural law. Moreover, the effectiveness is not applicable in this context and can only be enforced in cases explicitly identified by the law. Consequently, prior to commencing arbitration proceedings for a contractual dispute, the Board of Ministers or the Islamic Consultative Assembly must grant their approval, as the case may be. It is not reasonable to stipulate arbitration in a contract and then, after several years, request its authorization from the relevant authorities.

Secondly, as per Article 1(b) of the International Commercial Arbitration Law approved on September 17, 1997, "international arbitration" is defined as one in which at least one party is not an Iranian citizen at the time of entering into the arbitration agreement in accordance with Iranian law. Conversely, according to Article 2(1), the scope of international arbitration pertains to "disputes in international commercial relations, including the purchase and sale of goods and services, transportation, insurance, financial affairs, consulting services, investment, technical cooperation, representation, royalties, contracting, and similar activities." Consequently, the agreement involving the transfer of State lands in Kish to Mr. Alambeigi does not fall within the category of disputes arising from international commercial relations, and the contractual parties are both Iranian citizens. Therefore, their disputes cannot be subjected to international arbitration.

Thirdly, permitting a foreign authority to adjudicate disputes between the Iranian government and its residents blatantly contravenes "public order." This concern has led to the emphasis in Article 456 of the CPC: "Concerning transactions and contracts between Iranian and foreign nationals, as long as no dispute has arisen, the Iranian party cannot be obligated in any way to refer the dispute to an arbitrator(s) or a committee sharing the same nationality as the transaction party. Any transaction or contract violating this legal prohibition shall be deemed invalid and ineffective." Opting for a foreign arbitrator with the same nationality as the contracting party residing in Iran is inappropriate. In cases where appointing a foreign arbitrator with the same nationality as the contractual party residing in Iran is prohibited (based on the a fortiori argument), selecting a foreign arbitrator for disputes between an Iranian individual and the Iranian government is unacceptable. In response to the aforementioned concern, the Head of the Department of Drafting Bills and Defending Government Decisions at the Legal Vice Presidency of the Presidency under bill number 14622/144451, dated 15/01/2012, stated:

"Respectfully, in reference to the notices dated 27/07/2011 and 11/10/2011 concerning the complaint of the General Inspection Organization regarding the annulment of approval letter No. 168692/T36959H– 07.03.2007 of the Council of Ministers under file numbers

9009980900033032 and 900991809535, the following justifications are presented in defense of the impugned legislation:

1. The first objection raised in the complaint pertains to the transfer of lands subject to contract No. 17/178267-16/07/2002 to a company registered in Kish, despite the explicit prohibition on selling land to foreign nationals as stipulated in Article 24(1) of the Law on the Management of the Commercial-Industrial Free Zone of Iran. It is argued that the substance of the complaint legislation does not logically and conceptually involve the purchase of land in free zones, and thus, it is unnecessary to address this claim.

The second objection challenges the arbitration clause included in the contract based on Article 139 of the Constitution and Article 457 of the CPC. It is contended that a lawsuit regarding public property cannot be referred to arbitration without prior approval from the Council of Ministers or the Islamic Consultative Assembly, if necessary. However, it is argued that the requirement for advance approval is a condition of validity, rather than a condition of influence. Additionally, since the contract was concluded in 2002 and the government permission for the inclusion of the arbitration clause was obtained in 2006, four years after the contract was concluded, it is asserted that the approval letter was not issued in violation of the law. This objection is deemed as unfounded as neither Article 139 of the Constitution nor Article 457 of the CPC explicitly or implicitly require that permission to refer to arbitration must be obtained before including the arbitration clause in the contract. The focus of the aforementioned legal provisions is the control of the government's referral of matters to arbitration concerning public property, rather than the timing of the permission.

Additionally, according to Article 139 of the Constitution and Article 457 of the CPC, the "practical referral of the dispute to arbitration," or in other words, the implementation of the arbitration clause, is subject to the permission of the Council of Ministers or the Islamic Consultative Assembly, rather than the mere inclusion of the clause in the contract. "Even if we assume that the objection regarding the requirement for advance approval is valid, it should be noted that in this case, the necessary permit was obtained and issued before the actual referral of the lawsuit to arbitration, thereby fulfilling the government's approval requirement. Furthermore, the inclusion of an arbitration clause in the contract, particularly when it explicitly states that the arbitration process will be conducted in compliance with the laws and regulations of Iran, does not contradict Article 139 of the Constitution. This is supported by the fact that Article 7 of the contract explicitly mentions that referring the matter to the Paris Chamber of Commerce is subject to compliance of Iranian laws and regulations. Therefore, the claim that the resolution is non-compliant with the laws and regulations lacks a basis and is unfounded.

2. In the complaint letter, it is argued that the dispute falls outside the scope of the International Commercial Arbitration Law approved on 17/091997, as the current dispute is between the government of Iran and an Iranian company, and the law specifically applies to disputes where one of the parties, at the time of concluding the arbitration agreement, is not an Iranian citizen according to Iranian laws and regulations.

Additionally, it is asserted that the dispute arising from the contract for transferring government lands in Kish to Mr. Alambeigi does not qualify as a commercial dispute, thus not falling within the purview of the mentioned law.

Firstly, it should be noted that neither the contract nor the government enactment explicitly or implicitly state that the International Commercial Arbitration Law covers the present dispute. Therefore, the application of Article 1 of the International Commercial Arbitration Law, as suggested by the General Inspection Organization, is not warranted.

Secondly, the referral of a matter to foreign or international arbitration does not necessarily imply the application of the International Commercial Arbitration Law. Under existing laws, including the provisions of the CPC regarding arbitration, Iranian parties can refer their disputes to foreign bodies such as the Paris International Chamber of Commerce. In other words, there are no limitations in terms of referring the matter to foreign arbitration, except for the prohibition stated in Article 456, which pertains to binding arbitration involving Iranian nationals and the nationals of the other contracting party. Hence, the approval letter in question does not pose any issues.

3. The final objection concerns the alleged conflict of the enactment with public order due to acceptance of an international authority to resolve a dispute between the government of Iran and its citizens, as provided in Article 456 of the CPC. However, no explicit mention of the conflict with public order is made in the complaint, and therefore, it is contended that this objection lacks substantiation.

Firstly, it is essential to establish that public order must be based on legal decrees, and its scope cannot be invoked in a general sense.

Secondly, as previously mentioned, Article 456 of the CPC relates to the prohibition of Iranian parties from accepting arbitration by individuals who have the same nationality as the opposing contracting party. This provision is not relevant to the present case since the nationality of the arbitration authority, namely the Paris Chamber of Commerce, does not align with the nationality of the opposing contracting party. Furthermore, Article 456 primarily pertains to disputes between Iranians and foreign nationals, which is not applicable to the present dispute involving the government of Iran and Iranian citizens. In addition, Article 456, when interpreted through fortiori analogy, deems the appointment of a foreign arbitrator in lawsuits between an Iranian individual and the Iranian government as unacceptable due to the lack of legal basis and documentation. However, Iranian laws do not impose any further limitations on referring matters to arbitration beyond those stipulated in Article 456 of the CPC and Article 139 of the Constitution. As long as the content of the aforementioned article is not violated, there are no issues with the proposed approval letter. Consequently, the complaint is rejected based on the above rationale.

The decision of the General Board of the Administrative Court of Justice Court states:

Based on Article 139 of the Constitution of the Islamic Republic of Iran, it is decided that settlement of disputes regarding public and government property, or their referral to arbitration, necessitates the approval of the Council of Ministers and notification to the Islamic Consulta-

tive Assembly. Furthermore, in cases where one party to the dispute is a foreigner and the case if of significant domestic importance, approval from the Assembly is also required. The law determines the relevant terms. When concluding an arbitration agreement, government officials are required to obtain the approval of the Council of Ministers or the approval of the Islamic Consultative Assembly. Considering that the objected resolution was issued subsequent to the conclusion of the arbitration agreement and did not comply with the provisions of Article 139 of the Constitution, it is declared illegal and terminated by referring to Articles 19(1) and 42 of the Law of Administrative Court of Justice.

5.1. The Status of the Arbitration Clauses in Contracts Concluded Prior to the Ratification of the Constitution

In accordance with the aforementioned decision under Iranian law, the approval of the Board of Ministers or notification to the Islamic Consultative Assembly must be obtained before concluding an arbitration agreement.[1] Another crucial aspect of Iranian law concerns the differing opinions regarding the retroactive application of Article 139 of the Constitution. In response to a request for an interpretive award on this matter, the GC declared that, according to Article 139, even pre-Revolutionary agreements foreseeing the referral of disputes to arbitration must adhere to the provisions of the Article.

As this opinion is not deemed an official interpretation of the Constitution due to insufficient member votes, a subsequent interpretative opinion was sought from the GC. In this instance, the GC, acting as a problem solver, proclaimed that as long as the it has not provided an interpretive opinion on the inclusion of any constitutional principles in existing laws, those laws may be implemented without prohibition, and their implementation remains unchanged. With respect to the inclusion of Article 139 of the Constitution the relevant contract, since the GC has not provided an interpretation, the government's referral to arbitration without obtaining permission from the Islamic Consultative Assembly does not violate the Constitution.

Generally, prevailing theories tend to reject the significant impact of this principle on contracts or arbitration clauses concluded before the approval of this principle. In arbitration cases involving the government of Iran, where the issue of non-compliance with Article 139 of the Islamic Penal Code in contracts predating the approval of this principle was raised, the arbitration courts opined that this principle should not be retroactively applied to contracts concluded before its approval. For instance, this was observed in Framatome[2] claim against the Atomic Energy Organization of Iran. Despite acknowledging Iranian law as the governing rule of the contract, the Iranian side did not accept the argument that Article 139 of the Constitution should apply to the arbitration clause concluded prior to the 1979-Revolution since this principle was not explicitly stated in the earlier contracts.

However, under Chapter 7 of Article 454 of the CPC, "all individuals eligible to file a lawsuit can resolve their dispute through arbitration, regardless of whether it has been filed in the courts of law." Alternatively, Article 178 of the same law states, "[a]t any stage of civil proceedings, parties can settle their dispute through compromise." Consequently, parties can choose

1 . La'ya Joneidi, Nastaran Ghiyasvand Qazvini, op cit, 28.
2 . Framatome v. Atomic Energy Organization of Iran. ICC case 3986 (1982).

to resolve contract disputes by referring them to the court, opting for arbitration, or reaching a compromise. If the disputant is a domestic citizen, resolution occurs through internal courts or authorities, including conciliation or arbitration. If the party is foreign, the dispute is resolved by referring to internal courts or authorities acceptable to both parties and, under certain conditions, by resorting to international courts (with the diplomatic protection of the foreign party).

5.2. 5.2. The Status of Arbitration Clauses Following the Adoption of the Iranian Constitution

In this context, it is imperative to acknowledge the following:

A: In accordance with the regulations of the Iranian government, contracts concluded subsequent to the ratification of the Iranian Constitution, particularly those falling within the purview of Article 139 of the constitution, must comply with the tenets of international law and prevailing arbitration precedents, and obtain approval of the Iranian Consultative Assembly at the time of their formation. In instances where Iranian law governs the arbitration process or when a foreign entity seeks the intervention of Iranian courts to enforce the arbitration award, the impact on foreign investment shall be subject to evaluation.

B: From an international legal perspective, it is presumed that governments possess knowledge of their domestic laws and diligently adhere to them in contractual agreements. Therefore, the absence of parliamentary approval does not represent a valid justification for not invoking the stipulated arbitration clause in the contract.[1] This interpretation is grounded in the principle of good faith in contract negotiation and execution, which categorically rejects any assertion that a government would violate its own laws during contract formation. Moreover, this interpretation finds support in the doctrine of estoppel,[2] which precludes the acceptance of contradictions, actions, or claims that run contrary to prior statements or actions. Furthermore, the concept of good faith[3] in contract formation and execution vehemently opposes any contention that a government, having allegedly violated its own laws during contract formation, subsequently disputes the agreement during contract execution.[4] This approach has also been confirmed in numerous awards, in which the Iranian party has invoked the lack of a government order and the international arbitral tribunals have rejected this argument.[5]

5.3. Conclusion

Despite the absence of an explicit arbitration clause in the Iranian Cabinet Resolution regarding Iranian Petroleum Contracts (IPCs), Article 14 of the Resolution mandates the inclusion of a dispute resolution mechanism in each contract, With Arbitration being identified as one of the permissible methods. In light of this provision, the oil-related disputes mentioned above can be

1 . Philippe Fouchard, Berthold Goldman, Fouchard, Gaillard, Goldman on International Commercial Arbitration, (Hague: Kluwer Law International 1999) 322; La'ya Joneidi, Nastaran Ghiyasvand Qazvini, op. cit, 32.

2 . Ian C. MacGibbon, 'Estoppel in International Law'(1958) Vol. 7 No. 3 The International and Comparative Law Quarterly 473.

3 . Bernardo Cremades, 'Good Faith in International Arbitration' (2012) 27(4) American University International Law Review 761; Andreas R Ziegler, Jorun Baumgartner, Introduction, in Andrew D. Mitchell, Muthucumaraswamy Sornarajah, Tania Voon, Good Faith and International Economic Law (Oxford University Press 2015) 11.

4 . Jason Webb Yackee, 'Pacta Sunt Servanda and State promises to Foreign Investors before Bilateral Investment Treaties: Myth and Reality'(2008) Vol. 32 (5) Fordham International Law Journal.

5 . Hamidreza Nikbakht, Ahmad Hemati Kolvani, 'Article 139 of the Constitution in the Light of Judicial and Arbitral Precedent' (2020) 8(30) Private Law Research 10.

referred to arbitration, with the contractual terms delineating the procedures for such referral. An illustrative instance of such arbitration was also scrutinized.

it has been determined that, under domestic law, issues that fall within the framework of the Constitutional rules outlined in Article 139 require approval from the Islamic Consultative Assembly before they are referred to arbitration, and foreign parties should take the necessary precautions in this regard. In such cases, Article V(2)(a) of the New York Convention has a broader impact than its application scope, and it supports the lex fori (the law of the forum) even when the issue of arbitration admissibility arises at a stage other than the enforcement stage before the national court.

The lex fori, particularly in the context of national court proceedings, play a significant role in assessing the admissibility of arbitration since the majority of national laws on litigation reflect Article V of the New York Convention and thus explicitly refer to the lex fori. During the dispute referral phase, national courts may also consider the admissibility of arbitration.

Under International law, it is presumed that countries are aware of their domestic rules and uphold them when entering into treaties. This approach is also founded on the principle of good faith in contract formation and implementation. Contradictions and acts that contradict previous statements are not tolerated. The principle of estoppel does not tolerate government violations during contract execution. Furthermore, the current international trade system requires that the agreement between commercial parties on all issues, including the dispute resolution method, be stable and, to the greatest extent possible, immune to the invalidation of the arbitration agreement, contract, or the final annulment of the arbitrator's decision, particularly for procedural reasons.

On the other hand, Article 139 of the Constitution does not have retroactive effect and does not apply to arbitration conditions adopted prior to the adoption of the Iranian Constitution. As a result, the arbitrability of disputes is the prevailing principle in Iranian law, and the limitations of Article 139 of the Constitution should be considered exceptional. Given the nature of the IPCs described above, the dispute should be submitted to arbitration following parliament authorization, as supported by the unanimous ruling of the Court of Administrative Justice and the interpretation of Article 139 of the Constitution.

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A Comparative Analysis of the General Theory of *Arsh* in Islamic Jurisprudence and the Principle of Price Reduction in the CISG

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ABSTRACT

The examination of traditional legal institutions is a prudent approach to ensure effective contractual remedies. "Arsh" is one such institution that predominantly arises in relation to the option of defect. This paper aims to review the perspectives of Islamic legal scholars on Arsh in order to establish it as a general theory. However, it should be noted that this review does not propose a structural alteration in the nature of Arsh; rather, it intends to conduct a jurisprudential inquiry into the subject-matter. With regard to the nature of the general theory of Arsh, it can be categorized as a form of damages and compensation resulting from a breach of contract and contractual liability. In such cases, it aligns with the relevant legal principles. The basis of damages in the general theory of Arsh also exhibits a dual nature. While it is rooted in contractual compensation, if such compensation cannot be adequately provided, civil and obligatory liability may be invoked. One of the well-established legal-historical principles in the Civil Law system is the rule of Price Reduction, which bears resemblance to the institution of Arsh (i.e., the financial difference between a defective and non-defective item that is compensated to the customer) in the Islamic legal system. It is noteworthy that the foundation of Price Reduction lies in the principle of Commutative Justice, which serves as the basis for contractual liability in the realm of contract law.

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Introduction

Considering the profound impact of contracts on modern human life, debates surrounding contract law have expanded alongside communities. One issue that has gained prominence over time is the issue of contractual performance guarantees. The question of what performance guarantee should be provided to the non-breaching party in the event of contract breach by the adverse party has long been deliberated. The answer to this question was clear in primitive societies, particularly in relation to predominantly microtransactions. However, the existing performance guarantee is no longer sufficient in contemporary times, necessitating the development of new plans and the formulation of general rules governing performance guarantees and compensation.

