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BOOK REVIEW

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The Iranian Journal of International and Comparative Law (IJICL) is a bi-annual, open access, English language and double-blind peer- reviewed law journal. IJICL explores all issues at the forefront of *international and comparative law*, including International Law of Armed Conflicts, International Human Rights Law, International Criminal Law and criminology, International Economic Law, International Trade Law, international Treaty Law, Law of International Organizations, International Intellectual Property Law, International Dispute Resolutions, International Law of the Seas, International Aerospace Law, International Energy Law, International Environmental Law, International Labor Law, The law of state responsibility, Private International Law, Philosophy of International Law, International Islamic Law, and Comparative Studies of Legal Issues in Different Legal systems. The journal also intends to cover diverse Iranian legal issues with international aspects, ranging from the laws, regulations and legal procedures with international dimensions, to judicial rulings of the Islamic Republic of Iran; and to critique the works of international law authors in all issues of the journal. Although Iran-related topics are a priority, the journal welcomes any articles on a variety of topics in international law or comparative law from around the world.

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Announcement

As an ancient land, Iran (formerly known as Persia) has been the cradle of human culture and civility since time immemorial and has been home to one of the most gorgeous and significant old civilizations of humanity. The geographical and civilizational status of Iran situated at the crossroad of three continents and on the trade routes between great civilizations from China to Rome has facilitated the Iranians contact with various ethnic groups from Greeks and Arabs to Turks and Tatars in such a way that they link East to West in reality.

In spite of its plurality and multiplicity of cultures and their continuous diversity and development, Iran's territory has been governed by a pervasive cultural flow which is survived and preserved through an internal unity against its seeming plurality. The mechanism of such unity and integrity against various pressures resides in the cultural openness, meticulous selection of foreign elements and the moral and rational compatibility with the surrounding environment and pressures which has led to the survival and preservation of the Iranian identity.

The constituting elements of Iranian civilization which is the fruit of confluence and association of different cultures are mainly ancient Iranian culture, Islamic culture and modernity that, in varying degrees, are combined with each other. The Iranians' character has been such that instead of "self" and "other", the emphasis has been put on right and wrong as a touchstone and assessment of affairs according to human nature. And it is, indeed, for this very reason they have then embraced Islam.

Accordingly, this territory has definitely lent a notable contribution to the formation, development and consummation of the world culture and civilization. Law, a salient manifestation of civility, does have a venerable history in Iran which, as a consequence, has influenced the legal civilization's system of human societies. The long-lasting legacies of different periods of the life of this enduring territory's people are expressive evidence of this historical fact. The Charter of Cyrus the Great which has been frequently referred to in the course of the historical development of law in general and human rights in particular is a clear evidence for this claim. Having embraced Islam besides their own civilizations' humane and rational values, Iranians have remarkably benefited from the unique capacity of the revelational and rational teachings of Islam and its legal system (Sharīah). Combining the achievements and capabilities of these two cultures, they have created a glorious civilization which can be called the Iranian-Islamic Civilization.

Although this great civilization has been through the vicissitudes over time, it has had a constructive influence on the overall process of human progress. A culture and civilization with so distinctive, and perhaps unparalleled in some respects, capabilities and background should not then remain in anonymity and the world should not be deprived of its relative advantages nor should she deprive herself of benefitting from the relative advantages of other civilizations. It is specifically incumbent on the academicians of human societies to facilitate interaction and sharing of thoughts between the different communities so as to resolve the grounds for misunderstandings, enhance the possibilities for convergence and synergy, and make the world a safer, more convivial and peaceful place for the human societies to live through mutual understanding. A shared intelligible language is the means to establishing such interaction and in effect creating empathy and integration between human societies.

In this vein, professors at the University of Qom's Faculty of Law's International Law Department took the initiative to publish the Iranian Journal of International and Comparative Law (IJICL) in English. Several professors and jurists from other universities also help with the process to provide a suitable ground for communicating the views of Iranian jurists on international legal issues and dealing with Iran-related international legal questions as well as open a new door to the expert opinions of professors, thinkers and researchers of rest of the world on these issues and other different topics of international and comparative law.

Therefore, it can be said that IJICL which is published biannually from the early 2023 is an independent scientific organ of the Iranian legal community started its publication mainly with the following goals:

- Reflecting the Iranian perspective (the Iranian jurists) on international law;
- Reconsidering the role and contribution of Iranian-Islamic legal culture and civilization in the formation and evolution of international law;
- Reviewing Iran's international legal issues both descriptively and analytically;
- Identifying and rethinking the views of different legal systems on various national and international legal issues;
- Benefitting from recent legal achievements of human cultures and civilizations in order to reinforce global convergence and solidarity to overcome any untruthfulness, chaos, insecurity and injustice.

In line with the above-cited objectives, IJICL editorial will be more than glad to receive distinguished methodical papers (full article, insight article, state practice, and book review) in the fields of international and comparative law authored by thinkers, professors and researchers around the world and submitted to the Journal's site. The Journal is proudly run under the scientific supervision of an editorial board consisting of several eminent field scholars from different parts of the world. It also benefits from the consultation of an informed advisory board. International Law professors and specialists are welcome to join the editorial/ advisory board.

Hereby, I would like to express my sincere gratitude to the esteemed members of editorial board and advisory board for their generous assistance to the Journal. I am also very grateful to all reviewers for their expert opinions. Officials at the University of Qom deserve special appreciation for their unwavering support: Dr. Ahmad Hossein Sharifi (President of the University),

Dr. Saeed Farahani (Vice-president for Research and Technology), Dr. Ali Ehsani (Director of Research and Technology), Dr. Seyyed Hassan Shobeiri (Dean of Faculty of Law), Dr. Seyyed Yasser Ziaee (Research and Cultural Vice-president of the Faculty of Law) and Mohammadi Reza Shojai (Director of the University Journals Office). Journal staff at the University of Qom and some public and international law Ph. D. students and researchers should be thanked for their kind help, too. May God bless them with all the happiness and success in their life.

In the end, it is hoped that by the grace of God and blessings of Imam Mahdi (PBUH) and the cooperation of all officials and colleagues, the Journal can succeed in achieving the related goals and go always through a dynamic and growing path. Amen.

Mostafa Fazaeli
Editor in chief

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The Contemporary Development of Global Constitutionalism

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ABSTRACT

In the current globalized scenario, in view of the existence of phenomena and dynamics that go beyond state territories, of the integration of States in supranational and globally considered political systems, it is possible to perceive the emergence of new forms of political-legal organization in the international community that raise constitutionals conceptions beyond the classical perspective of the State-centered Constitution Theory. Thus, in view of the manifestation of a quantitative and qualitative growth of international law based on the identification of constitutional elements, an issue that has been gaining importance in debates and in the internationalist agenda, the problem to be developed asks: how is the development of Global Constitutionalism composed? considering the common challenges of the globalized world that transcend state borders, the confusion between external and internal limits, as well as the transformations of law in the international order, it is necessary to analyze the present content due to the need to point out directions by where you can tread the reflection in relation to the development of Global Constitutionalism. In this sense, the present study intends to find theoretical trends that compose the identification of the development process of the Global Constitutionalism paradigm. To answer the exposed problem, some objectives need to be achieved. Initially, an overview of the perspective of classical constitutional theory will be carried out. Then, we move on to the observation of the manifestation of Constitutionalism beyond the State. Finally, trends and aspects of the development of Global Constitutionalism will be examined.

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Introduction

In the current globalized scenario, in view of the existence of phenomena and dynamics that go beyond state territories, of the integration of States in supranational and globally considered political systems, it is possible to perceive the emergence of new forms of political-legal organization in the international community that raise constitutional conceptions beyond the classical perspective of the State-centered Constitution Theory.

Thus, in view of the manifestation of a quantitative and qualitative growth of international law based on the identification of constitutional elements, an issue that has been gaining importance in debates and in the internationalist agenda, the problem to be developed asks: how is the development of Global Constitutionalism composed?

To answer the above problem, some objectives need to be achieved. Initially, an overview of the perspective of classical constitutional theory will be carried out. Then, we move on to the observation of the manifestation of Constitutionalism beyond the State. Finally, trends and aspects of the development of Global Constitutionalism will be examined.

For that, the work made use of the deductive approach, studying the theme based on documentary research and specialized bibliography on the subject, taking into account the range of theoretical conceptions and doctrinal currents that seek to understand the theme, once it develops in a heterogeneous and complex plan of approaches.

That said, considering the common challenges of the globalized world that transcend state borders, the confusion between external and internal limits, as well as the transformations of law in the international order, it is necessary to analyze the present content due to the need to point out directions by where you can tread the reflection in relation to the development of Global Constitutionalism. In this sense, the present study intends to find theoretical trends that compose the identification of the development process of the Global Constitutionalism paradigm.

1. Horizon of classic constitutional theory

The Constitutional Theory is integrated into a long process, evolving the complex idea of "constitution" in different contexts throughout history. The notion can be traced back to antiq-

uity in the concepts of the Greek *politeia* and the Roman *constitutio* and *status republicae*. In medieval times, the notion of constitution overlapped with others, such as the *institutio*, the *lex fundamentalis* and the *Verfassung*[1].

In the Middle Ages, from the institutionalization of Canon Law, the idea of Constitution gains a legal aspect, determining an order to the different political powers of the Church, kings and nobility, delimiting the spheres of action of each through rules, pacts and contracts, as a means of maintaining the balance of relationships. Later, with the institution of modern States, norms emerged that sought the stability of power, conceiving the idea of sovereignty, disciplined to a fundamental state nucleus[2].

Despite the existence of embryonic concepts of constitution since ancient times, its systematization and classical conception emerged from the revolutionary contexts in the United States of America and France at the end of the 18th century. Despite important differences between the two phenomena, the concepts of constitution that emerged, in the wake of the Enlightenment, converged in the consecration of ideas such as the separation of powers, in the establishment of checks and balances and in the protection of the fundamental rights of the citizen as fundamental pillars to be protected by the established legal order[3].

Yet, as important as the American and French phenomena, the English experience of the common law observes a historical constitutional order, based primarily on customary law, which was able to safeguard legal certainty and guarantee rights to the English, without the existence of a written constitution as in other countries[4]. In this sense, it is possible to observe that the constitutionalist movement does not merely depend on the written existence of a state constitution, as it exists independently of the Constitution[5].

Widespread the phenomenon of constitutionalism in the following centuries, it was from the end of the Second World War and its sequels that the place of the Constitution and the influence of constitutional law on contemporary institutions were cemented. During the second half of the 20th century, one of the major paradigm shifts was the attribution to the constitutional norm of the status of a legal norm, overcoming the model that prevailed in Europe in which the Constitution was seen essentially as a political document, inviting the action of the Public Powers, consolidating the notion of supremacy of the Constitution. Such a constitutional wave produced a new form of political organization, primarily known as the Constitutional Rule of Law[6].

In this way, the rule of law has become the predominant model for structuring the constitutional order of the state in the era of globalization, with some essential elements, such as the protection of fundamental rights and their promotion, including social rights, the separation of powers and

1. Fassebender Bardo, 'International Constitutional Law: Written or Unwritten?', (2016), v. 15, n. 3, Chinese Journal of International Law, 494-495.
2. Trindade Otávio Cançado, 'A constitucionalização do direito internacional: Mito ou realidade?' (2008), v. 78, n. 45, Revista de Informação Legislativa, Brasília, 274.
3. Saunders Cheryl, 'Constitution Transformation. Global Constitutionalism', (2021), v. 10, n. 2. Cambridge University Press, 241-242.
4. Fassebender, Bardo. International Constitutional Law: Written or Unwritten?', (2016), v. 15, n. 3, Chinese Journal of International Law, 497-500.
5. Luz Eduardo Silvaand Sapio Gabriele, 'Relativização da Soberania Estatal em da Possibilidade de um Constitucionalismo Global', (2018), v. 1, n. 28, Actio Revista de Estudos Jurídicos, 159.
6. Barroso Luís Roberto, 'Neoconstitucionalismo e constitucionalização do Direito (O triunfo tardio do direito constitucional no Brasil)', (2005), 240 Revista de Direito Administrativo, 3.

the principle of legality, and, despite variations, the rule of law is composed of recognized values in accordance with common foundations and determinations of international society[1].

In this way, considering the multiplicity of conceptual understandings that the Theory of the Constitution entails, it is necessary to clarify key terms such as "constitution", "constitutionalism" and "constitutionalization", due to the "evaluative-descriptive" quality that these have when used in the context of the discussion of a global constitutionalism.