Drafting such general rules should take into account the capacities of domestic law and Islamic jurisprudence. In conventional law of contract, discussions regarding contractual performance guarantees were not thoroughly explored, and the conventional rules of necessity, non-damage, cancellation, and obligation were not sufficiently responsive. The consideration of damages was not given the attention it deserved. However, insights from these rules and conventional jurisprudence shed light on the general theory of victim compensation. Consequently, a conventional, jurisprudential and legal concept, namely "Arsh", was introduced into modern legal literature. This study is also an attempt at establishing mutual contractual justice and contractual compensation, modernizing conventional law of contract, and interpreting jurisprudential *ijtihad* in a timely and contextual manner without reference to non-Islamic legal institutions.

To incorporate the Arsh institution into our legal framework, it is necessary to articulate and contextualize this institution within conventional practices. It should be noted that the discussion of Arsh in Islamic jurisprudence and legal texts often involves *the option of defect*. Therefore, conventional legal literature should be examined, and as part of this examination, the concept of *Arsh* should be elevated to the level of a general theory.

This article aims to explore the nature of the *General Theory of Arsh* in the law of contract. It also seeks to examine the corresponding *Principle of Price Reduction* in Western legal systems, with a specific focus on its manifestation in the United Nations Convention on Contracts

for the International Sale of Goods (CISG). A comparison of these concepts, yields Arsh as a comprehensive theory that facilitates fair compensation for damages, particularly in contractual disputes, and upholds the principle of mutual justice in contracts, which serves as the philosophical foundation of contract law.

1. Conceptualization: Scope and Definition

This section delves into the conceptualization, scope, and definition of key concepts related to our topic. It aims to provide a clear understanding of the concepts and their relevance within the context of our discussion. The section explores two primary concepts: the concept of Arsh and its scope and the concept of Price Reduction and its scope. Each concept will be extensively examined and defined to shed light on their significance and implications. By delving into these concepts, we can establish a solid foundation for further analysis and exploration of our topic.

1.1. Arsh

The term "Arsh" encompasses multiple meanings. One of its meanings refers to the compensation known as blood money, which is awarded for injuries. Additionally, in the context of a defective property, *Arsh* denotes the compensation that the buyer receives from the seller upon discovering the defect. In *Mesbah Al-Manir Fiyomi*, Arsh is defined as the "blood money for injuries, with its sum referred to as *Orosh*. Arsh fundamentally signifies corruption. Therefore, it is associated with defects found in immovable property, as corruption exists within it. It is stated that the principle of Arsh is Harsh".[1] Arsh is also associated with other meanings such as *Khadsh*, demanding Arsh, accepting Arsh, bribery, and deceit.[2] Within Islamic jurisprudence, Arsh carries several connotations:

1. It refers to compensation demanded due to a defect in one of the considerations of an exchange.
2. It represents compensation sought for defects found in the object of possession or in the interest of possession, such as usurpation and non-usurpation.
3. It signifies payment made for a crime that lacks a specified blood money value.
4. It denotes compensation for the defloration of a virgin girl.[3]

Some Islamic jurists argue that Arsh has different meanings, leading to verbal disagreement. From their perspective, Arsh encompasses distinct definitions. However, the prevailing and more accurate viewpoint is that Arsh is an umbrella term, encompassing an amalgamation and abstraction of the aforementioned definitions and meanings. Scholars who adopt this abstract approach define Arsh as "[p]roperty in which the consideration of a defect lies within the property itself or in the body, and its amount is not specified in Shariah law".[4]

Legal scholars have offered various definitions of Arsh. Katouzian defines it as the "com-

1 . Ahmad ibn Fars Zakaria, Moghabis al-Loghah, vol. 1 (School of al-Alam al-Eslami Qom 1984) 79; Ahmad ibn Muhammad Fumi, al-Mesbah al-Monir (Qom: Institute of al-Hijra, 1987) 12.
2 . Mohammed bin Ya'qub Firouzabadi, Al-Qamous Mohit, vol. 2 (Beirut: Dar al-Ahya al-Tarath al-Arabi, 1992) 382.
3 . Mohammad Hassan Najafi, Jawahar al-Klamah, vols. 23 & 37 (Tehran: Dar al-Kotob al-Eslamiye, 1988) 499.
4 .

pensation for the non-fulfillment of obligations related to the delivery of sound goods".[1] Some even present a philosophical perspective on Arsh, viewing it as compensation for the disruption of the balance principles in Iranian law.[2] It becomes apparent that they believe it is a result of flouting the balance of the contract for which the law has provided two remedies: cancellation or demanding Arsh as a right of claim. However, these definitions appear to be largely descriptive and have not resulted in practical application.

1.2. Reduction of Price

The *Principle* of *Price Reduction* as a method of compensation is not a familiar concept within the common law system. In fact, this principle is rooted in Civil Law, known in ancient Roman law as *actio Arsh*.[3] In contemporary times, the legal literature of countries with codified laws widely refers to this principle (for instance, Article 441 of the German Civil Code and Article 1644 of the French Civil Code). Reduction of price is a recognized and significant method of financial compensation in addition to other remedies. It is widely practiced in domestic and international trade.[4]

Article 50 of the CISG also recognizes the right to reduction of price. It grants the buyer the right to deduct the price if the goods do not conform to the contract. However, there is no specific rule regarding reduction of price in the Principles of International Commercial Contracts (PICC) of 1994 and 2010. The omission of this rule is not explained within these principles. Nevertheless, in light of Article 50 of the CISG and Article 9: 401 of the Principles of European Contract Law (PECL), law scholars generally agree that the principle of reduction of price is established as one form of contractual compensation.

Advocates of the principle of reduction of price, based on Article 50 of the CISG, argue that this principle serves a different purpose in protecting transactions compared to damages. It is related to the obligation and represents the moral duty of the parties to preserve it, especially the buyer who is morally obligated to uphold the obligations. In contrast, damages focus on the economic efficiency of the commitments. Therefore, unlike contractual compensation, the principle of reduction of price is not based on actual damages incurred by the buyer but rather on the discrepancy between the actual value of the delivered goods and the hypothetical value of corresponding goods.

In general, it is recognized that the reduction of price primarily pertains to maintaining the contractual relationship between the parties and serves as a means to restore balance in the implementation of the agreement by the parties. Nevertheless, Article 50 of the CISG grants the buyer the right to reduce the price instead of seeking damages in cases where the delivered goods do not conform to the contract.

2. The Nature of Arsh

In order to address the question concerning the nature of Arsh, it is necessary to consider whether Arsh is a part of the description or a description of attributes. This question involves two distinct arguments. The outcome of these arguments can be observed in two scenarios:

1 . Naser Katouzian, General rules of contracts, vol. 3, 5 (Joint Stock Company of Enteshar 2015) 5, 308.
2 . Mohammad Jafar Jafari Langroudi, al-Fareq (Tehran: Ganj Danesh Publications 2003) 218.
3 . Reinhard Zimmerman, The Law of Obligations (A Clarendon Press Publication 1996) 31.
4 . Bianca Bonell, Commentary on the International Sales Law (Giuffrè: Milan; Reproduced with permission of Dott. A Giuffrè Editore, S.p.A 1987).

1. If Arsh is considered as part of the price, then any violation of the description of the healthy conditions of the goods during the contract would render the contract void only with respect to the violated portion.
2. If Arsh is not considered as part of the price, according to the first principle, it should be deducted from the price. However, according to the second argument, it is not obligatory to deduct it from the price, and payment from a non-price source is also permissible.

First, I will examine these two arguments, and subsequently, I will discuss the selected argument, which combines both perspectives.

2.1. Arsh is Considered as per the Rule

Contemporary Islamic jurists have expressed their inclination towards the argument of Arsh in two different ways.[1] Some aspects of this argument have also been mentioned in the writings of some previous jurists.[2] In essence, they believe that the description of truth forms part of the price. If the description of truth is partial, each mystical or religious consideration opposes the other part. In this case, establishing the existence of Arsh would be in accordance with the rule. Just as in cases of partial breach of sale, the reference is made to the price in front of it, and in the case of a breach of description, it refers to the amount that has been violated in part.

2.2. Arsh is Contrary to the Rule

In the Imamiyya jurisprudence, the majority of scholars hold the view that Arsh is not part of the price.[3] There are two reasons that make it impossible to consider Arsh as part of the price:

1. The sale of conveyance of property to property, where the description of the correctness of the estimator is for possession rather than the property itself. Thus, the sale is subject to the number of components of the property.
2. The necessity of the premise that the description of correctness is part of the property would render the sale void in the event of a missing part, and the price would be returned to the buyer. However, the parties to the contract do not intend for it to be void.
3. Furthermore, the principle of Arsh can be waived. However, if it were part of the price, the goods could not be waived.[4]

2.3. Selective Theory (General Theory of Arsh)

It appears that from the perspectives of several jurists in the Imamiyya school, an alternative analysis can be deduced. According to this analysis, Arsh is in accordance with the rule but is not

1 . Seyyed Mohammad Kazem Tabataba'i Yazdi, Hashiye al-Makaseb, vol. 3 (Qom: Dar al-Mustafi Le-Ahya al-Tarath 2002) 86-87, 223-224.

2 . Mohammad bin Maki Ameli (Shahid Ava), Al-Qawaed al-Fawaed, vol. 2 (Qum: Maktabe al-Mufid, no date)74-7; Hassan ibn Yusuf (Allameh) Helli, Ershad al-Ezhan, vol. 1 (Qom: Islamic Publishing 1990) 376; Zayn al-Din Ali Ameli (Shahid Sani), Rozeh al-Behayee, vol. 3 (Dar al-'Alam al-Islami Institute 1983) 474; Ahmad Moghadas Ardebili, Assembly of al-Faydeh wa al-Burhan, vol. 8 (Qom: Al-Nashr al-Islami-Qom Institute 1987) 426.

3 . Mohammad Hassan Najafi, Jawahar al-Klamah, vols. 23 & 37 (Tehran: Dar al-Kotob al-Eslamiye 1988) 236; Mohammad Kazem Akhund Khorasani, Hashiye Al-Makaseb (Tehran: Ministry of Culture and Islamic Guidance 1986) 211; Seyyed Abolghasem Mousavi Khoiy, by Mohammad Ali Tohidi, Mesbah al-Feghaha, vol. 7 (Qom: Institute of Ansarian 1997) 101; Seyyed Ruhollah Moosavi Khomeini, Sale, vol. 5 (Qom: Institute of al-Nashr al-Islami 1990) 129; Mohammad Hussein Mohaghegh Isfahani, Hashiye, al-Makaseb, vol. 4, 5 (Qom: Dar-al-Mustafi Le-Ahya al-tarath 2002) 436.

4 . Mohammad Hussein Mohaghegh Isfahani, Hashiye, al-Makaseb, vol. 4, 5 (Qom: Dar-al-Mustafi Le-Ahya al-tarath 2002) 436.

considered a part of the price. Instead, its nature is seen as compensation (in jurists' terms) and contractual damages (in lawyers' terms). Examining the arguments presented so far can further support our argument.

1. In the narratives of Hamad bin Isa[1] and Abdul Malik[2] who state: "Leh Arsh al-Ayb" meaning the buyer has the right to receive compensation for the defect from the seller; yet, it is not explicitly stated in the narratives from which property this compensation is derived. Both narratives encompass the aspects of compensation and damages. However, in principle, it can be inferred that the compensation would be derived from the price of the property.

The Iranian law-maker, recognizing the prevailing perception among intellectuals and community members, has determined that the description of *health* holds greater significance compared to other aspects in transactions. If Arsh is anticipated in this context, it does not contradict the principle. However, a comprehensive analysis reveals that such news serves as guidance for the common understanding of health descriptions. Consequently, these narratives should not be interpreted hastily but rather interpreted in accordance with the conventional wisdom of these traditions. Through this interpretation, the notion of consensus, which is unlikely to be achieved, loses its value for two reasons. Firstly, consensus is a theoretical concept. Secondly, the narratives are regarded as guiding principles. Therefore, Arsh aligns with the principle and encompasses a detrimental aspect.

All jurists, whether proponents of partial or accurate description, concur that accurate description affects the price and, in certain cases, is contingent upon it. In the most pessimistic scenario for the buyer, it may result in the possession of a defective property. Unlike other attributes, damages must be compensated in such cases if a violation occurs. As Sheikh Ansari stated in the analysis of the narratives, it is evident that the analysis is presented. Referring to the second group of narratives, he states: "[t]he seller must either compensate the customer for the difference between the right and the defect, or reject the difference". This narrative implies that the amount rejected should correspond to what the seller previously received from the customer and the object of the price. They argue that "the aforementioned interpretations indicate that the price has been received by the seller in price transactions and upon delivery. Since these transactions involve cash, the price is often in the form of Dirham, Dinar, or the common currency. The ruling to 'reject the difference' applies to credit transactions. In other words, payment should be made in cash rather than from the object of the price. This interpretation is achieved with precision and contemplation in the contents of the narrative."

Additionally, another response to the narrative is provided by Ibn Sanan, who states: "[i]f the buyer has not yet paid the money to the seller and discovers that the object of sale is defective, the buyer can deduct an amount equal to the value of the object from the price and pay the remainder to the seller. The reason being that in most cases, the price in the transaction is total and becomes an obligation for the customer. Therefore, due to the defect in the object of sale, the seller is obligated to compensate the buyer by Arsh. The customer can deduct the value of the object from the seller's other funds, or if the seller is in debt, deduct it from the debt or the obligated price, and retain the remaining amount".

1 . Muhammad ibn Hasan Horr Ameli, Wasael al-Shia, vol. 12 (Qom: Al-al-Bait Institution 1990) 415.
2 . Ibid, 416.

It is worth noting that these interpretations are based on the understanding that Arsh serves as compensation under the contract. This is the principle I aim to establish, considering Arsh as a form of damages imposed as a result of a mutual contract and a guarantee on the seller. In other words, Arsh represents compensation and damages within exchange contracts. Some contemporary jurists even argue that the verse implies that Arsh is divided into the components and attributes of *Sahihe* and *Kamalie*, and all factors contributing to the multiplicity of desire and the determination of prices agreed upon by the parties or performed in the transaction.

There exists a distinct disparity between our position and cancellation from the outset, where the sale of possession and non-possession are combined. This is because the jurists in that case ruled on the validity of possession and the annulment of non-possession. The sentence in question is descriptive and partial, akin to a violation of description. There are two approaches to this matter: one involves rejecting the transaction from the beginning and terminating it, while the other entails accepting the transaction and dissolving it partially through description. Consequently, termination is not ruled in this case because the issue pertains to either complete termination or partial dissolution through description.[1]

In fact, even if we do not concur with the idea that Arsh is a component of the price, we would still agree that the paid Arsh aligns with the rule. Despite any disparities in its description, according to Sobhani's explanation, it is regarded as part of the price. Furthermore, based on the principles of compensation and damage, no issues arise.[2] Therefore, the selected theory suggests that Arsh is not part of the price but rather a form of compensation or contractual damages that the buyer is entitled to in case of a breach of the description. This interpretation allows for the enforcement of the contract while still providing protection to the buyer.

2. Islamic jurists also affirm that the payment of Arsh constitutes damages and is in accordance with the rule. In fact, jurists define the continuity of the practice and method in conversations, transactions, and other social relations without considering the parties' rituals, religion, or nationality. Legal scholars recommend compensation. Therefore, Arsh is a matter in accordance with the basis of legal science and the principle. Moreover, examining the narratives indicates that the foundation of legal science has not only been accepted but also endorsed.[3]

3. The Nature of the Principle of Price Reduction

In the CISG, the reduction of price bears certain similarities to the claim for damages. In many instances where a defective commodity is surrendered to the buyer, the buyer can claim the difference in value of the commodity in accordance with Article 45(1). In other words, if the seller provides additional damages as a result of a failure, the buyer can only seek damages. However, in certain cases, the buyer can choose to combine the claim for price reduction with a claim for damages.[4]

1 . Jafar Sobhani Tabrizi, al-Mukhtar Fi Ahkam al-Khiyar- Derase Mabsute Fi al-Khiyar wa Ahkam wa al-Shorut wa al-Naghd wa al-Nasiye wa al-Ghabz (Qum: al-Emam al-Sadeq 2002) 427.

2 . Ibid.

3 . Mohammad Ali Kazemi Khorasani, Explanations of the discussion of Principles of Mirza Na'ini- Fawayed al-Osul, vol. 4 (Qom: al-Eslami Publishing 1986) 192; Mohammad Baqir Sadr, Dorus Fi Elm al-Osul, vol. 1 (Beirut: Dar-al-Montazer 1987) 111; Mohammad Javad Zehni Tehrani, "Expression of al-Morad, Persian Description on the principles of Jurisprudance," Mozaffar, vol. 3, (Ganjine Zehni 2009) 760.

4 . Peter Schlechtriem, Schwenzer, Commentary on the UN Convention on the International Sale of Goods (CISG)' (2016) Fourth Edition Oxford University Press, Article 50(15).

If the buyer has acted correctly in accordance with the provisions of Article 50, the price is reduced based on the relevant amount. The buyer also becomes the owner of the reduced proportion of the price. If the buyer has not yet paid the price, they are only required to pay the deducted amount. If the buyer has already paid the price, they can claim the fractional portion, and the seller must refund the corresponding part. This demand is directly assumed based on Article 50 of the CISG.[1] Additionally, commentators on the Convention agree that the buyer can claim the benefits of a portion of the price to be returned to them. However, there are differences among legal scholars regarding the description of this right. Some argue that this right is based on Article 78 of the CISG, while others consider Article 84(1) as its foundation.[2]

In the arbitration procedure of the Convention, price reduction has been accepted. The contract price is determined proportionally to the value of the non-conformity of the goods with the expected value. The price is reduced accordingly. The criterion for determining the value is the actual value of the goods at the time of surrender[3]. In a lawsuit, it was decided that if the improper packaging of a bottle causes it to explode or become non-sterile, rendering it completely unusable, its value is not assessed based on the time before transportation, but rather on the time the bottles arrived.