"Constitution", being a historical process that composes institutional forms to accommodate the plurality of interests, assumes the notion of basic legal norms that comprehensively regulate the social life and power dynamics of a political community[2]. In this sense, for a body of law to be recognized as a constitution, certain functions and content are identified and must be present, such as the organization and institution of the political entity as a legal entity, the separation of powers, establishing the general lines of policy, of morality, justice and government, as well as the presence of fundamental rights, and, more recently, the guarantee of minimum social security[3].

"Constitutionalism", in turn, is more than the term "constitution" loaded with material content, or simply having a constitution. It is essentially a cognitive framework on how to act in a political world in a constitutive process[4]. It thus sustains a complex of political conceptions, legal procedures and moral value, elaborated in the conditions of the course of a history, with the objective of imposing limits, controls and rules to the exercise of political power[5].

"Constitutionalization", namely, implies both for the emergence of constitutional law within a given legal order, and for the spread of constitutionalism as a mindset[6]. In this framework, the idea of constitutionalization examined is associated with an expansive effect of constitutional conceptions, whose material and axiological content radiates throughout the legal system[7].

From this panorama, from the perspective of classical Constitutional Theory, it follows a preliminary analysis of the forms and processes of manifestation of Constitutionalism beyond the State, as a means from the Global Constitutionalism paradigm.

2. Manifestation of constitutionalism beyond the state

In view of the above, it is necessary to examine the manifestation of constitutionalism beyond the national State, through the operation of a process of constitutionalization of international law, the development of the protection of human rights in the international community, the introduction of international norms oriented to the common good and reporting to the constitutional character of the United Nations Charter.

1. Liziero Leonam Baesso da Silva, 'A Constitucionalização do Direito Internacional como Efeito da Globalização', (2018), Vol. 8, n. 24, Revista Húmus. São Luís, MA, 97.
2. Peters Anne 'Compensatory Constitutionalism: The Function and Potential of Fundamental Norms and Structures', (2006), n. 19, Leiden Journal of International Law, 581.
3. Carvaliho Leonardo Arquimino, 'de. Constitucionalização do Direito Internacional: uma (re)introdução ao tema', (2012), Revista Via Iuris, São Paulo, dez, 89.
4. Peters Anne and Armingeon Klaus, 'Introduction: Global Constitutionalism from an Interdisciplinary Perspective', (2009), v. 16, n. 2, Indiana Journal of Global Legal Studies, 388-389.
5. Almeida Lilian Barros de Oliveira, 'Globalização, constitucionalismo e os Poderes do Estado brasileiro', (2018), v. 55, n. 219, Revista de Informação Legislativa: RIL, 241-242.
6. Peters Anne and Armingeon Klaus, 'Introduction: Global Constitutionalism from an Interdisciplinary Perspective', (2009), v. 16, n. 2, Indiana Journal of Global Legal Studies, 389-390.
7. Barroso Luís Roberto, 'Neoconstitucionalismo e constitucionalização do Direito (O triunfo tardio do direito constitucional no Brasil)', (2005), 240 Revista de Direito Administrativo, 12-13

2.1. the constitutionalization of international law

Despite the commonplace judgment that the constitutional phenomenon is connected to a nation-state frame, this fact does not mean exclusively and necessarily that Constitutionalism and the elements of the notion of Constitution cannot transcend state borders to deal with other possibilities of political-legal organization, namely in the international community[1].

In this circumstance, theories about the constitutionalization of international law are asserted, which aim to describe the quantitative and qualitative growth of international law based on the identification of constitutional elements, which can be verified in its norms, interpreted in communion with the constitutional law of the States, as well as in the practice of courts and other international institutions[2].

Faced with the common problems of the globalized world that transcend state borders, the study of a constitutionalized international order is based on the search for understanding the problem of sovereignty and the role of States in the contemporary world, the growth in the number of actors in the international public sphere, the proliferation of normative sources and international decision-making bodies, erga omnes and jus cogens norms, the need for transnational cooperation, the challenges of global issues and even in the face of the fragmentation of international law[3]. It is the purpose of international law to address these concerns through the fair participation of relevant stakeholders, and it is the duty of States to support and sustain the development of an international law that is capable of fulfilling this function[4].

The legal community inevitably finds itself questioned by world transformations, and, in this context, the impact of globalization affects the concept of constitution and is reflected in comparable questions about the impact on the institution of the State. As globalization is a multifaceted and polycentric phenomenon, it also has the peculiarity of limiting the sovereignty of States and re-signifying their functions[5].

As a central element in the State system, sovereignty takes place in the internal conception, as an expression of the ultimate authority legitimized to superimpose itself over the population of a given territory, in order to configure itself as the expression of domain governance[6]. However, there can be no autonomous national constitutional legitimacy since the practice of self-government within the framework of the sovereign state raises the issue of negative externalities relevant to justice, such as the expansion of communications, terrorism and related measures of their containment, international trade and finance, migratory flow, drug trafficking and environmental concerns. Given the possibility of reasonable disagreement among States on how these externalities should be taken into account, any claim by a State to resolve these issues authoritatively and unilaterally amounts to a form of domination[7].

1. Viviani Maury Roberto, Constitucionalismo Global: crítica em face da realidade das relações internacionais no cenário de uma nova ordem mundial, (Rio de Janeiro: Lumen Juris 2014), 169.
2. Rocha Isly Queiroz Maia, 'Limites da Constitucionalização do Direito Internacional no Sistema Interamericano: uma Análise dos Modelos Teóricos do Pluralismo Constitucional e do Constitucionalismo Multinível', (2021), Vol. 8, N. 01, Revista Vertentes do Direito, 133.
3. Viviani Maury Roberto, 'A Amplitude Constitucional da Carta Das Nações Unidas: Controvérsias de uma Proposta de Constituição para a Comunidade Internacional', (2016), Vol. 2, N. 2, Conpedi Law Review. Oñati, Espanha, 3.
4. Kumm Mattias, 'Constitutionalism and the Cosmopolitan State', (2013), Vol. 20, N. 2, Indiana Journal of Global Legal Studies, 9-10.
5. Saunders Cheryl, 'Constitution Transformation. Global Constitutionalism', (2021), v. 10, n. 2, Cambridge University Press, 244-245.
6. Viviani Maury Roberto, Constitucionalismo Global: crítica em face da realidade das relações internacionais no cenário de uma nova ordem mundial, (Rio de Janeiro: Lumen Juris 2014), 98.
7. Kumm Mattias, 'Constitutionalism and the Cosmopolitan State', (2013), Vol. 20, N. 2, Indiana Journal of Global Legal Studies, 9-10.

Thus, the State is in a relative crisis of legitimacy in relation to its sovereignty and autonomy in its internal policies. Although the State Constitutions continue to regulate the public power, it no longer holds the primacy of this task, as competition with other actors external to the State's order is greatly expanding. Currently, this manifestation of sovereign power can already be observed in other non-state sources, which seek to ensure the security of collective action through norms arising from new political scales, more capable of dealing with these new globalizing processes[1].

The State then starts to act in a more fragmented field of political decision-making, permeated by transnational networks. The strict link between territory and political power that existed in a restricted way is broken. New international and transnational institutions link sovereign states and transform, in part, sovereignty into a shared exercise of power[2].

In this way, the Constitutional State appears today correlated with the so-called "International Constitutional Law", observing a supranationalization or internationalization of the Constitutions of States, implying that States are incorporated in supranational political communities or in international political systems globally considered[3].

Based on this, it should be noted that the relationship between domestic law and international law is not one of derivation or autonomy, but of mutual dependence. The constitutional legitimacy of national law depends, in part, on its being properly integrated into the international legal system, while the legitimacy of the international legal system depends, in part, on States having an adequate constitutional framework. National and international law, in this sense, are mutually co-constitutive[4]. This perspective implies the idea of complementation and intertwining between the two, which can be observed both in the principles and instruments at the domestic level of the States that pass to the international sphere, as well as in the opposite direction, when international provisions influence domestic constitutional law[5].

Indeed, it should be noted that globalization, the various forms of integration between States and the increasing intersection between Constitutional Law and International Law have led to the emergence of multiple doctrinal conceptions about forms of constitutionalism beyond the State, such as for example multilevel constitutionalism[6], transconstitutionalism[7], network constitutionalism[8], societal constitutionalism[9], interconstitutionalism[10] and constitutional pluralism[11].

1. Azevedo Neto Álvaro de Oliveira and Vandresen Thaís, 'Desafios de um Constitucionalismo Global: A Sobreposição de Espaços Normativos e o Estado Constitucional Cooperativo', (2016), v. 2, n. 2, Conpedi Law Review, Oñati, 180-182.
2. Stelzer, Joana, O fenômeno da transnacionalização da dimensão jurídica, in: Stelzer, Joana; Cruz, Paulo Márcio, Direito e Transnacionalidade, (Curitiba: Juruá 2009), 39.
3. Canotilho Gomes, Brancosos e interconstitucionalidade: itinerários dos discursos sobre a historicidade constitucional, (Coimbra: Almedina 2012), 284-285.
4. Kumm Mattias, 'Constitutionalism and the Cosmopolitan State', (2013), Vol. 20, N. 2, Indiana Journal of Global Legal Studies, 8-9.
5. Viviani Maury Roberto, Constitucionalismo Global: crítica em face da realidade das relações internacionais no cenário de uma nova ordem mundial, (Rio de Janeiro: Lumen Juris 2014), 181.
6. See Pernice Ingolf, La dimensión global del Constitucionalismo Multinivel: Una respuesta global a los desafíos de la globalización, (Ceo Ediciones, Madrid 2012).
7. See Neves Marcelo, Transconstitucionalismo, (Martins Fontes, São Paulo 2013).
8. See Slaughter Anne-Marie, A New World Order. Princeton University Press, (Princeton and Oxford 2004).
9. See Teubner Gunther, Societal Constitutionalism: Alternatives to State Centred Constitutional Theory, (Storrs Lectures, Yale Law School 2003).
10. See Canotilho Gomes, Brancosos e interconstitucionalidade: itinerários dos discursos sobre a historicidade constitucional, (Coimbra: Almedina 2012).
11. See Maccormick Neil, 'Beyond the Sovereign State', (1993), Vol. 56, N. 1, The Modern Law Review.

Among the main theories that emerged, these can be grouped in different ways, depending on the perspective adopted to characterize the process of constitutionalization. One can think of a classification in terms of its extension, that is, as a global constitutionalism, in a functional, regional, multilevel constitutionalism that is structured around one or more of these nuances. One can also group constitutional ideas according to their scope in normative terms, that is, according to whether the intention is to form a single constitutional text, or to recognize the constitutional nature of several dispersed norms, or to assume a plurality of constitutional systems. In the same way, one could speak of an organic constitutionalism, a procedural constitutionalism or a foundational constitutionalism, depending on whether the objective is to form a constitutional structure, or to constitutionalize certain procedures, or whether constitutionalism intends to function as a legitimate source of international law[1].

The constitutionalization of international law appears, at the same time, as a phenomenon and a process. It is a phenomenon since in the way it is described it exists in the real world and it is a process since it represents a way of acting, a method that aims at certain ends. And, contrary to what can be deduced, despite the constitutionalization of law being used to build a higher integrative norm, there is no equation that determines that the existence of a constitution is associated with a group of States or with a "Global State"[2].

In this perspective, the process of constitutionalization of International Law is, therefore, a political and intellectual movement that intends to endow international law with constitutional characteristics, that is, it seeks to make International Law a system that justifies, organizes and limits the exercise of power and that respects the principles of legality, separation of powers, rule of law and human rights[3].

In this way, constitutionalization can be evidenced by the emergence of instruments and structures of a constitutional nature in the international order and the consecration of constitutional values and principles in the international legal scenario in which limitations to the unrestricted power of the State are established, and seeks to establish the notions of State of Law, checks and balances and protection of Human Rights, as a way of establishing minimum parameters of coherence and efficiency to the interests of the international community[4].