Nevertheless, the contracting parties can agree on a specific method for reducing the value. If the parties agree to sell the non-conforming product at the best possible price, the buyer can reduce the original contract price with the price of resale. In the event of a disagreement between the parties regarding the determination of the value of the relevant item, it will be determined by expert witnesses.

4. The Basis of the General Theory of Arsh

The basis of Arsh can be either obligatory or contractual. In other words, the basis of Arsh must be either a contract or something outside the contract. It is necessary to discuss each of these bases in detail.

4.1. Contractual Basis of the General Theory of Arsh

This section assesses the contractual basis of Arsh which include exchange guarantee and the Implicit condition of goods' quality.

4.1.1. Exchange Guarantee

Some jurists argue that the guarantee of price reduction is a type of exchange guarantee. This is because the function of the guarantee of defect lies in the quality of the defective guarantee. If the guaranteed price is usurped, it is referred to as the liability of unlawful possession. In this case, the defect of the guaranteed item is assigned to the total price in exchange for description. If we consider the guarantee as part of the consideration, it implies a lack of ownership of consideration in exchange. Thus, this type of guarantee can be classified as an exchange guarantee.

The main reason for this classification is that the guarantee functions in conjunction with the whole. Exchange guarantee means that when a component of the consideration is defective

1 . Ibid, Article 50(16).
2 . Ibid.
3 .

or partial, the same defect or partiality triggers the guarantee, not the price of the defect. The guarantee of the entire object of sale on the seller is also considered valid as an exchange guarantee. This means that the seller guarantees the delivery of the object of sale to the buyer, and if the seller loses part of the object of sale, they are responsible for the corresponding amount of the price.

The main issue with exchange guarantees is that they are applicable before delivery or before the expiration of the option period. The rule regarding the loss of the object of sale before delivery does not encompass the loss of description.[1] The answer to this issue lies in the nature of Arsh, and if we opt for compensation, the exchange guarantee can be considered an appropriate basis for price reduction.

4.1.2. The Implicit Condition of Goods' Quality

Some jurists consider the quality of goods as a condition of the contract. According to their perspective, the quality of goods is apparent to the buyer and therefore does not need to be explicitly stated as a condition during the transaction. Consequently, they believe in the existence of inherent conditions.[2]

In legal terminology, the condition of correctness is often not explicitly stated in the contract, but the law deems it as implied based on the nature of the exchange. The term "contract" implies the necessity of the goods being in good condition. However, the condition of the goods' health is not a requirement for the validity of the contract; rather, it is a customary and rational expectation. If the object being sold does not meet the contractual requirements, the seller must compensate for the violation by paying Arsh. According to this viewpoint, the health of the goods, unlike other features, is tied to a portion of the price. If a problem arises, the buyer can request a partial refund.

It should be noted that the amount of the price is not necessarily contingent upon the health of the goods. The health of the goods, along with other conditions, incentivizes the buyer because, under this perspective, the transaction would be void with regard to the affected portion of the object being sold, and the corresponding price should be refunded. Furthermore, if the goods subject to the obligation possess defects or hidden risks, it is the responsibility of the seller, under the implied health guarantee, to inform the buyer about such defects and risks, provide necessary information on how to deal with them, and advise on ways to avoid potential hazards.

4.2. The Obligatory Nature of Arsh

Some proponents argue that Arsh is based on an obligatory principle. The purpose of this obligatory responsibility is to compensate for damages resulting from violations, solely based on Sharia law and general legal principles, rather than contractual obligations.[3]

1 . Mohammad Hussein Mohaghegh Isfahani, Hashiye, al-Makaseb, vol. 4, 5 (Qom: Dar-al-Mustafi Le-Ahya al-tarath, 2002) 72.
2 . Najm al-Din Jafar ibn al-Hassan Mohaghegh Helli, Sharaye al-Islam, vol. 2 (Najaf: al-Adab, 2010) 290.
3 . Naser Katouzian, non-contractual requirements (Obligatory and civil liability), vol. 1 (Tehran: Tehran University Press, 2003) 74; Asadollah Lotfi, Causes of obligatory guaranty (Tehran: Majd Publications, 2000) 14.

4.2.1. Liability for Unlawful Possession

Some jurists contend that Arsh is based on the liability for unlawful possession, and the buyer is responsible for the price due to the accuracy of the description. The foundation for this prophetic principle is the proposition "Ala Alid Ma Akhzat Hata Todi." Jurists generally hold two views on the validity of this narrative. Some jurists, such as Mohaghegh Khoiy, consider it as lacking authority [1], while others, like Mohaghegh Maraghi, maintain that the originality of the narrative cannot be established through the document itself. Overall, there is a consensus among the jurists that compensates for the weakness of the document.[2] The inclusion of liability for unlawful possession for Arsh is feasible when considering the second argument.

According to Sheikh Mufid and Ibn Babuye, a problem with property is considered a defect in the property. When a commodity is defective, it means that a portion of the property is lost, and the description of the property is part of the property itself. Therefore, the guarantee of Arsh is not considered contrary to the rules. Consequently, since Arsh is considered non-fungible, it represents the difference in price between a healthy object and a defective object.[3]

Some legal experts also consider the liability for unlawful possession. They argue that the seller's liability in paying Arsh is akin to that of a usurper.[4] In essence, the guarantor of the usurper is responsible for non-fungible property or defects in non-fungible property. When one person possesses property belonging to another, the owner becomes the guarantor against loss and defects in that property. The owner is obligated to return the property to its rightful owner and is liable for compensation in case of loss or damage.[5] In simpler terms, the original property owner is liable to the owner of the property and must return the property if it remains intact. However, if the property is lost or defective, the owner may suffer losses.[6]

According to this perspective, regardless of whether the transaction is valid or invalid, the means of discharging an obligation or debt is to not only reject the goods but also pay Arsh. In this scenario, the property owner is obligated to accept the defective object and its associated Arsh. The option to refuse the defective object and demand the entire price of the property does not exist.[7]

Another proposition, which emphasizes the liability of unlawful possession, states: "[t]he price is dependent on the object of sale, and the accurate description and correctness of the object have value in the market, while defects in the description diminish the value, as the condition of accuracy is lost. The object of sale does not possess the partiality of a proper description, and this deficiency in the price is irreplaceable." The price is distributed over the entirety of the object of sale, and indeed, one part of the price is not transferred to the seller. This aspect aligns

1 . Ali ibn al-Hussein Mohaghegh Korki, Jamne al-Maghased, vol. 4 (Qom: Al-al-Beyt Le-Ahya al-Tarath Institute, 1988) 87.
2 . Mohammad Taqi Boroujerdi, A narrative of the discussions of Aqa Zia Araghi, Nahaya al-Afkar (Nashr al-Islami 1992) 54-55.
3 . al-Fiqh al-Reza Ibn Babuye, al-Mu'tmer al-'Alami Lel-Imam al-Reza (Mashhad 1986) 253; Muhammad ibn Muhammad Sheikh Mufid, al-Maqnah (Qom: Institute of al-Nashr al-Islami, 1990) 596.
4 . Sayed Mostafa Mohaghegh Damad, The Rules of Civil Jurisprudence (Tehran: Islamic Sciences Publishing Center 2006) 61.
5 . Ibid, 66.
6 . Naser Katouzian, non-contractual requirements (Obligatory and civil liability), vol. 1 (Tehran: Tehran University Press 2003) 29.
7 . Seyyed Ruhollah Mousavi Khomeini, Tahrir al-Wasile, vol. 1 (Qom: al-Nashr al-Islami 1996) 500; Sayed Mostafa Mohaghegh Damad, The Rules of Civil Jurisprudence (Tehran: Islamic Sciences Publishing Center 2006) 93.

with a corrupt contract.[1] It appears that considering the foundation of liability for unlawful possession, Arsh is obligatory.

4.2.2. Compensation of Commitment

Some scholars view compensation and Arsh as stemming from commitment rather than exchange guarantee and liability for unlawful possession.[2] Supporting the words of Akhund Mohaghegh Khorasani, Mohaghegh Isfahani stated: "[c]onsidering Arsh as a guarantee does not conform to the customary understanding of liability for unlawful possession since the contract pertains to the description, not the loss of the client's property in the possession of the seller. Therefore, it falls outside the scope of liability for unlawful possession or exchange guarantee. The principle of wasting the object of sale before delivery does not include the waste of description, and even if we assume its inclusion, it does not require an option. I will explain what I mentioned earlier, that the guarantee of describing the loss of the object of sale falls outside the scope of liability for unlawful possession and exchange guarantee; instead, it is a matter of commitment.[3]"

Imam Khomeini also addressed the issue of commitment in Arsh and stated, "[i]t is certain that the guarantee in "Ma nahno Fihe" does not imply liability for unlawful possession, assuming that Arsh is guaranteed. It is not considered a guarantee of loss, and it is clear that it is not a cause for guarantee, nor is it considered an exchange guarantee. According to another interpretation, Arsh is an independent guarantee separate from other guarantees in jurisprudence. The buyer has the right to refer to the seller and obtain it.[4]"

Some contemporary jurists have undermined this interpretation and believe that "Arsh is not an issue of commitment unless it is explicitly expressed in laws. It is not one of the issues that require the jurist to apply their common sense and ijtihad in providing evidence. Arsh pertains to common matters between traders, negotiators, and marketers, and it is necessary to refer to experts. If we consult the general knowledge of the people and marketers, they would say that Arsh refers to a defect in a property, the price of which is the opposite of the property itself. Therefore, Arsh is a form of compensation that exists outside the essential considerations of its nature. We can refer to the opinions of Islamic jurists to support our argument. Additionally, transaction guarantee is a commitment to the commodity in the transaction. It is not covered by the transaction warranty unless it provides for damages, and the seller is obligated to compensate the buyer for any waste or loss of the object. If the lack of description is explained, the seller's liability is required, and the payment of Arsh is in accordance with the rule".[5] It appears that his reference to custom is the correct approach, and the commitment of Arsh is unlikely.

Lawyers also consider the claim of Arsh as a legal decision. In fact, by accepting the principle of exclusive contractual liability, if the condition of the transaction case is not agreed upon, the inclusion of Arsh is referred to the law. In the same vein, it is stated that if there is no consensus regarding Arsh, it would be incorrect to consider Arsh as an option for defect realization. If it is possible to reject the object of the sale, Arsh does not serve as a substitute for the missing

1 . Mohammad Taqi Boroujerdi, A narrative of the discussions of Aqa Zia Araghi, Nahaya al-Afkar (Nashr al-Islami 1992) 38.
2 . Mohammad Kazem Akhund Khorasani, Hashiye Al-Makaseb (Tehran: Ministry of Culture and Islamic Guidance 1986) 231.
3 . Mohammad Hussein Mohaghegh Isfahani, Hashiye, al-Makaseb, vol. 4, 5 (Qom: Dar-al-Mustafi Le-Ahya al-tarath 2002) 71-72.
4 . Seyyed Ruhollah Mousavi Khomeini, Tahrir al-Wasile, vol. 1 (Qom: al-Nashr al-Islami 1996) 126.
5 .

description of the object being sold. However, if the object of the sale is not rejectable and there is no other way to compensate for the loss, Arsh can be considered valid.[1]

4.2.3. Rule of No-Harm

According to the rule of no-harm, a person who causes harm to another has to compensate for it. The rule of no-harm can also be referred to in Islamic jurisprudence as the obligatory basis for Arsh. According to the opinions of Fazel Tony and Mir Fattah Maraghi, the provisions of the rule of no-harm negate the idea of non-compensable harm. In other words, Islam does not recognize non-compensable harm, and anyone who causes harm to another is required to compensate for it.[2] Seyyed Kazem Yazdi also considers guaranteeing Arsh based on the rule of no-harm.[3]

Some jurists also consider options and Arsh as a manifestation of the rule of no-harm, as they address the non-contractual aspect.[4] According to them, the jurist intends to compensate for the buyer's damages through the inclusion of Arsh. Therefore, the seller's warranty becomes a form of obligatory guarantee. Shahid Sadr also states that according to the rule of no-harm, those who damage others by exercising their legal rights will be deprived of their own legal rights.[5] According to this principle, the rule of no-harm supports the concept of guarantee.

It should be noted that some jurists have invoked the rule of no-harm as evidence for guarantee.[6] In other words, these jurists have acknowledged the existence of harm and have provided diverse means to prevent harm within the community. Accordingly, the jurist establishes the validity of guarantee in the context of Arsh.[7] In this regard, it can be argued that the jurist, through the inclusion of Arsh in cases of defect, aims to compensate for the buyer's loss. Consequently, the seller's guarantee becomes a form of obligatory guaranty.

The issue with the rule of no-harm from a jurisprudential perspective is that although it acknowledges the existence of harm in Sharia, it does not specify the method or manner of addressing it. Additionally, if the seller demands the full price assuming the presence of a defective object, it disrupts the balance and renders the complete acquisition of the price void.[8] Some legal scholars have also discussed the exclusion of harm in relation to the option of defect and Arsh.[9] The law has provided customers with two options to prevent them from suffering losses due to defects in the object. They can either terminate and dissolve the contract, as with other available options, or they can accept the transaction while receiving Arsh.

Perhaps based on this principle, some legal scholars argue that rejecting the object of sale for any reason is impossible, and the widely-accepted comment, which is also supported by the Civil Code, is that Arsh constitutes a right in the transaction, and rejecting the object is not

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1 . Roshanali Shekari, The description and translation of the texts of the jurisprudence of sale and options (Tehran: Keshavarz Publishing 2003) 176-177.
2 . Mir Fattah Hosseini Maraghi, al-Anawin al-Faqh, vol. 1 (Institute of Islamic Publication of Society of Teachers in the Seminary of Qom 1997) 311.
3 . Seyyed Mohammad Kazem Tabataba'i Yazdi, Hashiye al-Makaseb, vol. 3 (Qom: Dar al-Mustafi Le-Ahya al-Tarath 2002) 68.
4 . Abdullah Mamqani, Nahaya al-Maqal (Tehran: Lithography 1965) 103.
5 . Mohammad Baqir Sadr, Dorus Fi Elm al-Osul, vol. 1 (Beirut: Dar-al-Montazer 1987) 489.
6 . Seyyed Ali Hosseini Sistani, Rule of no-harm (the Grand Ayatullah Sistani)- The First Issue (Qom: The Grand Ayatullah Seyyed Ali Hosseini Sistani Publications 1994) 294.
7 . Ibid, 134,150,178.
8 .
9 . Seyyed Hassan Emami, Civil Rights, vol. 1 (publications of Islamiyah Bookstore 1998) 501.

permissible.[1] In Iranian law, Katouzian[2] does not justify Arsh based on the rule of no-harm, but rather suggests that historical considerations should be taken into account when justifying Arsh. It appears that his justification is primarily based on legal material, neglecting the fundamental principles of options, especially Arsh.

The problem with the rule of no-harm is that it does not provide evidence for the existence of the right to Arsh. The rule of no-harm is a negation-based principle. It states that any judgment causing harm is eliminated, or matters with harmful origins are excluded. The rule of no-harm does not provide evidentiary support. Therefore, according to the rule of no-harm, it cannot be proven that Arsh exists in the transaction. However, if we consider that the foundation for scholars' commentary is the main source of the rule of no-harm, and the notion of no-harm serves as guidance for their rulings, then the payment of Arsh can be seen as compensation for causing harm to others. In this case, it becomes irrelevant whether the rule of no-harm proves or disproves the guarantee, as the payment itself serves as proof of the guarantee.

4.3. Selected Theory on the Basis of Arsh

It appears that Arsh operates on the basis of a dual framework. In other words, Arsh can serve as a foundation for both contractual responsibility and non-contractual liability. It seems that the underlying principle of Arsh is rooted in contractual obligations, and in cases where contractual liability is not applicable, Arsh is based on obligatory liability and must be paid. There is an argument that Arsh can be seen as a form of blood money in punishments, referred to as "non-determined blood money." Many legal experts contend that blood money has a dual nature.[3] Arsh essentially functions as a type of blood money and follows the same dual nature.

In Sunni schools, the responsibility for paying Arsh is believed to be based on a contract. In these schools, the absence of a description implies the presence of a defect that gives rise to the right to terminate the contract or claim Arsh.[4] In recent discussions on contractual liability, it is argued that the purpose of the damages paid in the event of non-performance of contractual obligations is not to compensate for losses, but rather to provide the promised benefit that the promisee expected from the contract but did not receive.[5] Based on this introduction, it is necessary to explain the chosen theory in relation to the principle and the exception.