2.2. The Consolidation Of Human Rights In The Process Of Constitutionalization Of International Law

In this process of constitutionalization of international law, it is evident that human rights play an integral role, as they concern both constitutional and international law, which makes them function as a link between legal systems[5]. In this context, the recognition of the emergence and existence of a common interest of the global community in the protection of Human

1. Acosta Alvardo and Paola Andrea, 'Del diálogo interjudicial a la constitucionalización del derecho internacional: la red judicial latinoamericana como prueba y motor del constitucionalismo multinivel', Tese (PhD in International Law and International Relations – Complutense University of Madrid 2013), Ortega y Gasset University Research Institute, Madrid, 189.
2. Carvaliho Leonardo Arquimino, 'de. Constitucionalização do Direito Internacional: uma (re)introdução ao tema', (2012), Revista Via Iuris, São Paulo, dez, 87-88.
3. Peters Anne 'Compensatory Constitutionalism: The Function and Potential of Fundamental Norms and Structures', (2006), n. 19, Leiden Journal of International Law, 579-610.
4. Calixto Angela Jank and Carvaliho Luciani Coimbra de, 'The Role of Human Rights In The Process of Constitutionalization of International Law', (2020), v. 25, n. 1, Revista Novos Estudos Jurídicos – Eletrônica, 240-241.
5. Moreira Thiago Oliveira, A Possível Formação de um Direito Constitucional Comum na América Latina e os Direitos Humanos Sociais. In.: Moreira, Thiago Oliveira; Oliveira, Diogo Pignataro De; Xavier, Yanko. Direito internacional na contemporaneidade, (Brasília: CFOAB 2018), 152.

Rights, whether individual, civil, political, social, economic or cultural, is a key factor in the process of constitutionalization of International Law, Through this recognition, the international community begins to develop norms and introduce mechanisms to ensure the implementation of these fundamental rights and values[1].

Since the second half of the 20th century, the need for concrete measures on the part of the international community has increased in order to strengthen the protection of human rights and prevent new atrocities, such as those committed during the Second World War. Due to this need to protect human rights at the international level, to prevent further abuses by States against individuals, the global legal landscape has undergone a process of permanent and accelerated change[2].

This process originated with the creation of the United Nations and its main bodies, as well as the signing of the United Nations Charter[3]. Later, in 1948, the Universal Declaration of Human Rights (UDHR)[4] was promulgated. Developed with the aim of defining the role of Human Rights in the United Nations Charter, the UDHR became a code and common platform for States to act and introduced the contemporary concept of Human Rights into the international order, with such rights being perceived as a unit interdependent and indivisible[5].

The proliferation of international and regional documents has, therefore, contributed to the development of the idea that the protection of Human Rights must go beyond borders, limiting the absolute sovereignty of States. Furthermore, the promulgation of international norms for the protection of Human Rights and the creation of international bodies to guarantee accountability allowed the protection of Human Rights in all parts of the globe to be supervised and monitored, cumulating in the recognition of the individual not only as an object of paramount importance, but also to be recognized as legitimate holders of rights emanating from the international legal system[6].

It was in this scenario, with the urgent need to protect Human Rights, that the specialized branch of International Human Rights Law (IHRL) emerged and consolidated, with the primary objective of guaranteeing the protection of the individual and giving full effectiveness to Human Rights through the establishment of international norms that protect human dignity, freedom and equality, as well as through the provision of legal and political instruments for the implementation of such rights. With this expansion, an international system for the protection of human rights was created, through which the international community could monitor and enforce the observance of these rights by all States[7].

Given that this process involves protection by the external order of matters that were previously the exclusive domain of domestic jurisdictions, the proliferation of international legal norms designed to regulate post-war tensions led to a juridification of international relations

1. Calixto Angela Jank and Carvaliho Luciani Coimbra de, 'The Role of Human Rights In The Process of Constitutionalization of International Law', (2020), v. 25, n. 1, Revista Novos Estudos Jurídicos – Eletrônica, 246.
2. Ibid, 236.
3. Carta das Nações Unidas, (1945), Disponível em: http://www.onu.org.br/conheca-a-onu/documentos/ – Acesso em 17 fev. 2022.
4. Declaração Universal dos Direitos Humanos. 1948. Disponível em: https://www.unicef.org/brazil/declaracao-universal-dos-direitos-humanos. Acesso em: 9 maio 2021.
5. Calixto Angela Jank and Carvaliho Luciani Coimbra de, op. cit., 243-244.
6. Calixto Angela Jank and Carvaliho Luciani Coimbra de, 'The Role Of Human Rights In The Process Of Constitutionalization Of International Law', (2020), v. 25, n. 1, Revista Novos Estudos Jurídicos – Eletrônica, 246-247.
7. Taiar Rogério, Direito Internacional dos Direitos Humanos: uma discussão acerca da relativização da soberania face à efetivação da proteção internacional dos Direitos Humanos, Tese (Direitos Humanos – Universidade de São Paulo 2009), São Paulo, 232.

and a quantitative and qualitative expansion of international law. The quantitative expansion resulted from the intensive production of international norms in the most diverse fields of social conduct, while the qualitative expansion resulted from the strengthening of international procedures to interpret and enforce International Law with the creation of international organizations and quasi-judicial bodies, thus overcoming the decentralization and fragility in the implementation of international standards[1].

Furthermore, with the establishment of a complex international corpus juris for the protection of Human Rights and the assumption of characteristics inherent to Constitutional Law, there is a redefinition of what was previously the exclusive competence of States. By focusing on the protection of people's rights, the IHRL began to address issues that were traditionally seen as constitutional in nature, as rights intended to protect the person against abuse were considered to be an exclusively domestic competence. The direct consequence of this understanding is the formation of the idea that, due to this process, International Law can be conceived as a binding legal system for all States, precisely because it is seen as an autonomous constitutional system[2].

2.3. The Rules Of International Law Oriented To The Common Good

When considering the norms of international law currently framed in different categories, common contents are discovered, correspondences of protected goods, which allow for a material determination of "common goods of the international community". In particular, these are, first, the so-called "imperative international law" (jus cogens), second, the obligations of a State towards all other States ("obligations erga omnes"), and third, the crimes of the State defined by international law ("international crimes of States")[3].

The first of these categories of norms specifically oriented towards the common good is that of "binding international law". Jus cogens norms were introduced into positive international law through a provision of the Vienna Convention on the Law of Treaties of 1969, which maintains, "a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"[4].

The Vienna Convention on the Law of Treaties does not define the content of jus cogens, in a way that the internationalist doctrine traces the circle of the norms that compose it with a sometimes shorter, sometimes longer radius. But there is consensus on the following rules: the prohibition of the use of force in the Charter of the United Nations, fundamental human rights (especially the right to life and protection from torture and degrading treatment) and the rules of international humanitarian law that prohibit reprisals against protected persons[5].

1. Carvaliho Ramos André de, 'A relação entre o Direito Internacional e o Direito interno no contexto da pluralidade de ordens jurídicas', (2012), v. 1, n. 12, BRANDT, Leonardo Nemer Caldeira (Org.). Brazilian Yearbook of International Law. Belo Horizonte: CEDIN, 103-104.

2. Taiar Rogério, Direito Internacional dos Direitos Humanos: uma discussão acerca da relativização da soberania face à efetivação da proteção internacional dos Direitos Humanos, Tese (Direitos Humanos – Universidade de São Paulo 2009), São Paulo, 196.

3. Fassbender Bardo, La protección de los derechos humanos como contenido central del bien común internacional, In: Aznar Mariano J; Gutierez Ignacio; Peters Anne, La Constitucionalización de la Comunidad Internacional, (Valencia: Tirant lo Blanch 2010), 153.

4. Artigo 53. Convenção de Vienabender sobre o Direito dos Tratados. 1969. Disponível em: < http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/decreto/d7030.htm> Acesso em 09 fev. 2022.

5. Fassbender Bardo, La protección de los derechos humanos como contenido central del bien común internacional, In: Aznar Mariano J; Gutierez Ignacio; Peters Anne, La Constitucionalización de la Comunidad Internacional, (Valencia: Tirant lo Blanch 2010), 138.

The normative category of the so-called erga omnes obligations of States dates back to the formulation of the International Court of Justice in the judgment of the "Barcelona Traction" case of 1970[1]. The obligations towards all States would result, says the International Court of Justice, for example, from the prohibition the war of aggression, the prohibition of genocide and the principles and rules that affect the most fundamental rights of the human person, including protection against slavery and racial discrimination. Subsequently, the Court also considered the right of people to self-determination to be a norm erga omnes[2].

The category of erga omnes obligations was developed to make the breach of certain fundamental international legal duties a matter for everyone, not just the sphere of the States immediately affected[3].

The third normative category that covers the creation of State crimes defined by international law dates back to the period immediately after the Second World War, driven to sanction crimes committed by States against the peace and security of humanity[4]. The design of a criminal court of universal vocation, at this juncture, is part of the context of the creation of a new international legal system, translated, in the criminal field, in the conviction that certain crimes, due to their gravity, affect not only a certain State, but they are of interest to all international society because they affect fundamental principles of humanity[5].

In this context, the work of the International Law Commission led to a Conference of States in Rome and the agreement on the "Rome Statute of the International Criminal Court", which sought to regulate the creation of the Court, the facts submitted to its jurisdiction, the general principles of criminal law that must be respected, as well as its composition and domestic legal system. Article 5.1 of the Statute limits the Court's jurisdiction "to the most serious crimes (…) that affect the international community as a whole", specifically the crimes of genocide, crimes against humanity, war crimes and the crime of aggression"[6].

2.4. The Constitutional Scope Of The United Nations Charter

As a result of the need to achieve world peace and security in the face of successive war tragedies caused by the First and Second World Wars, the United Nations (UN) was created on October 24, 1945 in the city of San Francisco (USA) and the United Nations Charter was signed, leading to a redefinition of the fundamental values of the international community.

This process marked the beginning of a new international order, in which legal and institutional frameworks were established to limit the power of the State, characterizing a systemic integration of International Law with the internal rights of States. Important principles were established, such as respect for State sovereignty and territorial integrity, peaceful settlement of international disputes,

1. Barcelona Traction, Light and Power Company, Limited. Arrêt, CIJ, Recueil 1970. Julgamento de 5.02.1970. Disponível em: https://www.icj-cij.org/public/files/case-related/50/050-19700205-JUD-01-00-EN.pdf
2. Fassbender Bardo, La protección de los derechos humanos como contenido central del bien común internacional, In: Aznar Mariano J; Gutierez Ignacio; Peters Anne, La Constitucionalización de la Comunidad Internacional, (Valencia: Tirant lo Blanch 2010), 140.
3. Ibid, 141.
4. Ibid, 149.
5. Lopez Filho; Francisco Camargo Alves; Moreira,Thiago Oliveira, Limites Du Paradigme Hiérarchique Dans L'incorporation Du Statut De Rome Dans Les Expériences Française Et Brésilienne, MENEZES, Wagner (Ed.), Direito Internacional em Expansão, Vol. XIX. (Belo Horizonte: Arraes Editores 2020), 38.
6. Artigo 5.1. Estatuto de Roma do Tribunal Internacional. 1998. Disponível em: < http://www.planalto.gov.br/ccivil_03/decreto/2002/d4388.htm> Acesso em 09 fev. 2022.

self-determination of peoples and non-interference in the internal affairs of other countries, for example, which form the basis of contemporary international law and international relations[1].

One of the main approaches to the scope of the constitutional character of the United Nations Charter most evident today seeks to identify several characteristics that make it similar to a Constitution. Among these characteristics, one can present, among others, the denomination as a "Charter", contrary to the usual term "treaty" or "agreement"; the expression "We the People of the United Nations", implying a reference to a constituent power; the functioning and structuring of the Organization, with its own governance devices similar to the Constitutions of the States, in which the identification of bodies, the separation of powers and the organization of the competence of the institutions are observed; the normative hierarchy addressed to the international community, especially in view of the provisions of art. 103 of the Charter of the United Nations, which establishes primacy over any other treaty or agreement; the character of universality, circumscribing not only the member states; and the constitutional history of the international community, which since 1945 has orbited around the UN, which serves as a privileged locus for global issues and a facilitator for the achievement of common values that contain the essence of human dignity[2].

However, there are numerous counterweights to qualify the Charter as a Constitution of the international community, such as the fragility of the Security Council's legitimacy, given that it lacks representativeness, generating a deficit of democratic legitimacy, in addition to not having judicial review bodies, causing a violation of the balance of powers, typical in a set of constitutional norms. In this sense, it still seems premature to attribute the role of a World Constitution to the United Nations Charter[3].

Nevertheless, the constitutional approach of the UN Charter does not necessarily lead to equating the Charter with a state constitution. The constitutional notion in international law must be understood as an autonomous concept and not as an extrapolation of national constitutional law[4]. Therefore, the United Nations Charter is inevitably referred to as a starting point for global constitutionalism, since it presents a greater range of constitutional aspects than any previous multilateral international treaties, denoting an aspect of historical construction, typical of constitutionalism. The Charter is therefore the main contribution to the constitutional history of the world[5].