4.3.1. Principle

Given that breaching contractual obligations leads to a right for the promise to seek fulfillment of their contractual expectations and assert their legal rights, it appears that the principle underlying Arsh is contractual liability. Arsh aims to restore justice in contractual relationships, as the seller receives more than what was sold due to a defect in the object, while the buyer receives less than what they paid for.[6]

Some legal scholars, following Seyed Yazdi, have proposed the concept of exchange justice as the basis for Arsh. They argue that within the realm of meaning, a conflict between the de-

1 . Seyyed Hossein Safaei, Primary Course of Civil Liberty, vol. 2 (Tehran: Nashr al-Mizan 2003) 283.
2 . Naser Katouzian, General rules of contracts, vol. 3, 5 (Joint Stock Company of Enteshar 2015) 320.
3 . Hamid Reza Behroozizad, "The nature of blood money: Penalty or Compensation," no. 60 (2006), 50-57.
4 . Mansour Bin Younes, Kashf al-Qanaah, vol. 2 (Beirut: Dar al-Kotob al-Elmiye) 37.
5 .
6 . Naser Katouzian, General rules of contracts, vol. 3, 5 (Joint Stock Company of Enteshar 2015) 309.

scription and consideration is conceivable. In the absence of a condition or description, the party with the right to terminate the transaction contract has two options: termination or claiming Arsh. The reason for awarding Arsh is that the condition stipulated in the contract increases the price, and the added value can be compensated.[1] Furthermore, the concept of exchange guarantee is also attributed to contractual and exchange justice. Islamic legal experts contend that Arsh serves as a means to compensate the option holder for losses, and based on the principle of innocence, the seller is exempt from surrendering a part of the object's price. The buyer, on the other hand, is not compelled to do anything beyond compensating for the losses, making Arsh a form of compensation, and exchange guarantee is the defect in the object being paid to rectify it.[2]

Jafari Langroudi, based on the verse of consent (Taajara An Taraz) and jurisprudential principles, argues for the necessity of observing the three principles of balancing contracts. He believes that the reason for awarding Arsh aligns with this rule, and the verse of consent serves as the rationale. Additionally, economic balance justifies the payment of Arsh in cases where a condition is required to determine the economic value of the considerations. According to this perspective, the balance in the value of the considerations is a fundamental principle of exchange contracts that the parties considered at the time of entering into the contract. Arsh is considered an example of an exchange guarantee in this context.[3] In other words, the purpose of awarding Arsh is to compensate the client's loss, but the seller's responsibility has a contractual aspect, and legal enforcement can be based on a breach of the implicit obligation to deliver sound goods.[4]

Indeed, the principle of the soundness of goods can be invoked to support the contractual basis. Some legal experts, referring to the opinions of jurists on the principle of the soundness of goods, argue that the basis for claiming an option due to a defect should be sought in consent.[5] According to this perspective, in customary cases, buyers of sound products enter into transactions with sellers based on the belief in the soundness of the object. They consider the implicit condition related to the soundness of the transaction as a specific type of condition governed by certain rules. The right to terminate serves as a means of compensation and has a contractual aspect.[6]

Perhaps the principle of good faith can also be invoked as a contractual basis. The requirement to uphold honesty and avoid deception in contracts is a factor that supports the secondary judgment of awarding Arsh. Arsh serves as a secondary ruling that nullifies the initial requirement of the contract in cases where there is a lack of honesty and deception by one of the contracting parties. Thus, the necessity of honesty and avoidance of deception can be used as a basis for the principles of good faith and fair treatment. In other words, when a defect is hidden

1 . Ebrahim Abdipourfard, Ali Saghafi, 'Arsh of Condition' (2008) No. 19 Journal of jurisprudence and law 72.
2 . Asadollah Lotfi, Sale contract (Tehran: Khorsandi 2009) 195.
3 . Mohammad Jafar Jafari Langroudi, The General Philosophy of Law Based on the Originality of Practice (Tehran: Ganj Danesh Publications 2002) 76, 138.
4 . Naser Katouzian, Non-contractual requirements (Obligatory and civil liability), vol. 1 (Tehran: Tehran University Press 2003) 107.
5 . Naser Katouzian, General rules of contracts, vol. 3, 5 (Joint Stock Company of Enteshar 2015) 5, 303.
6 . Naser Katouzian, Non-contractual requirements (Obligatory and civil liability), vol. 1 (Tehran: Tehran University Press 2003) 105-106.

and cannot be detected through conventional examination, there is a moral duty to disclose it. The deliberate silence of a party aware of the defect, especially when the other party relies on their good faith, constitutes deceit and deception that the law should not overlook.[1]

Adopting the contractual basis also serves the interests of the group of users of defective goods and provides them with additional support. Based on Arsh, it can be argued that Arsh is a means of enforcing the agreed-upon commitment within the contract itself. When parties enter into a contract based on the balance of the value of considerations, if this commitment is violated due to reasons such as a defect in the object, the commitment should be nullified.

4.3.2. Exception to a Rule: Contractual Liability and Implied Conditions

Contractual liability and implied conditions present several significant flaws: a dominant party in the contract, such as a manufacturer, may include a non-liability condition, rendering the citation of this implicit condition futile. While implicit conditions may hold weight in traditional contracts, they do not hold the same weight in consumer contracts due to the limited responsibility within the consumption cycle. Individuals who lack a direct or indirect contractual relationship with the manufacturer will not receive compensation for damages incurred. As a result, legal systems recognize that the manufacturer should be held responsible regardless of the contractual agreement. This type of responsibility is referred to as absolute responsibility, irrespective of fault.[2]

Even in the final stages of development, some American courts have recognized the manufacturer's absolute responsibility by breaching rules associated with absolute responsibility. This means that the manufacturer is liable for damages resulting from the consumption of their products, regardless of the presence or absence of defects in the product design.[3] In many cases today, Arsh fails to compensate the buyer's loss. For instance, a car may be sold with a technical defect in its brakes, leading to an accident that causes damages several times the price of the car. However, the price reduction due to the brake defect is minimal.[4] In such cases, it may be possible to attribute fault to facilitate easier compensation for the loss. Contractual liability is waived here because damages must be direct, meaning that the violation of the contractual obligation is considered the direct consequence. Therefore, the presence of an intermediary between the breach of obligation and the damages incurred will sever the connection between the two. Article 520 of the Iranian Civil Procedure Act of 2000 also supports this view, as lawyers consider this description of damages necessary for establishing a causal relationship between the lack of commitment and the damages suffered.[5]

The principle and exception are also evident in Article 2 of the Iranian Consumer Protection Act. According to this Article, in the case of defective goods and services, consumers have the right to terminate the transaction, cancel the transaction, or demand compensation for a defective product from the supplier. Furthermore, Article 2 stipulates that all suppliers are responsible for the health and safety of their goods. This indicates that the law-makers have taken a

1 . Naser Katouzian, General rules of contracts, vol. 3, 5 (Joint Stock Company of Enteshar 2015) 228.
2 . Naser Katouzian, 'Contractual Freedom Constraints Based on Consumer Protection' (2008) No. 3 Law Quarterly Journal of Faculty of Law and Political Science 334.
3 . Naser Katouzian, Civil responsibility from manufacturing defect (Tehran University publications 2011) 24.
4 . Naser Katouzin, Certain contracts, vol. 1 (Joint-Stock Company of publication 1997) 250.
5 . Naser Katouzian, General rules of contracts, vol. 3, 5 (Joint Stock Company of Enteshar 2015) 248.

contractual perspective. However, it is explicitly stated in the Article that compensation is generally provided in the event of a defect or lack of quality, and compensation is non-contractual.

5. Basis of Principle of Reduction of Price

The underlying bases for the principle of price reduction varies. The CISG mentions several bases for price reduction. Some argue that price reduction is intended to preserve the contract and prevent its dissolution.[1] The Convention states that maintaining proportionality is crucial for the contract.[2] Another viewpoint suggests that price reduction supports the buyer in cases where the entire object is not delivered and aims to restore the contract.[3] Some publications mention the observance of fair exchange, compensation for unjustifiable losses to the buyer, the unfairness of the seller, and the parties' intentions.[4]

The main philosophy behind the principle of price reduction appears to be the implementation of fair exchange and the prevention of unfairness. Since a third party is not entitled to receive an excessive price, any surplus belongs to the buyer. Therefore, if the lack of conformity of the goods is due to force majeure, the right to price reduction should not be eliminated. It is deemed unfair, according to principles of fair exchange, for the seller to receive the total price when the payment of the total amount is unjust. While force majeure absolves the seller of guilt, they should not be rewarded with the payment of the entire price.[5]

Conclusion

There is no disagreement among legal systems regarding the need for compensation. The point of contention lies in how compensation should be carried out and to what extent. One of the most complex issues in legal systems is the concept of damages in Imamiyya Jurisprudence and Iranian law. However, Imamiyya jurisprudence and Iranian law offer mechanisms, such as Arsh, that can help systematize the compensation framework. In this article, I have focused on the nature and foundation of Arsh, presenting it as a general theory.

Regarding the nature of Arsh, we have examined various perspectives and selected a combination of theories in Islamic jurisprudence. It appears that Arsh represents damages and compensation resulting from a breach of contract. According to the general rule, when a contract is violated, the party responsible for the breach must compensate for the damages. Since contract law aims to uphold agreements, maintaining the contract takes precedence over terminating it. This principle of reducing the price is also recognized by the international legislator in Article 50 of the CISG. However, there are some disagreements within the CISG regarding the dis-

1 . Arnau Muria Tunon, 'The Actio Arsh and Sales of Goods Between Mexico and the U.S: An Analysis of the Remedy of Price in the UN Sales Convention, CISG Article 50, and Its Civil Law Antecedents' (1998) available at: www.cisg.law.pace.edu/cisg/biblio/muria.html.

2 . Sondahel, Erika, "Understanding the Remedy of Price Reduction – A Means to Fostering a More Uniform Application of the United Nations Convention on Contracts for the International Sale of Goods," available at: http://www.cisg.law.pace.edu/cisg/biblio/sondahl.html.

3 . Peter Schwenzer Schlechtriem, Commentary on the UN Convention on the International Sale of Goods (CISG), (Fourth Edition: Oxford University Press 2016) art. 50, para. 4.

4 . Alireza Bariklou, Safar Beigzadeh, 'Principle of Reduction of Price- Comparative Study in the International Sale Convention' (2011) Vol. 15 No. 3 Imamiyya Jurisprudence and Iranian Law- Comparative Law Studies of Tarbiat Modares University 72.

5 . Seyyed Hossein Safaei, Primary Course of Civil Liberty, vol. 2 (Tehran: Nashr al-Mizan 2003) 274.

tinction between price reduction and compensation for damages, which require further review. Nonetheless, it is evident that price reduction carries a nature of damages.

Regarding the foundation of Arsh, while emphasizing its contractual and obligatory basis, it is argued that Arsh has a dual nature. It possesses a contractual aspect, and in cases where the contractual aspect cannot adequately and reasonably compensate for the damages, it resorts to obligatory damages. In such instances, we can explicitly refer to the general theory of Arsh. Scholars perceive a shared essence between Arsh and blood money, as both serve as institutions with a dual nature of punishment and civil liability. Based on this similarity, it can be concluded that the general theory of Arsh encompasses both contractual liability and obligatory liability. The objective is to compensate the damages suffered by the victim. If contractual liability is applicable, it should be pursued; otherwise, exceptions under the obligatory aspect of the general theory of Arsh should be applied to ensure the correct realization of the parties' expectations.

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Combating Corruption in Public Administration, Policy and Governance: a Perspective on Iranian Law

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ABSTRACT

Corruption in the public sector, characterized by the misuse of public office for personal gain, has become a complex issue that has garnered significant attention since the 1990s. Recognized as a crucial component of good governance, the detrimental impacts of corruption are particularly evident in public administration, policy, and governance. Corruption not only leads to financial losses but also undermines the principles of good governance, erodes public trust in institutions, and distorts the allocation of public resources. This research aims to comprehensively analyze Iran's initiatives in combating corruption within the realms of public administration, policy, and governance. Over the past two decades, Iran has established numerous anti-corruption institutions and enacted relevant laws. However, similar to many other developing countries, Iran's experience highlights the limited effectiveness of institutionalization in curbing corruption. Reports from Transparency International indicate a simultaneous increase in the number of anti-corruption institutions and the severity of Iran's corruption ranking in recent years. To address this challenge, it is recommended that Iran focus on ensuring transparency and accountability, adhering to the principles of good governance, and empowering civil society. By embracing these measures, Iran can make significant progress in combating corruption and promoting effective public administration.

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Introduction

The study of corruption has evolved into a specialized interdisciplinary field since the 1990s, gaining recognition as a crucial component of *good governance*. Corruption's detrimental impacts are particularly pronounced in the domains of public administration, policy, and governance, where the equitable and transparent exercise of power is vital for the functioning of democratic systems and the protection of human rights. In 2003, the United Nations Convention against Corruption (UNCAC) was adopted by the General Assembly, constituting the principal international instrument in this area. Numerous provisions within the Convention emphasize the importance of establishing anti-corruption institutions as effective tools. Subsequently, many countries that have acceded to the Convention since then have established various institutions under different designations to combat corruption. From an international legal perspective, there is a growing recognition that addressing corruption necessitates a collective effort by states guided by a robust legal framework that transcends national boundaries.

This research aims to provide a comprehensive analysis of Iran's efforts in combating corruption within the spheres of public administration, policy, and governance. As a member of the international community, Iran has committed itself to upholding the principles enshrined in various international legal instruments aimed at combatting corruption, including its accession to the UNCAC in 2009. In 2010, Iran established the "National Center of the United Nations Convention against Corruption" as a national entity responsible for monitoring the implementation of the Convention. Currently, there are eleven active anti-corruption institutions in Iran, with all but two established after the adoption of the Convention in 2003. The first institution specifically created to combat corruption in Iran is the "Coordination Council for the Fight against Economic and Financial Crimes," established in accordance with the Supreme Leader's "8-Articles" Directive and comprising representatives from the three branches of government. Iran's legal framework to combat corruption encompasses a combination of domestic legislation, administrative regulations, and international commitments.

Some scholars in the field of corruption studies argue that despite the existence of international legal frameworks, little progress has been made in reducing corruption, even in devel-

oping countries.[1] Iran's experience in combating corruption also highlights the limited effectiveness of institutionalization in curbing corruption. The annual Corruption Perceptions Index published by Transparency International since 1995 indicates a simultaneous increase in the number of anti-corruption institutions and the severity of Iran's ranking. In Iran, anti-corruption institutions are predominantly governmental, indicating a narrow focus on combating corruption within the governmental sphere. While civil society institutions have recently become involved in these efforts, a lack of mutual collaboration between these institutions and the primary anti-corruption apparatuses of the state persists. Among the areas of focus, active institutions in Iran primarily concentrate on controlling financial and economic corruption. This one-sided approach raises concerns regarding a comprehensive and multidimensional understanding of the problem and practically hampers effective crisis management. Furthermore, anti-corruption institutions in Iran tend to remain primarily engaged in preventive and policy-making stages, with less emphasis on undertaking major anti-corruption initiatives.

1. Understanding Corruption in Public Administration, Policy, and Governance

In order to comprehend the complex phenomenon of corruption in the public sector, it is essential to delve into its definition, types, causes, and consequences. This section aims to provide a comprehensive understanding of corruption's impact on governance, development, and human rights. Furthermore, it explores the international legal framework established to combat corruption, including prominent conventions such as the United Nations Convention against Corruption (UNCAC), the Inter-American Convention against Corruption, and the Iranian Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Additionally, regional documents focused on the criminalization of corruption will be examined. By examining these various aspects, we can gain valuable insights into the multifaceted nature of corruption in public administration, policy, and governance.

1.1. Definition and Types of Corruption in the Public Sector

Corruption within the public sector denotes the misappropriation of entrusted power by public officials for personal gain or the unlawful advantage of others.[2] It encompasses a broad spectrum of illicit activities, including bribery, embezzlement, nepotism, favoritism, fraud, and money laundering. These corrupt practices may manifest in various forms, such as the solicitation or acceptance of bribes, the misallocation of public funds, the manipulation of public procurement processes, or engagement in conflicts of interest.[3] A comprehensive understanding of the various types of corruption is imperative in order to grasp the multifaceted nature of this pervasive issue and develop effective strategies to combat it.

1. Benjamin A. Olken, Rohini Pande, 'Corruption in developing countries' (2012) 4 Annual Review of Economics 481.
2. Alvaro Cuervo-Cazurra, 'Corruption in international business' (2016) 51 Journal of World Business 36; Klaus Uhlenbruck, Peter Rodriguez, Jonathan P. Doh, Lorraine Eden, 'The impact of corruption on entry strategy: Evidence from telecommunication projects in emerging economies' (2006) 17 Organization Science 402; Jakob Svensson, 'Eight questions about corruption' (2005) 19 Journal of Economic Perspectives 20.
3. Law on Promoting the Health of the Administrative System and Combating Corruption, Article 1, available at https://rc.majlis.ir/fa/law/show/802617, accessed on January 16, 2024.

Corruption has persisted throughout human societies, extending across history and remaining a paramount and intrinsic concern among nations worldwide. It has engendered a multitude of disorders within societal frameworks, giving rise to successive wars, violence, and rebellions, ultimately culminating in the disintegration of societies. Corruption has consistently stood as a pivotal factor contributing to the collapse of civilizations. Over the course of centuries, a reciprocal relationship between the appropriate exercise of power and the prevalence of corruption has been observed. When power is wielded optimally, corruption diminishes.