3. The Development of A Global Constitutionalism

In the current emerging global order, marked by several regional subsystems and at the same time globalized, diversified and localized, characterized by the intersection and overlapping of different forms of domestic governance and organizational practices, the pursuit of

1. Fassebender Bardo, 'International Constitutional Law: Written or Unwritten?', (2016), v. 15, n. 3, Chinese Journal of International Law, 512.
2. Fassbender Bardo, The United Nations Charter as the Constitution of the International Community, (Leiden (Netherlands): Martinus Nijhoff 2009), 86-115.
3. Viviani Maury Roberto, 'A Amplitude Constitucional Da Carta Das Nações Unidas: Controvérsias De Uma Proposta De Constituição Para A Comunidade Internacional', (2016), v. 2, n. 2, Conpedi Law Review, Oñati, abr, 5.
4. Fassebender Bardo, 'International Constitutional Law: Written or Unwritten?', (2016), v. 15, n. 3, Chinese Journal of International Law, 510.
5. Viviani Maury Roberto, 'A Amplitude Constitucional Da Carta Das Nações Unidas: Controvérsias De Uma Proposta De Constituição Para A Comunidade Internacional', (2016), v. 2, n. 2, Conpedi Law Review, Oñati, abr,. 18.

national interest and material capabilities point to the ordering of a political balance of powers that qualifies a multipolar system[1].

In a historical and cultural approach, it is understood that countries have the right to independently constitute models of rule of law that are appropriate to their national conditions, that recognize social and economic development trajectories, the importance of culturally specific identities and the legitimacy of different views on the nature of sovereignty, the rules of international trade and the relationship between State and society[2]. Nevertheless, it is also understood that countries of different systems and in different stages of development are intertwined in mutual dependence and interconnected in a community of common destiny[3].

In this context, the lack of a centralized authority in international society and the dispute of several centers of power for the legitimacy of central issues of global repercussions indicate the need for international regulations that evoke the attribution of responsibility and authority beyond the States in relation to global governance[4].

Thus, in the face of the challenging transformations that are taking place in the contemporary world, the perception of a global society without a legality that corresponds to the effective stage of interdependence of the present legal pluralism highlights new trends in constitutional theory and the theoretical outlines that are currently being developed towards constitutionalism at a global level[5].

In different magnitudes, the current general architecture of evolving constitutionalism indicates the coexistence of diverse paradigms, both at the national, transnational and global levels. Taking into account the need for coherence for the structural balance of the general scheme of constitutionalism, the comprehensive position to address and reach the issues and concerns of the globalized world enables global constitutionalism to act as an overarching paradigm of unity in the diversity of manifestations of that scheme[6].

Following the hermeneutic premise that there is no meaning of a text independent of the reader, the constitutionalist reading of current international law is not a distortion of norms that are objectively something else, but a legitimate form of interpretation. It is not a mere deduction from positive thinking, but an intellectual construction induced by multiple general developments in international law[7].

Still, gauging the sense that law and politics should not be seen as distinct domains, but as structurally coupled subsystems, it can be said that law is at the same time a product of political activity as well as organizer and limiter of political action. Consequently, the evolutionary dynamics of constitutionalism lead not only to the legalization of politics, but also to a stronger

1. Flockhart Trine, 'The coming multi-order world', (2016), v. 37, n. 1, CONTEMPORARY SECURITY POLICY, 6-11.
2. Ibid, 9.
3. Ahl Björn, Chinese Positions on Global Constitutionalism, Community of Common Destiny for Mankind, and the Future of International Law, (The Chinese Journal of Comparative Law 2021), 17.
4. Afonso Henrique Weil and Castro Thales Cavalcanti, 'Constitucionalismo Além Do Estado: Perspectivas Históricas E Demandas Emancipatórias', (2015), V. 10, n. 2, Revista Eletrônica do Curso de Direito da UFSM, 520.
5. Ferreira Francisco Gilney Bezerra de Carvalho and Lima Renata Albuquerque, 'Teoria constitucional em mutação: perspectivas do constitucionalismo contemporâneo frente aos desafios da globalização e transnacionalidade', (2017), v. 13, n. 3, Revista Brasileira de Direito, Passo Fundo, dez, 124.
6. Chen Wen Cheng and Chu Shirley Chi, Taking Global Constitutionalism Seriously: A framework for Discourse', (2016), v. 11, n. 2, National Taiwan University Law Review, 402-404.
7. Peters Anne 'Compensatory Constitutionalism: The Function and Potential of Fundamental Norms and Structures', (2006), n. 19, Leiden Journal of International Law, 605.

politicization of law, and the introduction of legal and even constitutional principles contributes to the stability of expectations, legal certainty and equal treatment of relevant actors[1]. In this sense, the Constitution, in the modern sense, is a factor and product of the structural coupling between politics and law[2].

From this perspective, Global Constitutionalism has descriptive and prescriptive elements. It is not only intended to describe some features of the status quo of international relations, but also seeks to provide arguments for its further development in a specific direction[3]. The evolution of constitutional values to the international domain allows for a path to shape global governance through constitutional thinking in order to facilitate coordination between national legal systems and international law[4].

In this way, Global Constitutionalism consists of a constitutive process of emergence and deliberate creation of constitutional elements in the international legal system, gradually, although not linearly, by political and legal actors, supported by an academic discourse in which these elements are identified and developed[5].

The perception of Global Constitutionalism is developed in a plan of approaches that seek to understand the adequate responses to face the complex dynamics of world society in the face of globalization and the transformations that take place in the international community[6]. In this way, doctrinal approaches can at the same time be characterized as heterogeneous and interdisciplinary, since they structure their theses on different and contrasting assumptions, and insofar as they do not limit their analyses to only legalistic parameters[7].