Administrative corruption, as an organizational phenomenon, significantly impacts the developmental processes of nations and begets fundamental problems and societal crises. Notably, administrative corruption is not confined solely to traditional authoritarian systems, as it can be found even within certain democratic structures. However, the forms, extent, channels, and techniques through which administrative corruption manifests are influenced by the fundamental characteristics of the political system. Consequently, administrative corruption can be discerned across various governmental frameworks. The present article endeavors to scrutinize and scientifically examine the phenomenon of corruption within the realms of public administration, policy, and governance.

1.2. Causes and Consequences of Administrative Corruption

Numerous factors have been identified as contributors to administrative corruption within diverse societies. Studies conducted on administrative corruption reveal its intricate nature and the wide array of factors that contribute to its occurrence. Primary causes of administrative corruption include economic inequality and income disparities, cultural divergence, the absence of robust moral values, the lack of deterrent regulations and laws, and ineffective control systems. Administrative corruption elicits diverse and far-reaching effects on society. It obstructs political and economic stability, social cohesion, and economic development,[1] eroding public trust and respect for governmental institutions.[2] When it becomes widespread and tolerated, administrative corruption engenders an environment in which the transgression of basic ethical norms becomes commonplace. Additionally, the perception of immunity and impunity among administrative officials, who may exploit their positions for personal gain, fosters the belief that their wealth and connections with influential groups will shield them from legal consequences. The ramifications of this sense of immunity include diminished reverence for the constitution, restricted opportunities for the wholesome development of individuals and organizations, and ultimately impeding societal progress and development.

Administrative corruption has emerged as a prevalent issue in the contemporary world, particularly within developing countries. The multifaceted nature of corruption, influenced by various factors, has rendered it a complex phenomenon. Consequently, numerous government programs aimed at combating corruption have proven ineffective.[3] Despite the implementation

1. Federico Ceschel, Alessandro Hinna, Fabian Homberg, ‘Public Sector Strategies in Curbing Corruption: A Review of the Literature’ (2022) 22 Public Organization Review 572.
2. Vladyslav Teremetskyi, Yevheniia Duliba, Volodymyr Kroitor, Nataliia Korchak, Oleksandr Makarenko, ‘Corruption and strengthening anti-corruption efforts in healthcare during the pandemic of Covid-19’ (2021) 89 Medico-Legal Journal 25.
3. Simone R. Bohn, ‘Corruption in Latin America: Understanding the Perception–Exposure Gap’ (2012) 4 Journal of Politics in Latin America 91.

of numerous administrative reform initiatives and the enactment of laws targeting administrative corruption, the problem persists, continuing to plague our administrative organizations.

1.3. Discussion of the Impacts of Corruption on Governance, Development, and Human Rights

Corruption has far-reaching consequences that extend beyond financial losses. At its core, corruption undermines the principles of good governance,[1] erodes public trust in institutions, and distorts the allocation of resources and policy-making processes. In the realm of governance, corruption weakens the rule of law, impairs public accountability, and fosters a culture of impunity.[2] It exacerbates social inequalities, as it diverts public resources away from essential services such as healthcare, education, and infrastructure, thereby hindering human development. The impact of corruption on human rights cannot be overlooked. Corruption perpetuates and reinforces systemic inequalities, impeding the realization of fundamental rights and exacerbating social injustices.[3] It undermines equality before the law, erodes access to justice, and undermines the right to a fair and transparent public administration. Corruption can also undermine the enjoyment of economic, social, and cultural rights, as it diverts resources meant for poverty alleviation programs, healthcare, education, and other essential services. Furthermore, corruption weakens the protection of civil and political rights, as it can lead to the suppression of dissent, the erosion of democratic institutions, and the subversion of electoral processes.

Understanding the dimensions, origins, and expansion of corruption is of paramount importance for the development of effective public policies.[4] Administrative corruption, which has long plagued governmental institutions in expanding societies, has emerged as a national crisis in contemporary times. If left unaddressed, this phenomenon poses a significant risk to the stability of governing systems. The presence of flaws in the rationalization of goals, structure, and conduct within bureaucracies provides bureaucrats with a powerful tool to justify, conceal, and engage in corrupt practices. Furthermore, research indicates that bureaucracy itself is not the root cause of administrative corruption in developed societies. Rather, it is the upper echelons of the bureaucratic system that influence bureaucrats to engage in disproportionate and abusive behavior. Numerous studies establish a correlation between bureaucracy and corruption. When analyzing bureaucracy, it is possible to examine the broad realm of bureaucrats' responsibilities and competences. While bureaucrats may legitimately and legally exercise discretion, they should also be held accountable for their actions.

On the whole, corruption diminishes people's participation and erodes their trust in governance institutions.[5] Corruption weakens democracy and the rule of law, infringes upon people's rights, distorts markets, degrades quality of life, and provides a breeding ground for organized crime and threats to human security. Consequently, combating corruption and making concerted efforts to reduce its prevalence are imperative.[6]

1. Taryn Vian, 'Anti-corruption, transparency and accountability in health: concepts, frameworks, and approaches' (2020) 13 Global Health Action 1.
2. Robert Klitgaard, 'Fighting Corruption' (2011) 9 CESifo DICE Report 31.
3. Ibid.
4. Supra note 6, at 573.
5. Supra note 10.
6. Daniel Aguirre, The Human Right to Development in a Globalized World (First Edition, Routledge 2008) 13.

1.4. Overview of the International Legal Framework against Corruption

Corruption, a long-standing issue in human societies, has contributed to the downfall of empires and civilizations throughout history. The corruption of rulers and elites has been particularly detrimental. The revolutions of the 17th and 18th centuries, such as the Glorious Revolution in England and the French Revolution, were driven not only by calls for freedom and independence but also by demands for justice. These revolutions aimed to combat the pervasive corruption prevalent in political and administrative systems of the time. While corruption has been a consistent concern for governments and intellectuals, the international discourse on fighting corruption gained momentum with the development of international instruments on the subject.

Several significant treaties have been established to address corruption, although this list is not exhaustive.

1.4.1. The United Nations Convention against Corruption (UNCAC)[1]

The UNCAC serves as the principal international instrument to combat corruption. Adopted in 2003, the UNCAC provides a comprehensive framework that outlines preventive measures, criminalization provisions, international cooperation mechanisms, and asset recovery measures.

1.4.2. The Inter-American Convention against Corruption[2]

Adopted in March 1996 in Caracas, Venezuela, this Convention stands as the inaugural legal instrument in its domain, acknowledging the global ramifications of corruption and the imperative to foster and facilitate inter-state cooperation in combatting this issue.

1.4.3. The Convention on Combating Bribery of Foreign Public Officials in International Business Transactions[3]

Adopted in 1997 and entered into force in 1999, the Convention itself establishes a monitoring mechanism driven by peer evaluation, which remains open-ended, to guarantee the comprehensive implementation of the international commitments undertaken by countries pursuant to the Convention. The OECD Working Group on Bribery conducts this monitoring. The country monitoring reports encompass recommendations derived from meticulous assessments of each country.

1.4.4. The United Nations Convention against Transnational Organized Crime and its Protocols[4]

This Convention, along with two additional protocols, namely (1) the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and (2) the Protocol Against the Smuggling of Migrants by Land, Sea, and Air, were adopted by the United Nations General Assembly on November 15, 2000. As of now, 147 States are Signatories to the Convention.

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1. 'UN Convention Against Corruption', Available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf, accessed on January 16, 2024.
2. 'Inter American Treaties B-58 Against Corruption', Available at https://www.oas.org/en/sla/dil/inter_american_treaties_B-58_against_Corruption.asp, accessed on January 16, 2024.
3. 'OECD Anti Bribery Convention', Available at https://www.oecd.org/corruption/oecdantibriberyconvention.htm, accessed on January 16, 2024.
4. Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&clang=_en, accessed on January 16, 2024.

1.4.5. The United Nations Declaration Against Corruption and Bribery in International Commercial Transactions[1]

Adopted in 1997, this Declaration represents a political commitment without legal force. It recognizes the importance of promoting the implementation of \the International Code of Conduct for Public Officials, and emphasizes that all nations should take every feasible measure to advance this objective. It also urges Member States to effectively and collaboratively criminalize the act of bribing public officials from other countries in the context of international commercial transactions, and encourages them to participate in programmatic endeavors aimed at deterring, preventing, and combating bribery and corruption.

Moreover, international financial institutions, such as the World Bank[2] and the International Monetary Fund (IMF),[3] play a crucial role in promoting anti-corruption efforts through their policies and lending programs. These institutions emphasize the importance of transparency, accountability, and good governance in their operations and promote anti-corruption measures as prerequisites for development assistance. The international legal framework against corruption emphasizes the need for states to enact domestic legislation, establish independent anti-corruption bodies, promote transparency and accountability, and foster international cooperation in the investigation and prosecution of corruption cases. By adhering to these international legal obligations, states can enhance their capacity to prevent and combat corruption, foster sustainable development, and protect human rights.

1.5. Regional Documents on the Criminalization of Corruption

Several regional documents have been established to combat corruption, including the Convention on the Protection of the Financial Interests of the European Community (1995) and its Additional Protocols (1996, 1997).[4] Other influential documents include the African Convention for the Prevention and Combating of Corruption (2002),[5] the Council of Europe Civil Law Convention against Corruption (1999),[6] the Council of Europe Criminal Law Convention against Corruption (1998),[7] the Convention on Combating Corruption of Officials of the European Community or Officials of the Member States of the European Union (1998),[8] and the Additional Protocol of the Economic Community of States to the West African Convention on Combating Corruption (2001).[9]

These regional documents and conventions reflect the international community's commitment

1. Available at https://digitallibrary.un.org/record/246856, accessed on January 16, 2024.
2. Available at https://www.worldbank.org/en/home, accessed on January 16, 2024.
3. Available at https://www.imf.org/en/Home, accessed on January 16, 2024.
4. 'Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests', Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A41995A1127%2803%29, accessed on January 16, 2024.
5 . 'African Union Convention on Preventing and Combating Corruption', Available at https://au.int/sites/default/files/treaties/36382-treaty-0028_-_african_union_convention_on_preventing_and_combating_corruption_e.pdf, accessed on January 16, 2024.
6. 'Civil Law Convention on Corruption', Available at https://rm.coe.int/168007f3f6, accessed on January 16, 2024.
7. ' Criminal Law Convention on Corruption', Available at https://rm.coe.int/168007f3f5, accessed on January 16, 2024.
8. ' Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union', Available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A41997A0625%2801%29, accessed on January 16, 2024.
9. ' Economic Community of West African States Protocol on the Fight against Corruption', Available at https://eos.cartercenter.org/uploads/document_file/path/406/ECOWAS_Protocol_on_Corruption.pdf, accessed on January 16, 2024.

to combating corruption and addressing various forms of administrative/ economic corruption crimes. Their provisions contribute to the establishment of legal frameworks and cooperation mechanisms to tackle corruption effectively.

2. Iranian Legal Framework to Combat Corruption

This section provides a comprehensive overview of Iran's legal framework to combat corruption. It covers the historical context, key laws and regulations addressing corruption, developments in criminal law, major authorities involved in fighting corruption, and various anti-corruption institutions. It offers valuable insights into Iran's comprehensive efforts to tackle corruption.

2.1. Historical Context

Although the fight against corruption in domestic laws has been a recent development, corruption in Iran has historical roots dating back to ancient times. Some of the Iranian sultans were notorious for their corrupt acts, and their misdeeds are well-documented in history. Instances of extortion and financial abuse were prevalent. However, following the Constitutional Revolution of 1906, Iran adopted its first constitution, initially consisting of 51 articles.[1] In subsequent revisions, it was amended and ultimately approved with 107 articles. The Constitution brought about significant changes in individual and public rights and freedoms, marking a transition from a traditional to a modern state. The adoption of the Code of Criminal Procedure in 1911[2] and the General Penal Code in 1925[3] played crucial roles in implementing individual rights in criminal proceedings guaranteed by the Constitution.

As of the past 100 years, during the first Pahlavi, in the reign of Reza Shah, administrative corruption was relatively limited. Historians attribute this decline mainly to the establishment of a modern state modeled after European systems, which was less tolerant of existing corruption and deficiencies and the Shah's personal stance against administrative corruption, as he was stringent in combating such practices.[4] However, corruption persisted in the lower ranks of the bureaucracy, including the administrative and military sectors. During the second Pahlavi period, particularly between 1953 to 1963, Iran witnessed the growth of administrative corruption mainly due to increased oil revenues.[5]

Even after the Islamic Revolution in 1979, corruption persisted across various sectors, albeit to a lesser extent in some cases. Notable examples of contemporary corruption include billion-dollar embezzlements, large-scale bribery, and various forms of money laundering. Media coverage of these incidents has contributed to a growing sense of distrust among the Iranian people towards the administrative structures. Despite this, several anti-corruption laws have

1. For a review, see Ali M. Ansari, Iran's Constitutional Revolution of 1906 and Narratives of the Enlightenment (Gingko Library 2016).
2. Available at http://shop.chatredanesh.ir/pdf/nokh.jazaee.pdf and https://rc.majlis.ir/fa/law/show/92264, accessed on January 16, 2024.
3 . 'Public Proswcution Law', Available at https://rc.majlis.ir/fa/law/show/91023, accessed on January 16, 2024.
4. For a brief overview, see The Pahlavi Regime in Iran by Homa Katouzian, included in Houchang E. Chehabi, Juan J. Linz, (eds) Sultanistic Regimes (JHU Press 1998).
5. For a full review, see Gregory Brew, Petroleum and Progress in Iran: Oil, Development, and the Cold War (Cambridge University Press 2022).

been enacted in this era. Some of the early and prominent legislations in the fight against corruption in Iran are as follows:

2.1.1. Law on Penalties for Unlawful Influence and Violation of Legal Regulations[1]

Enacted on 20 December 1936, this Law states that any person who, through favoritism and influence, obtains cash or any other benefit for him/her-self or a third party in exchange for exerting influence over government employees, municipal officials, national officers, or public officials, or receives a promise or commitment from them, in addition to the confiscation of the received cash or property or its value, shall be subject to imprisonment ranging from six months to two years and a proportionate monetary penalty. Furthermore, if any person abuses their private relationships with the aforementioned officers or employees and exerts unlawful influence, contrary to the rights and legal regulations, in administraپtive matters where they have authority, causing harm or benefit to anyone, they shall be sentenced to imprisonment ranging from one to twelve months. Additionally, government employees or public officials who use their influence on individuals in their administrative actions or decisions, resulting in the deprivation of someone's rights or causing harm to individuals or the state, shall be sentenced to job dismissal from two to five years. If the aforementioned action or decision involves the relinquishment of rights from individuals or the government, they shall be permanently separated from government service, unless this act is subject to other penal laws.

2.1.2. The Law on Prohibition of the Government from Negotiating and Contracting Oil Concessions with Foreigners[2]

Enacted on 2 December 1944, this law sets forth the prohibition that Prime Ministers, Ministers, or individuals authorized by them or acting as their deputies shall not engage in negotiations or enter into contracts regarding oil concessions with official or unofficial representatives of neighboring or non-neighboring countries, representatives of oil companies, or any other individuals, except those specifically authorized by law to conduct official and legally binding negotiations or contract signing. Article 2 of the law stipulates that such negotiations require approval and notification by the National Consultative Assembly. Additionally, Article 3 imposes penalties of imprisonment ranging from 2 to 8 years and permanent removal from official positions for those who violate this prohibition.

2.1.3. The Law on Prohibition of Ministers, Parliamentarians, and Government Employees from Interfering in Government and National Transactions[3]

Enacted on 23 December 1958, this law prohibits high-ranking officials, including the Prime Minister, Ministers, Members of Islamic Consultative Assembly, Ambassadors, Governors, and all civil and military employees, as well as certain government-affiliated legal entities and even certain relatives of government employees, from interfering in government and national transac-

1. 'Penalty law for exerting influence against the right and legal regulations', Available at https://rc.majlis.ir/fa/law/show/93130, accessed on January 16, 2024.
2. 'Law prohibiting the government from negotiating and entering into contracts regarding oil concessions with foreigners', Available at https://rc.majlis.ir/fa/law/show/93867, accessed on January 16, 2024.
3. 'The law regarding the prohibition of interference of ministers and MPs and employees in state and country transactions', Available at https://rc.majlis.ir/fa/law/show/94793, accessed on January 16, 2024.

tions listed in Article 1(3) of the law. Violators are subject to imprisonment ranging from 2 to 4 years and prescribed penalties.

2.1.4. The Law on Punishing Collusion in Government and Public Transactions[1]

Enacted on 9 June 1969, this law stipulates those individuals involved in collusion in government transactions, tenders, auctions, etc., resulting in damage to the government, companies, public institutions, etc., shall be sentenced to imprisonment ranging from 1 to 3 years, in addition to monetary fines equivalent to the unlawfully acquired amount. If the offenders are government employees, they are subject to the maximum penalties of imprisonment and permanent removal from official positions.

2.1.5. The Law on Aggravated Penalties for Bribery, Embezzlement, and Fraud[2]

Enacted on 6 December 1988, this law establishes penalties for individuals engaged in the mentioned criminal acts. Article 4 further provides that if such acts are committed in an organized manner and constitute a case of corruption on a significant scale (socio-economic corruption), the offenders shall be sentenced to death.

2.1.6. The Law on Punishment of Disruptors of the Economic System[3]

Enacted on 19 December 1990, this law prohibits actions that disrupt the monetary and currency system of the country, such as major currency smuggling, counterfeiting coins or banknotes, disrupting the distribution of essential commodities and the country's production system, or exporting cultural heritage, among others. Violators of this law face severe punishments ranging from 5 years of imprisonment to the death penalty.

2.1.7. Law on Prohibition of Commission Taking in Foreign Transactions[4]

Enacted on 18 July 1993, this law prohibits the acceptance of any form of commission, such as money, instruments, or the delivery of goods, directly or indirectly, in relation to foreign transactions by the three branches of government, organizations, companies, and government institutions, armed forces, revolutionary institutions, municipalities, and all affiliated entities. In addition to the confiscation of the commission or its equivalent, the offender shall be subject to imprisonment for a term of 2 to 5 years and a monetary penalty equal to the amount of the commission. The offense carries a minimum prescribed punishment as stipulated in the aforementioned provision, and if the act itself constitutes a separate offense, the perpetrator shall also be subject to punishment for that offense. If a foreign natural or legal person involved in the transaction pays a commission, the matter shall be reported to the relevant authority, and the said amount shall be fully deposited into the treasury account. In such a case, the person taking the action shall not be subject to the provisions of the aforementioned article.

1. ''Penalty law for collusion in government transactions', Available at https://rc.majlis.ir/fa/law/show/96365, accessed on January 16, 2024.
2. 'Amending and approving articles of the bill to intensify the punishment of the perpetrators of bribery, embezzlement and fraud', Available at https://rc.majlis.ir/fa/law/show/99593, accessed on January 16, 2024.
3. 'The Law of Punishing Disruptors in the Economic System of the Country', Available at https://rc.majlis.ir/fa/law/show/91851, accessed on January 16, 2024.
4. 'The law prohibiting taking commission in foreign transactions', Available at https://rc.majlis.ir/fa/law/show/92259, accessed on January 16, 2024.

2.1.8. The Law on Prohibition of Holding More Than One Official Position[1]

Enacted on 1 January 1995, this law states in line with Article 141 of the Iranian Constitution that the President, Vice Presidents, Ministers, and government employees shall not hold more than one official position. Regulations approved by the Supreme Leader have been enacted to enforce this law, and government employees at all levels are prohibited from holding multiple positions to prevent administrative and financial corruption, including the abuse of multiple job positions and receiving multiple incomes from various government sources.

2.2. The 8-Article Directive[2]

In Iran, there are several significant legal sources pertaining to corruption. One of these sources is the 8-Article Directive of the Supreme Leader in 2001, which holds significant importance in the fight against corruption across all sectors, including the private sector.

1. The Directive urges officials in the three branches of government to remain resolute and not be swayed by objections, as tolerance towards corruption is seen as complicity.
2. It addresses misconceptions and explains that combating corruption will foster a secure economic environment and instill confidence among individuals engaged in healthy economic activities.
3. It underscores the need for those involved in combating corruption to have clean hands and to embody the qualities of reform themselves.
4. It emphasizes that the pursuit of justice must be decisive, precise, and delicate. Additionally, encouraging the righteous and dedicated individuals is recognized as an important duty alongside the fight against corruption.
5. It calls for sincere cooperation among various supervisory departments, including the National General Inspectorate, the Audit Court, and the Ministry of Intelligence.
6. It obligates the Ministry of Intelligence, within its legal responsibilities, to monitor vulnerable areas in the economic activities of the government including foreign transactions, contracts, large investments, national plans, and important economic and monetary decision-making centers.
7. It emphasizes the principle of non-discrimination in the fight against corruption, expressing that no individual or organization should be exempted, and no one can evade accountability by invoking personal or official affiliations.
8. It emphasizes that the fight against corruption should focus on tangible actions and prioritize tackling the root causes rather than trivial issues. Additionally, any information shared with the public should be responsible, avoiding ill-considered statements, while maintaining public peace and confidence.

The Directive of the Supreme Leader plays a crucial role in the legal framework addressing corruption in Iran. It provides guidance and instruction to combat corruption effectively, ensuring the integrity of economic activities and fostering public trust in governmental institutions.

1. ‘Law prohibiting holding more than one job’, Available at https://rc.majlis.ir/fa/law/show/92490, accessed on January 16, 2024.
2. ‘Eight-point decree to the heads of the forces on fighting economic corruption’, Available at https://farsi.khamenei.ir/message-content?id=3062, accessed on January 16, 2024.

2.3. Developments in the Criminal Law

Given that the presence of corruption within government institutions disrupts the administration of public affairs, impedes growth and development, generates dissatisfaction among the populace, and weakens the authority of the government in any society, it is imperative for criminal law to address this significant issue. Criminal law serves as the most essential tool for combating crime within society, and through the implementation of appropriate methods and the formulation of relevant criminal laws, it should strive to safeguard and enhance the integrity of the administrative system. While administrative corruption may not instill the same level of fear as other crimes such as murder and theft, its impact on societal destruction and general deviance surpasses that of other transgressions. In other words, the most conspicuous evidence of the government's and society's deviation from the law manifests in an increase in administrative corruption. If corruption proliferates within the government apparatus, society is confronted with a genuine catastrophe, as government employees constitute the prominent figures within society, and the occurrence of infractions and deviations within this group cannot be easily disregarded.

Iran's penal laws, spanning from the earliest iterations in 1925 (1304 in the Persian calendar)[1] to the current Islamic Penal Code of 2013,[2] have made efforts to combat these crimes by defining various forms of corruption and prescribing punishments for them. However, Iran's accession to the United Nations Convention against Corruption (UNCAC)[3] has prompted the government to adopt repressive and preventive measures through the enactment of the Law on Promoting the Health of the Administrative System and Combating Corruption[4] on 2011 December 10. This law seeks to combat corruption through preventive measures, which were perceived to be lacking in the existing criminal legislation. Notwithstanding, the practical implementation of Iran's legislation in combating such crime exhibits numerous deficiencies, and the society is currently witnessing an escalation in corruption. However, the enactment of the above law represents a novel approach that, if properly communicated to administrative organizations, could prove effective in preventing administrative corruption.[5]

Most recently, the Iranian Islamic Consultative Assembly passed a law on December 5, 2023, aimed at safeguarding whistle-blowers and combating financial crimes. This law, enacted on January 13, 2024, represents a significant step in addressing financial corruption in public administration. Article 2 of the Law enumerates various forms of major financial corruption, including bribery, embezzlement, unlawful misappropriation of public property, abuse of official power, collusion in government transactions, acquisition of commission in domestic or foreign transactions, offenses related to state officials' interference in government and national

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1. 'Public Prosecution Law', Available at https://rc.majlis.ir/fa/law/show/91023, accessed on January 16, 2024.
2. Available at https://www.refworld.org/docid/518a19404.html, accessed on January 16, 2024. Article 36, 47, and 109 specifically address the issue of corruption in the public sector and provides for strict punitive and disciplinary measures.
3. 'The law of accession of the government of the Islamic Republic of Iran to the United Nations Convention against Corruption', Available at https://rc.majlis.ir/fa/law/show/134837, accessed on January 16, 2024.
4. 'The Law on Improving the Health of the Administrative System and Combating Corruption', Available at https://rc.majlis.ir/fa/law/show/802617, accessed on January 16, 2024. This law is a prime anti-corruption document in the Iranian administrative system.
5. For a review of the preventive functions of transparency in the Iranian criminal policy, see Adel Sarikhani, Rooholah Akrami Sarab, 'The Preventive Functions of Transparency in Criminal Policy', (2013) 77(82) Judiciary Legal Journal 91-116.

transactions, fraud in government transactions, and illegal accumulation of wealth by public employees. The law provides for rewards and protection to be extended to whistle-blowers who expose such corrupt practices.[1]

2.4. Major Authorities Fighting Corruption

This section focuses on the major authorities at the forefront of combating corruption in Iran. It provides an overview of the key institutions tasked with investigating, prosecuting, and adjudicating corruption cases. The section explores the roles and responsibilities of the Judiciary Branch, National General Inspectorate, Ministry of Intelligence, Administrative Court of Justice, and the Supreme Court of Audit. By delving into the functions and powers of these authorities, we can gain a deeper understanding of their contributions to the anti-corruption efforts in Iran.

2.4.1. The Judiciary Branch[2]

The Iranian Judiciary branch operates in accordance with the provisions outlined in Articles 156, 157, and 158 of the Constitution. Its responsibilities encompass:

1. Adjudicating grievances, infringements, complaints, lawsuits, disputes, and making necessary decisions and actions in matters related to Hasbiyyah affairs.
2. Safeguarding public rights, promoting justice, and ensuring the protection of legitimate freedoms.
3. Overseeing the proper implementation of laws.
4. Detecting crimes, prosecuting offenders, and enforcing the regulations stipulated in the Islamic Penal Code.
5. Taking appropriate measures to prevent crimes and rehabilitate offenders.

The appointment of the Head of the Judiciary, the highest-ranking official within this Branch, is made by the Supreme Leader for a tenure of five years.

2.4.2. National General Inspectorate[3]

The National General Inspectorate, established in accordance with Article 174[4] of the Constitution[5] and the Law on the Establishment of the National General Inspectorate (1981-10-11) (as amended in 2014-10-07),[6] is responsible for continuous inspection of all ministries and departments. It appoints extraordinary inspectors and reports violations, deficiencies, and administrative and financial irregularities.[7] The organization conducts financial and administrative inspections at all stages of corrupt and criminal phenomena, whether before, during, or after their occurrence.

1. 'Corruption whistleblower protection law', Available at https://dotic.ir/news/15714, accessed on January 16, 2024.
2. Available at https://eadl.ir, accessed on January 16, 2024.
3. Available at https://bazresi.ir, accessed on January 16, 2024.
4. Iranian Constitution, Article 174: "In accordance with the right of the judiciary to supervise the proper conducting of affairs and the correct implementation of laws by the administrative organs of the government, an organization will be constituted under the supervision of the head of the judiciary branch to be known as the National General Inspectorate. The powers and duties of this organization will be determined by law."
5. 'The Constitution of The Islamic Republic of Iran', Available at https://irandataportal.syr.edu/wp-content/uploads/constitution-english-1368.pdf, accessed on January 16, 2024.
6. 'The law on the formation of the inspection organization of the whole country', Available at https://qavanin.ir/Law/TreeText/252219, accessed on January 16, 2024.
7. Article 2 of the Law on the Establishment of the National General Inspectorate.

2.4.3. Ministry of Intelligence[1]

The Ministry of Intelligence, established by the Law on the Establishment of the Ministry of Intelligence of the Islamic Republic of Iran approved on 08-18-1983,[2] aims to acquire and develop security and foreign intelligence, protect against intelligence and counter-espionage, and obtain necessary information about internal and external adversaries to *prevent* and *counteract* their conspiracies against the Country.[3] Additionally, according to Article 10 of the Law, the Ministry of Intelligence is responsible for uncovering subversive conspiracies, espionage, sabotage, and similar activities. Hence, based on its legal duties, the Ministry plays a significant role in combating administrative and financial corruption at all stages of illegal activities.

2.4.4. The Administrative Court of Justice[4]

The Administrative Court of Justice is established in accordance with Article 173 of the Constitution[5] and operates under the supervision of the Head of the Judiciary. Its primary purpose is to address individuals' complaints, grievances, and objections against government officials, units, regulations, and by-laws. Pursuant to the amended Law on the Organization and Procedure of the Court in 2023,[6] the Court comprises trial, appellate, general, and specialized boards, and is exclusively located in Tehran.

To ensure accessibility to the Court's services, administrative offices have been established in provincial centers. These offices are responsible for registering plaintiffs' requests and petitions, providing judicial guidance and assistance, and delivering copies of the Court's opinions within their respective jurisdictions. Additionally, they are tasked with executing the orders issued by the Court's ruling enforcement unit within their respective jurisdictions.

Court judges are appointed by the Head of the Judiciary and must possess a minimum of seven years of judicial experience. Presently, the Court operates with 60 trial branches, 29 appellate branches, and 6 execution branches. Each trial branch consists of a president or alternate judge. These trial branches specialize in specific types of administrative claims, and the judges presiding over them adjudicate cases based on their expertise. Decisions rendered by the trial branches can be subject to appeal.

The Court's appellate divisions are comprised of a president and two advisers, with decisions being issued based on the majority opinion. In instances where defendants refuse to comply with the Court's decisions, the defendant may face dismissal from public office for a period of up to five years or deprivation of social rights for a maximum of five years, coupled with compensation for any resulting damages.

It is important to note that the Court does not have jurisdiction to review judicial decisions issued

1. Available at https://www.vaja.ir, accessed on January 16, 2024.
2. 'Law establishing the Ministry of Information of the Islamic Republic', Available at https://rc.majlis.ir/fa/law/show/90795, accessed on January 16, 2024.
3. Article 1 of the Law on the Establishment of the Ministry of Intelligence of the Islamic Republic of Iran.
4. Available at https://divan-edalat.ir, accessed on January 16, 2024.
5. Iranian Constitution, Article 173: "In order to investigate the complaints, grievances, and objections of the people with respect to government officials, organs, and statutes, a court will be established to be known as the Court of Administrative Justice under the supervision of the head of the judiciary branch. The jurisdiction, powers, and mode of operation of this court will be laid down by law."
6. 'Law amending the Law on Organizations and Procedures of the Court of Administrative Justice', Available at https://rc.majlis.ir/fa/law/show/1778633, accessed on January 16, 2024.

by the Judiciary, regulations, circulars, and decisions issued by the Head of the Judiciary, as well as enactments and decisions made by the Guardian Council,[1] the Council for the Expediency Discernment of the State,[2] the Assembly of Leadership Experts,[3] the Supreme National Security Council,[4] the Supreme Council of the Cultural Revolution,[5] and the Supreme Council of Virtual Space.[6]

2.4.5. The Supreme Court of Audit[7]

The Supreme Court of Audit is an autonomous government institution with independent authority in financial and administrative matters, operating under the supervision of the Islamic Consultative Assembly as its supervisory body. This Court is responsible for conducting comprehensive examinations or audits of the accounts belonging to ministries, institutions, state-owned companies, and other entities that utilize the national budget in any capacity. Its operations adhere to the legal provisions, ensuring that expenditures do not exceed approved appropriations, and that all funds are properly allocated and expended.

Annually, the Court of Audit submits the audited accounts and accompanying documents, in accordance with the law of the fiscal year and the budget liquidation report, to the Islamic Consultative Assembly along with its supervisory report. The establishment of this Court originates from the provisions of Articles 54 and 55 of the Constitution.[8] In addition to its central headquarters located in Tehran, the Court maintains offices in all provincial centers.

The institution of the Court of Audit in Iran traces its roots back to 1803, but its modern form and functions were designated under Articles 101-103 of the Constitution of 1906 and its subsequent amendments.

2.5. The Anti-Corruption Institutions in Iran

This section highlights the diverse range of anti-corruption institutions in Iran that play a crucial role in combating corruption. It provides an overview of these institutions and their respective functions and responsibilities. By exploring these diverse anti-corruption institutions, we gain valuable insights into the comprehensive efforts and measures in place to combat corruption in Iran.

2.5.1. Council of Supervisory Authorities[9]

The absence of a comprehensive and effective supervisory system capable of facilitating necessary coordination among the supervisory entities throughout the country, encompassing all layers

1. Available at https://www.shora-gc.ir, accessed on January 16, 2024.
2. Available at https://maslahat.ir, accessed on January 16, 2024.
3. Available at https://majlesekhobregan.ir, accessed on January 16, 2024.
4. Available at https://rc.majlis.ir/fa/law/show/133640, accessed on January 16, 2024.
5. Available at https://sccr.ir, accessed on January 16, 2024.
6. Available at https://majazi.ir, accessed on January 16, 2024.
7. Available at https://dmk.ir, accessed on January 16, 2024.
8. Iranian Constitution, Article 54: "The National Accounting Agency is to be directly under the supervision of the Islamic Consultative Assembly. Its organization and mode of operation in Tehran and at the provincial capitals, are to be determined by law."; Article 55: "The National Accounting Agency will inspect and audit, in the manner prescribed by law, all the accounts of ministries, government institutions and companies as well as other organizations that draw, in any way, on the general budget of the country, to ensure that no expenditure exceeds the allocations approved and that all sums are spent for the specified purpose. It will collect all relevant accounts, documents, and records, in accordance with law, and submit to the Islamic Consultative Assembly a report for the settlement of each year's budget together with its own comments. This report must be made available to the public."
9. 'Law of the fifth five-year development plan of the Islamic Republic of Iran (1390-1394)', Available at https://bazresi.ir/شورای-دستگاه%E2%80%8Cهای-نظارتی-کشور, accessed on January 16, 2024.

and components of the country's administrative and executive system, has long been apparent. This prompted the initial concept of coordinating the supervisory agencies within the country. Subsequently, article 221 of the law the Fifth Development Plan[1] in 2011 specified "to establish coordination for the effective functioning of the supervisory system, enhance efficiency, and strengthen the management of the country, the Council of Supervisory Authorities shall be established. This council shall consist of two officials from the supervisory bodies of each branch, appointed by the head of each branch, while preserving their independence within the limits specified in the Constitution." Eventually, the Council was founded in 2012.

Similar councils were also established in 32 provinces, with the Secretariat of the council located in the National General Inspectorate in Tehran. Thus, the Council of Supervisory Authorities was officially recognized in accordance with the law. The Council performs as the Supreme supervisory body examining the shortcomings of the country's supervisory system and providing solutions to enhance its effectiveness and efficiency, identifying strategies to increase productivity, strengthen the country's management system, and providing executive recommendations to officials, and establishing coordination among supervisory bodies for the implementation of monitoring and inspection programs.

2.5.1.1. Provincial Supreme Supervisory Boards

In November 1922, the First National Employment Law of Iran[2] was enacted and put into effect. Chapter III of this law, titled "Regarding the Procedure for the Trial of Guilty Employees," established specific regulations. According to these regulations, the trial and appellate administrative courts were tasked with addressing instances of administrative misconduct by government employees, operating within the existing judicial system. Since 1967, the administrative courts have been mandated to safeguard the frameworks and rights of citizens and employees in this realm, utilizing the "Administrative Procedure Law."[3]

Following the 1979 Revolution, there were changes in nomenclature, and on February 28, 1984, the first law regarding Boards for Handling Administrative Offenses, in accordance with Article 85 of the Constitution of the Islamic Republic of Iran, was provisionally approved. On November 28, 1993, the current law on Boards for Handling Administrative Offenses was passed by the Islamic Consultative Assembly.[4] Article 22 of this law established the "Supreme Supervisory Boards" to ensure the proper implementation of the law and to foster coordination among the boards responsible for handling administrative offenses within the relevant institutions.

The Supreme Supervisory Board has the authority to nullify all or some of the decisions made by the trial or appellate boards or the relevant institutions if non-compliance with, discrimination in the implementation of or negligence in addressing offenses provided in the law on handling administrative offenses and similar regulations are observed. Currently, there are 32 (one per province) trial boards for handling administrative offenses across the country.

1. Ibid, Available at https://rc.majlis.ir/fa/law/show/790196, accessed on January 16, 2024.
2. 'National employment law', Available at https://rc.majlis.ir/fa/law/show/90706, accessed on January 16, 2024.
3. 'Payment of legal fees', Available at https://rc.majlis.ir/fa/law/show/101597, accessed on January 16, 2024.
4. 'Administrative Offenses Handling Law', Available at https://rc.majlis.ir/fa/law/show/92332, accessed on January 16, 2024.

2.5.2. Coordination Headquarters for Combating Economic and Financial Corruption[1]

This Coordination Headquarters was established on April 30, 2001, with the following duties and objectives:

1. Implementation of the 8-Article Directive aimed at enhancing the efficiency of the administrative system and combating corruption.
2. Establishing coordination among the three branches of government to enhance the utilization of executive, supervisory, regulatory, judicial, and cultural institutions in promoting the efficiency of the administrative system and combating corruption.
3. Convening meetings of the Coordination Headquarters with the participation of the first deputies of the three branches, ministers, members of Islamic Consultative Assembly, and heads of supervisory bodies.
4. Identifying and addressing corruption-prone areas within the administrative and economic system of the country, promoting transparency, enhancing supervision in those areas, and creating a business-friendly environment.
5. Cultivating an administrative culture that reflects anti-corruption measures of the system within society and internationally.

The performance of the Coordination Headquarters has experienced fluctuations since its establishment, with interruptions in the convening of meetings during certain periods. In 2005, a proposal was raised in the Islamic Consultative Assembly to investigate and examine this headquarters, but the proposal was not accepted by the Speaker of the Assembly that year. Instead, representatives were granted the opportunity to express their concerns in a meeting with the head of the judiciary.

2.5.3. Center for Administrative Health Studies and Anti-Corruption in the Judiciary[2]

Given the broad jurisdiction, supervision, and inspection responsibilities, there arises a necessity for a research center that can conduct research and studies in diverse areas related to combating corruption and enhancing administrative integrity. In light of this concern, the Center for Administrative Health Studies and Anti-Corruption in the Judiciary was established within the National General Inspectorate. Its primary objective is to undertake practical and theoretical research projects aimed at bolstering the state of inspection, improving inspection reports, identifying corruption factors, and proposing solutions to enhance administrative integrity. The center was established in 2008. Since its inception, the center has published numerous bi-weekly newsletters, quarterly journals, and books pertaining to the field of corruption.[3]

2.5.4. Supreme Council for Combating Money Laundering and Financing of Terrorism[4]

The Anti-Money Laundering Act was approved in 2007.[5] Pursuant to Article 4[6] of this legislation, the Supreme Council for Combating Money Laundering was established to coordinate the sub-

1. Available at https://www.qavanin.ir/Law/TreeText/85760 and https://rc.majlis.ir/fa/legal_draft/show/831665, accessed on January 16, 2024.
2. See https://discuss.tp4.ir/t/topic/3267/3, accessed on January 16, 2024.
3. See also https://rc.majlis.ir/fa/law/show/132663, accessed on January 16, 2024.
4. 'Instructions for the formation of the High Council for Supervision and Inspection of the Judiciary', Available at https://rc.majlis.ir/fa/law/print_version/1279126, accessed on January 16, 2024.
5. 'Anti-Money Laundering Law', Available at https://rc.majlis.ir/fa/law/show/133400, accessed on January 16, 2024.
6. Available at https://www.dastour.ir/Print/?LID=426627, accessed on January 16, 2024.

ordinate entities engaged in the collection, processing, and analysis of news, documents, records, information, and reports. The Council's primary objectives include the establishment of intelligent information systems, identification of suspicious transactions, and combating the crime of money laundering. The Council is chaired by the Minister of Economic and Financial Affairs and comprises the Minister of Industry, Mining, and Trade, the Minister of Intelligence, the Minister of the Interior, and the Head of the Central Bank.

In 2018, the Anti-Money Laundering Act underwent a review and amendment process,[1] resulting in a change of the Council's name to the Supreme Council for Combating Money Laundering and Financing of Terrorism. The Council is entrusted with investigation of suspicious activities and operations related to money laundering and the financing of terrorism, tracking the flow of funds and the transfer of assets in accordance with legal regulations, and reporting suspicious activities and operations. The Ministry of Intelligence, the Iranian Police Force,[2] the Customs Administration,[3] the Central Bank,[4] the National Organization for Civil Registration,[5] the Central Insurance Organization,[6] the Iranian National Tax Administration,[7] the State Organization for Registration of Deeds and Properties,[8] the Audit Organization,[9] the Securities and Exchange Organization,[10] the Central Headquarters for Combating Goods and Currency Smuggling,[11] the Central Headquarters for Combating Narcotics,[12] and the National General Inspectorate[13] are obligated to securely and electronically transmit supplementary information related to suspicious financial transactions and activities involving money laundering to this center.

2.5.5. The National Authority for the United Nations Convention against Corruption[14]

Iran officially became a Party to the UNCAC on April 9, 2009,[15] designating the Ministry of Justice[16] as the national authority responsible for implementing the Convention within the country.[17] Some of the objectives of this center include addressing legal gaps for the effective implementation of the UNCAC provisions, active participation in international standard-setting initiatives in the field of anti-corruption, enhancing Iran's standing in international corruption rankings,

1. 'Anti-Money Laundering Amendment Law', Available at https://rc.majlis.ir/fa/law/show/1107413, accessed on January 16, 2024.
2. Available at https://police.ir, accessed on January 16, 2024.
3. Available at https://www.irica.ir, accessed on January 16, 2024.
4. Available at https://www.cbi.ir, accessed on January 16, 2024.
5. Available at https://www.sabteahval.ir, accessed on January 16, 2024.
6. Available at https://centinsur.ir, accessed on January 16, 2024.
7. Available at https://tax.gov.ir/Pages/HomePage, accessed on January 16, 2024.
8. Available at https://ssaa.ir, accessed on January 16, 2024.
9. Available at https://audit.org.ir, accessed on January 16, 2024.
10. Available at https://www.seo.ir, accessed on January 16, 2024.
11. Available at https://epe.ir, accessed on January 16, 2024.
12. Available at https://news.dchq.ir/3/, accessed on January 16, 2024.
13. Available at https://bazresi.ir, accessed on January 16, 2024.
14. Available at https://www.moj.gov.ir/ImportantActions, accessed on January 16, 2024.
15. 'The law of accession of the government of the Islamic Republic of Iran to the United Nations Convention against Corruption', Available at https://rc.majlis.ir/fa/law/show/134837, accessed on January 16, 2024.
16. Available at https://www.moj.gov.ir, accessed on January 16, 2024.
17. Available at https://rc.majlis.ir/fa/law/show/879685, accessed on January 16, 2024.

strengthening measures to prevent and combat bureaucratic corruption, and facilitating international cooperation and technical assistance in corruption prevention and combat.

2.5.6. Committee for the Fight against Corruption, Fraud, and Money Laundering of the Supreme Audit Court[1]

Following the enactment of the Anti-Money Laundering Act in 2007[2] and the subsequent issuance of its executive regulations in 2010,[3] as well as the establishment of the Anti-Money Laundering Council[4] and its approval of the Implementing Guidelines for Anti-Money Laundering,[5] the Supreme Audit Court has actively integrated the enforcement of this legislation into its agenda since 2011. Consequently, the Committee was established to address these issues. The primary objective of establishing this committee was to ensure compliance with anti-money laundering laws and regulations within the entities falling under its jurisdiction and to enhance the effectiveness and efficiency of implementing these laws and regulations in the fight against money laundering.

As an initial step, the Supreme Audit Court developed monitoring guidelines for ensuring adherence to existing anti-money laundering laws and regulations. These guidelines were disseminated to all audit groups and institutions. Furthermore, in fulfillment of its legal responsibilities and with the aim of benefiting from the experiences of other supreme audit institutions and international audit bodies, the Supreme Audit Court became a member of INTOSAI (the International Organization of Supreme Audit Institutions)[6] and ASOSAI (the Asian Organization of Supreme Audit Institutions).[7] The Court actively contributes to documenting the latest advancements in anti-money laundering audit practices worldwide and within the Asian region. Notably, it successfully developed guidelines for combating money laundering and corruption at the INTOSAI level, which were implemented in 2014. In this regard, the Supreme Audit Court of Iran holds membership and chairs the tenth research project under ASOSAI, titled "Fighting Money Laundering and Corruption (Forensic Auditing and Fraud Detection)."

2.5.7. Committee for Combating Money Laundering in Banks[8]

Pursuant to Article 18 of the third chapter of the Executive Regulations for Combating Money Laundering, approved in 2009,[9] banks, financial institutions, and individuals specified in the law are legally obligated to establish a designated unit responsible for combating money laundering and to notify the Secretariat[10] accordingly. This Committee is tasked with supervising and implementing measures to prevent money laundering within their respective organizations.

1. Available at https://www.iacpa.ir, accessed on January 16, 2024.
2. 'Anti-Money Laundering Law', Available at https://rc.majlis.ir/fa/law/show/133400, accessed on January 16, 2024.
3. 'Executive Regulations of Anti-Money Laundering Law', Available at https://rc.majlis.ir/fa/law/show/136036, accessed on January 16, 2024.
4. 'Presenting a report on the activities of the Supreme Anti-Money Laundering Council', Available at https://dolat.ir/detail/239946, accessed on January 16, 2024.
5 . Available at https://www.iacpa.ir/قانون-مبارزه-با-پولشویی, accessed on January 16, 2024.
6. Available at https://www.intosai.org, accessed on January 16, 2024.
7 . Available at https://asosai.org/asosai/, accessed on January 16, 2024.
8 . Available at https://units.bmi.ir/fa/Unit.aspx?id=9957, accessed on January 16, 2024.
9. 'Executive Regulations of Anti-Money Laundering Law', Available at https://rc.majlis.ir/fa/law/show/136036, accessed on January 16, 2024.
10. Available at https://iranaml.mefa.ir/, accessed on January 16, 2024.

Article 18 of the aforementioned regulations, outlines the responsibilities of individuals or units assigned with combating money laundering including:

1. Examining, investigating, prioritizing, and providing opinions on the reports submitted by relevant personnel and transmitting the reports to the financial intelligence unit.
2. Monitoring the activities of customers and developing necessary software to facilitate quick access to required information and the systematic identification of suspicious transactions.
3. Inspecting and monitoring the units under their jurisdiction to ensure full compliance with laws and regulations.
4. Monitoring and maintaining records and correspondence related to the relevant entity concerning money laundering and the financing of terrorism, and ensuring adequate financial resources for counter-terrorism efforts.

Since its establishment, the Committee has implemented a range of measures to address money laundering. For instance, the Central Bank of Iran has dedicated a section of its information dissemination platform to the prevention of money laundering. This section comprises resources such as laws, regulations, guidelines, circulars, relevant research literature and translations of relevant international documents. Furthermore, the Ministry of Economic Affairs and Finance[1] has issued a circular mandating banks to implement a comprehensive Anti-Money Laundering (AML) system. This system enables the timely processing of transactional data, tracking the transfer and movement of funds, and identification of payment instruments used. Notably, banking information has been recorded in this system since 2009.[2]

2.5.8. Committee for Administrative Health and Safeguarding People's Rights[3]

This committee is formed to execute the objectives of the Plans of the Administrative System Reform,[4] provisions of the Country Management Services Law,[5] including Articles 90 and 91, and other relevant regulations pertaining to promoting organizational culture, honoring authorities, organizing complaint handling, administrative health, and combating administrative corruption. This committee was established in the ministries,[6] organizations,[7] and institutions[8] in 2015, and its formation process is ongoing. The key responsibilities of the Committee include determining, safeguarding and solidifying people's rights, increasing accountability, responsibility, and public trust, enhancing administrative health, and reducing corruption.

1. Available at https://www.mefa.ir/en-US/english.mefa/5942/page/Home, accessed on January 16, 2024.
2. Available at https://iranaml.mefa.ir/, accessed on January 16, 2024.
3. 'Guidelines for the protection of people's rights and administrative health', Available at https://www.shenasname.ir/salamat/2655-bakhsh35, accessed on January 16, 2024.
4. Available at https://www.shenasname.ir/tahavol/2372-map93 and https://rc.majlis.ir/fa/law/show/1072527, accessed on January 16, 2024.
5. Available at https://rc.majlis.ir/fa/law/show/130021, accessed on January 16, 2024.
6. See for instance https://lorestan.farhang.gov.ir/fa/slamat2, accessed on January 16, 2024.
7 . See for instance https://bazresi.irantvto.ir/uploads/137/old/salamatedari.pdf and https://www.thmporg.ir/note/5366/preview/, accessed on January 16, 2024.
8. See for instance https://fa.pasteur.ac.ir/کمیته-سلامت-اداری-و-صیانت-از-حقوق-مردم, accessed on January 16, 2024.

2.5.9. Commission for Publication and Access to Information[1]

By the order of the President in September 2014, the Commission for Publication and Access to Information was formed. The objectives and responsibilities of this commission include protecting the freedom of information and public access to information available in public procurement institutions, and developing necessary implementation plans in the field of information dissemination. In 2015, the proposal for the Commission regarding the executive bylaw of the Access to Information Act[2] was approved by the Board of Ministers. Furthermore, in 2017, this Commission examined and approved the "Dispute Resolution Procedure for Information Provision."[3] According to this Enactment, if an institution refuses to provide information to an applicant or provides incomplete information, the applicant can file a complaint with the Commission for further investigation, and if the process continues, the responsible manager may face administrative and criminal penalties.

2.5.10. The Fraction for Transparency, Economic Reform, and Financial Discipline[4]

This Fraction was established in the Islamic Consultative Assembly in 2016. Members of the Assembly from various fractions have participated in the sessions of the Transparency Fraction since its inception. The main objective of this Fraction is to influence the transparency process of the legislative branch and to institutionalize a culture of transparency, integrity, and justice. The strategies adopted by this Fraction fall within four categories: legislative, supervisory, executive, and promotional.

2.5.11. Headquarters for Transparency in the Welfare Organization[5]

In 2018, the Headquarters for Transparency in the Welfare Organization was established with the aim of undertaking necessary actions to enhance organizational transparency through the development of appropriate strategies in the following areas and reporting to the President of the Welfare Organization:

1. Collaboration in creating the necessary conditions for the effectiveness and further development of the information technology domain in line with organizational transparency.
2. Reformation and elimination of unnecessary processes, with efforts directed towards expanding employee participation in the organizational decision-making and decision-making process.
3. Coordination in enhancing the health of the administrative and financial system through the utilization of modern methods and tools in support of e-government implementation.
4. Expansion of the necessary grounds for data transparency, statistics, information, maps,

1. 'The law of publishing and free access to information', Available at https://iranfoia.ir, https://rc.majlis.ir/fa/law/show/780303, accessed on January 16, 2024.
2. 'Executive Regulations of the Law on Publishing and Free Access to Information', Available at https://qavanin.ir/Law/TreeText/244251, https://rc.majlis.ir/fa/law/show/937940, accessed on January 16, 2024.
3. Available at https://rc.majlis.ir/fa/law/show/1150862, accessed on January 16, 2024.
4 'The formation of the "Transparency and Sanitization of the Economy and Financial Discipline" faction', Available at https://rc.majlis.ir/fa/news/show/974733, accessed on January 16, 2024.
5. Available at http://shafaf.behzisti.ir, accessed on January 16, 2024.

and program plans, presented clearly to stakeholders of the organization.

2.6. Corruption Perceptions Index

Overall, the 2000s can be considered as the heyday of institutionalized efforts to combat corruption in Iran. There were five active anti-corruption institutions in Iran in the decade and this reflects the grave situation of corruption meantime. In the first half of the 2010s, the situation improved to some extent as six more institutions joined the efforts in this field, reaching a relatively consistent level with an average ranking of 130-144 out of 180 countries. However, it has recently gained in an alarming rise.

Year	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022	2023
Rank	133	144	136	130	131	130	138	146	149	150	147	149

Table 1: Corruption Perceptions Index (CPI) of Iran in 2012-2023 among 180 Countries

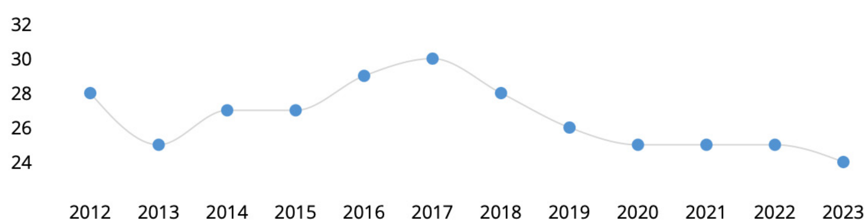

Figure 1: Score Changes of Iran Based on the CPI out of 100

3. Analysis and Classification of Anti-Corruption Strategies in Global and Iranian Policies

This section delves into the analysis and classification of anti-corruption strategies employed in global and Iranian policies. It provides an in-depth examination of different approaches and tactics used to combat corruption. Each classification is explored in detail to understand the various methods and measures employed within these strategies. Furthermore, it identifies areas where improvements can be made and offers recommendations for enhancing the existing framework. By critically assessing the strengths and weaknesses of the current system, valuable insights can be gained to inform future anti-corruption initiatives in Iran. Together, these analyses provide a comprehensive understanding of anti-corruption strategies both globally and within the Iranian context.

3.1. Classification of Anti-Corruption Strategies

The content of global and Iranian strategies could be classified into three broad categories: economic-financial strategies, cultural-social strategies, and administrative-judicial strategies.

3.1.1. Economic-Financial Strategies

The economic-financial strategies encompass measures such as privatization and transfer, major reforms in economic and commercial systems (e.g., banking, insurance, customs, and taxes), financial discipline and legality, and the elimination of monopoly to promote a more competitive economy.

3.1.2. Cultural-Social Strategies

The cultural-social strategies involve improving public services (e.g., medical insurance, job creation, social welfare), enhancing the cultural and social aspects of administrative and economic health, promoting freedom and respecting the right to access information and transparency, improving accountability within the administrative system, and encouraging the participation of the non-governmental sector in anti-corruption programs.

3.1.3. Administrative-Judicial Strategies

The administrative-judicial strategies focus on establishing a meritocracy system, ensuring fairness in wages, strengthening personal and professional ethics, enhancing the productivity of administrative procedures, enacting laws and developing preventive programs, implementing deterrent punishments, and establishing comprehensive monitoring mechanisms within and outside the system.

3.2. Gap Analysis in the Iranian Legal Framework and Recommendations for Enhancement

The following recommendations are proposed to address existing and potential gaps and to enhance administration, policy, and governance in Iran:

1. Limiting the sphere of discretionary competence of public officials.
2. Implementing systematic supervision through integrated supervisory and regulatory bodies.
3. Establishing and strengthening e-governance infrastructures, such as e-procurement and e-payments.
4. Promoting transparency and accountability in the public sector administration.
5. Institutionalizing both proactive and reactive anti-corruption measures.
6. Fostering international cooperation with successful anti-corruption institutions.
7. Empowering the academic community to research effective anti-corruption strategies.
8. Facilitating and ensuring protection for whistle-blowers.
9. Promoting professional ethics and moral values within the administrative systems.
10. Establishing administrative governance based on administrative constitutionalism.

Conclusion

In conclusion, the model of good governance, which emphasizes the participation of civil society, the private sector, and the government, has emerged as a successful approach in public affairs administration. By prioritizing indicators such as participation, transparency, accountability, the rule of law, and consensus orientation, this model aims to reduce corruption in public offices and institutions. Through fostering accountability, transparency, and citizen feedback, good governance facilitates the establishment of an efficient and transparent government. Key elements such as meritocracy, clear laws, fair rule of law, civil society engagement, and independent mass media contribute to enhancing accountability, increasing revenues and investments, and combating corruption.

Research indicates that Iran has primarily relied on social strategies, particularly the strengthening of civil society, in addressing corruption. Findings support the need for a robust

strategy centered around empowering civil society to effectively combat corruption. The indicators used in the anti-corruption field, which prioritize civil society strategies, align with relevant variables. Given that good governance indicators emphasize the importance of a strong civil society within political structures, they should play a crucial role in successfully reducing corruption in societies. Civil institutions contribute to this goal by monitoring government performance, promoting transparency, public education, a culture of lawfulness, and the prevention of corruption.

In the broader context, governance is an interactive process where citizens and political elites collaborate to achieve shared priorities. Good governance is characterized by effectiveness, efficiency, transparency, citizen participation, and accountability. Corruption, on the other hand, hampers development, democracy, and good governance, and is symptomatic of inefficiencies within the government system. It is prevalent across various aspects of social life and arises from factors such as a disruptive political environment, weak judiciary, and poor administrative management.

The significance of good governance cannot be understated, as it is crucial for efficient public institutions and a well-functioning political system. However, corruption disrupts this interaction and impedes development, democracy, and good governance. To combat corruption and enhance governance, it is essential to strengthen education, social care, and civil institutions, while promoting civil society participation, transparency, and accountability. Civil society plays a vital role in safeguarding citizens' rights, monitoring government activities, and ensuring a balance of power. Their involvement in decision-making and performance evaluation improves transparency and citizen participation. A developed and informed civil society can effectively monitor anti-corruption measures, contributing to a healthy system. Activities such as monitoring government performance, promoting public education, establishing a culture of lawfulness, and advocating for reform are critical functions of civil institutions.

In Iran, corruption has had detrimental consequences, and efforts to control and combat corruption face obstacles and political considerations. However, by embracing the principles of good governance and empowering civil society, Iran can make significant strides in addressing corruption and promoting effective governance, policy-making and administration. It is imperative to recognize the importance of transparency, accountability, and citizen participation in fostering a system that is resilient against corruption and supportive of sustainable development and democracy.

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Book Review of "the Legal Implications of the United States' Strike on General Soleimani, His Associates, and Iran's Respones" Edited by Mostafa Fazaeli*

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ABSTRACT

"The Legal Implications of the United States' Strike on General Soleimani, His Associates and Iran's Response" offers a comprehensive examination of the assassination of General Soleimani from the perspective of international law. This book sheds light on the subject by delving into the various dimensions of international law, including international treaty law, international criminal law, the use of force in international law, humanitarian law, and the fight against terrorism, with a focus on elucidating the act of terrorism committed by the United States. The book's strengths lie in its emphasis on international treaties and its reflection of Eastern thought regarding the assassination of an anti-terrorism hero within the framework of international law. Furthermore, the book seeks to establish legal convergence in the Middle East regarding the assassination of General Soleimani and to counter United States' Lawfare against Iran's authorities. However, the book falls short in failing to address certain recent developments, such as changes in foreign policy after the Trump Administration, Iran's intention to bring the case before the International Court of Justice, and the conclusion of legal proceedings concerning General Soleimani's assassination in Iran and Iraq.

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Introduction

International issues often lend themselves to multiple perspectives and analyses. Consequently, legal publications frequently present diverse interpretations of similar subjects, reflecting the varied approaches and legal analyses of scholars and commentators. "The Legal Implications of the United States' Strike on General Soleimani, His Associates and Iran's Response"[1] is a recently published book (comprising a collection of articles) from the Qom University Press that offers a unique perspective on the assassination of General Qassem Soleimani. Written in English, the book incorporates the viewpoints of nearly twenty legal experts specializing in international law and criminal law.

1. Organization of the Book

In the foreword to the book, the editor, Mostafa Fazaeli, a prominent Iranian legal scholar discusses the existing foundations of the international order and the principles that govern it, such as sovereign power, political independence, territorial integrity, and non-interference in the internal affairs of States. Fazaeli acknowledges that while the general rule is to prohibit the use of force or the threat of force between States, there are exceptions, such as legitimate self-defense and collective security, as outlined in the United Nations Charter. He highlights that some States, particularly major powers, have adopted controversial approaches and interpretations to expand the scope of the use of force in the post-Cold War era, giving rise to concerns, criticisms, and doubts from many States, international institutions, and legal doctrines. Fazaeli expresses concern that these expansionist approaches may have undermined the rule of law and replaced it with the rule of power.

Fazaeli specifically references the military drone strike ordered by then-President Donald Trump of the United States on January 3, 2020, which targeted General Soleimani and Abu Mahdi al-Muhandis in Iraq. He deems this action as lawless and a violation of international law, human rights law, and existing treaties and agreements. He highlights the engagement of the

1 . Mostafa Fazaeli, 'The Legal Implications of the United States' Strike on General Soleimani, His Associates and Iran's Response' (2023) Qom University Press.

Iranian academic community, particularly legal scholars, in this regard and includes relevant contributions from prominent legal professors and researchers from Iran and other countries. He provides brief overviews of each article, facilitating readers' selection.

2. Content Analysis

The book provides a legal analysis of the assassination of General Soleimani through fourteen articles, which are not specifically categorized, aiming to present various aspects of the subject to an English-speaking audience. The articles cover topics such as the legal dimensions of the United States' assassination of General Soleimani, the nature of this act in light of the prohibition of the use of force, consideration of humanitarian law and international crimes, the use of drones for terrorist activities, the United States' approach to targeted killings, international responsibility arising from the actions of the United States, and the criminal responsibility of United States' political and military officials involved in this operation. Additionally, several articles examine Iran's reciprocal actions.

Some articles argue that the United States' action constitutes a violation of international law and an act of aggression. They discuss the potential jurisdiction of international courts, such as the International Criminal Court and the International Court of Justice, to address the United States' legal responsibility for the attack. Some others address the violation of Iraq's sovereignty, the absence of legal justifications presented by the United States, and the implications of the attack on international laws and regulations, including human rights law and international humanitarian law.

Some authors examine the feasibility of characterizing the assassination as a crime against humanity and discuss the challenges in prosecuting the perpetrators. The book also explores Iran's potential legal responses to the attack, such as forcible reprisal, use of force short of war, and filing complaints before national and international courts and tribunals. It further discusses the legitimacy of Iran's retaliatory missile attack on the US Ain al-Assad base in Iraq and its compliance with international law.

The contributing authors of the book delve into the underlying reasons for the actions of the Trump Administration and the rationale behind the assassination of General Soleimani from an extra-legal perspective. General Soleimani, in his final years, made significant efforts to combat terrorism in Syria and Iraq, particularly the terrorist group ISIS. The book argues that the assassination, framed as the "War on Terrorism," failed to convince legal scholars and instead exemplified the terrorist nature of the action.

The publication of the book by Qom University Press and with special contribution of the International Law Department of the University holds significance as the institution is a leading center for humanitarian studies in Iran. The Department has organized numerous national and international conferences, seminars, and programs focusing on International Humanitarian Law. Additionally, the simultaneous publication of the book in Persian, Arabic, and English reflects the Department's commitment to international audiences and signifies its Iranian-Islamic and Middle Eastern perspective on international legal issues.

2.1. Distinctive Features

The book possesses several notable features from the perspective of international law:

1. **Recognition of General Soleimani as an anti-terrorism figure**: In contrast to the statements of certain US officials and European governments, the book acknowledges General Soleimani's status as an anti-terrorism hero in the Middle East region. This departure in perception has led Western governments to take legal action against him while supporting Western political and military positions. By highlighting General Soleimani's anti-terrorism persona, the book offers a realistic and legally grounded perspective that challenges the misleading and self-serving statements made by Trump and the Trump Administration. The author contends that this outlook reflects a realistic and Eastern perspective on the assassination of General Soleimani.
2. **International consensus on the lack of legal justification for the United States' action**: Despite the majority of authors being distinguished professors from Iranian universities, the inclusion of non-Iranian authors in the book highlights the absence of sound legal justifications for the terrorist act committed by the United States, as acknowledged not only by Iranians but also by legal scholars from other countries. The book incorporates references that illustrate the US government's attempts to downplay its involvement in the act.
3. **Comprehensive examination from various perspectives**: The book explores the actions of the United States from diverse angles, encompassing topics such as treaty law, criminal law, the use of force, humanitarian law, and terrorism. By adopting a multidisciplinary approach, the book provides readers with a comprehensive understanding of the legal implications surrounding the assassination of General Soleimani.
4. **A treaty-based approach in examination:** A significant portion of the book relies on treaty law. Treaty law represents a fundamental component of international law that experiences minimal disagreement. Consequently, arguments based on treaty law are universally understandable. The examination of the United States' actions from the perspective of its agreements with Iraq (SOFA, 2008) and the "Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973)," as well as the "Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)," constitutes a significant portion of the articles in this book. Distinct from the majority of works published on the assassination of General Soleimani, this book does not solely focus on examining the nature of the United States' actions; it also considers the compliance of Iran's legitimate Self-Defense from the perspective of international law. This matter holds significance because conventional thought in international law deems legitimate self-defense as an inherent right in response to aggression and violation of political independence or territorial integrity. However, based on the accepted developments outlined in United Nations General Assembly Resolution 3314 on the definition of aggression, harm to the sovereignty of a State and its governmental authorities also allows for reference to self-defense.
5. **Provision of legal responses to frequent questions:** The legal warfare waged by the

United States and the European Union against the Islamic Revolutionary Guard Corps, known as IRGC, and the endeavor to label this official military force of the Islamic Republic of Iran as a terrorist entity, though addressed by the political entities of the Iranian government in recent years, prompts this book to offer a legal response to the claims and components of this legal warfare.

2.2. Limitations

While the book offers valuable insights, it has certain limitations:

1. **Temporal limitations**: The majority of articles in this book were written shortly after the assassination of General Soleimani, and significant international and domestic events have occurred since then which are not reflected in the book. These events include the transition from the Trump Administration to the Biden Administration and the absence of escalation of particularistic policies by the new government, which highlight the political and military responsibilities of the Trump Administration.
2. **Limited examination of recent developments in the case**: Several significant developments have taken place in the years following the writing of these articles regarding the case of the assassination of General Soleimani. These include the initiation of an Iranian-Iraqi lawsuit by the families of the victims in Iraqi courts and the agreement between the judiciary authorities of Iran and Iraq to pursue the legal aspects of this case. The book does not address these developments, which could provide valuable insights into the legal implications of the case. Readers seeking the most up-to-date information on these matters will need to consult additional sources.
3. **Potential bias and limited perspective**: As the articles are for the most part authored by legal experts from Iran, there is a possibility of bias or a specific perspective being promoted. While the book aims to provide a Middle Eastern viewpoint, readers should be aware that alternative perspectives may exist.
4. **Insufficient attention to diplomatic law and international immunity**: The book pays little attention to the dimensions of General Soleimani's assassination from the perspective of diplomatic law and international immunity. New documents presented during the judicial proceedings indicate that General Soleimani had traveled to Iraq at the official invitation of the Iraqi government and was on a diplomatic visit. Exploring these issues in greater detail would enhance the book's analysis of the case.
5. **Lack of discussion on Iran's legal instruments and potential future actions**: The book does not adequately address Iran's legal tools to encounter potential future actions by the United States. The new Iranian government, the Raisi Administration, has expressed a strong belief in pursuing national interests through international legal means. It would have been beneficial for the book to dedicate a section to the possibility of Iran bringing a lawsuit to the International Court of Justice and the potential outcomes of such legal action.
6. **Translation and language considerations**: A significant portion of the book was originally written in Persian and translated into English and Arabic. This may introduce po-

tential inaccuracies and misconceptions in legal facts and terminologies in the translation process. While efforts have been made to address this issue, readers should remain cautious about the possible impact on the precision of the legal content in translation.

7. **Limited accessibility to non-English sources**: The book relies in part on Persian sources, which may pose a challenge for the Arabic and English-speaking audience who may require the original sources for thorough comprehension. Although the logic recruited in authoring the articles is rooted in international law, it is essential to acknowledge the value of including non-English sources to reflect global concerns and perspectives in legal analysis.

Conclusion

"The Legal Implications of the United States' Strike on General Soleimani, His Associates, and Iran's Response" is a valuable contribution to the field of international humanitarian law, offering a comprehensive analysis of the assassination of General Soleimani. The book explores various legal dimensions, provides a Middle Eastern perspective, and challenges the justifications provided by the United States for its actions. However, readers should supplement their understanding with more recent developments and consider alternative viewpoints to gain a comprehensive understanding of the topic.

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Praise to God, Iranian Journal of International and Comparative Law was founded at the initiative of the International Law Department of University of Qom. It officially started work as a bi-annual, open access, English language and peer- reviewed law journal under the permission granted by the Ministry of Culture and Guidance of the Islamic Republic of Iran in winter, 2021. This bi-quarterly is the leading comprehensive English language journal on international and comparative law published in Iran. The journal enjoys a great editorial team and advisory board of prominent professors from different countries. In the effort to advance the knowledge of International and comparative law, the journal is committed to obtain valid international indexes in the first issue and thus submission of high quality articles by distinguished professors, scholars, thinkers and researchers in the field of international and comparative law will be mostly welcomed.

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