In view of this, it is possible to encompass three trends proposed to address the ambience of Global Constitutionalism, which are functionalist, normative and pluralist[8]. The functionalist element responds to the analysis of the constitutionalization processes that are revealed through bargains and negotiations in the institutional environments that structurally regulate international relations, identifying institutions capable of performing typically constitutional functions such as control and division of power at a global level, jurisdictional control of acts regulations and protection of fundamental human rights[9]. The normative factor foresees a movement towards the progressive political and legal development of practices beyond the sphere of influence of the States, determining- in a compensatory way- the normative contents that have been weakened at the state level as a result of the forces of globalization and global governance, advocating a commitment to constitutional

1. Carvaliho Leonardo Arquimino, 'de. Constitucionalização do Direito Internacional: uma (re)introdução ao tema', (2012), Revista Via Iuris, São Paulo, dez, 89.
2. Peters Anne, 'The Merits of Global Constitutionalism', (2009), v. 16, n. 2, Indiana Journal of Global Legal Studies, 407.
3. Peters Anne and Armingeon Klaus, 'Introduction: Global Constitutionalism from an Interdisciplinary Perspective', (2009), v. 16, n. 2, Indiana Journal of Global Legal Studies, 388-389.
4. Ahl Björn, Chinese Positions on Global Constitutionalism, Community of Common Destiny for Mankind, and the Future of International Law, (The Chinese Journal of Comparative Law 2021), 16.
5. Peters Anne, 'The Merits of Global Constitutionalism', (2009), v. 16, n. 2, Indiana Journal of Global Legal Studies, 397-398.
6. Viviani Maury Roberto, 'A Amplitude Constitucional da Carta Das Nações Unidas: Controvérsias de uma Proposta de Constituição para a Comunidade Internacional', (2016), Vol. 2, N. 2, Conpedi Law Review. Oñati, Espanha, 5-6.
7. Afonso Henrique Weil and Castro Thales Cavalcanti, 'Constitucionalismo Além Do Estado: Perspectivas Históricas E Demandas Emancipatórias', (2015), V. 10, n. 2, Revista Eletrônica do Curso de Direito da UFSM, 525.
8. Wiener Antje and Lang Anthony; Tully James; Maduro Miguel Poiares; Kumm Mattias, 'Global Constitutionalism: Human rights, democracy and the rule of law', (2012), vol. 1, no.1, Global Constitutionalism, 1-15.
9. Afonso Henrique Weil and Castro Thales Cavalcanti, 'Constitucionalismo Além Do Estado: Perspectivas Históricas E Demandas Emancipatórias', (2015), V. 10, n. 2, Revista Eletrônica do Curso de Direito da UFSM, 526.

standards[1]. And the pluralist component, comprising Global Constitutionalism not in a singular perspective, but through differentiated systems and their interactions beyond the limits of the State, aims to mutually recognize different standards, in different regimes, respecting a minimum standard that confers organicity and systematization to enable its implementation by the States[2].

In this regard, three characteristic points are listed that underpin the treatment of Global Constitutionalism: the foundation of a legal-political system in relation between States and people marked by the foundation of the United Nations Charter; the emergence, through international declarations and documents, of a set of norms oriented to the common good of the international community, recognized in jus cogens norms, imperative international law, in the erga omnes obligations of States, and in the normalization of an international criminal law; and in the consolidation of human rights and the protection of human dignity as a presupposition of all constitutionalisms[3].

By accepting the conception that Global Constitutionalism consists not only of an idea and/or perspective, but of an academic and political agenda that aims to apply constitutional matrices, such as the rule of law, checks and balances and the protection of human rights in the international legal sphere, in fact, it is observed that, in a broad sense, the existence of a Constitution in the international sphere is admissible, as elements of structuring, organization and institutionalization can be found in that sphere[4].

1 . Peters Anne 'Compensatory Constitutionalism: The Function and Potential of Fundamental Norms and Structures', (2006), n. 19, Leiden Journal of International Law, 579-610.
2. Dantas Iana Melo Solano and Moreira Vaninne Arnaud de Medeiros, 'Análise Da Fragmentação Do Direito Internacional À Luz Do Constitucionalismo Global Orgânico', (2016), v. 2, n. 1, Revista Brasileira de Direito Internacional. Brasília, 156.
3. Canotilho José Joaquim Gomes, Direito Constituciona e Teoria da Constituiçãol, (7th Ed. Coimbra: Almedina 2008), 1370-1371.
4. Viviani Maury Roberto, Constitucionalismo Global: crítica em face da realidade das relações internacionais no cenário de uma nova ordem mundial, (Rio de Janeiro: Lumen Juris 2014), 173-176.

Conclusion

As demonstrated in the present study, it can be seen that while the development of a constitutional theory conceived throughout history in a way that is intrinsically centered on the national state, the intensification of globalization and the emergence of common problems that transcend state borders provides that Constitutionalism and elements of the notion of Constitution transcend to the international order.

Indeed, noting a relationship of mutual dependence and increasing intersection between domestic constitutional law and international law, the process of constitutionalization of international law is evidenced through the emergence of values, principles, instruments and structures of a constitutional nature in the international legal scenario, seeking to establish notions of checks and balances, limitation to the exercise of power and protection of human rights in the international order.

Such understanding took place through the consolidation of the protection of human rights, previously seen as an exclusive internal competence, as a link between the various legal systems in the international order; the creation of norms of international law oriented to the common good, particularly the norms of jus cogens, the erga omnes obligations, and the definition of international crimes of the States; and finally, the constitutional contribution of the United Nations Charter to redefining the fundamental values of the international community.

Finally, it is concluded that such construction verifies the development of a Global Constitutionalism through the emergence and deliberate creation of constitutional elements in the international legal system, which is developed in a plan of approaches that seek to understand the appropriate responses to face the complex dynamics of world society. in the face of globalization and the transformations that are taking place in the international community, gradually, though not linearly, by political and legal actors, supported by an academic discourse in which these elements are identified and developed.

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Law or Love: Contemporary Family from Postmodern Perspectives With Deference to Islamic Viewpoints

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ABSTRACT

Postmodernism in the contemporary world asserts that there is neither a dominant nor an ideal marriage form as monogamy or even a classical family type. Unlike modernists who sought human issues as permanent entities, postmodernists believe in everything to be of a transient nature. In the same vein, they argue that love and law are ephemeral rather than eternal entities. Mariage blanc has increased in many aspects corollary to this ideology. In a world of no restrictions, postmodernists indulge in short and diverse satisfactions, whereas the classic world believed that long-lasting personal relationships are more important to personal fulfillment and happiness. Therefore, attitude toward marriage for a durable satisfaction is subdued to having a serious relationship. It seems, however, that quality in the relationships is superseded by quantity in the postmodern era.

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Introduction

According to the postmodern ideology, individuals marry for a variety of reasons. These include marriage of convenience, lavender marriage, polygamy, etc. whereby they forge a relationship in order to aid or rescue a partner from persecution or harm; as well as for financial, cultural, and social advantage. A prototypical class, Mariage blanc has increased in many respects due to the postmodern ideologies. It is stated that misogyny was the direct product of classism. While modernism brought egalitarianism between men and women's rights and preached unitarianism in marriage or monogamy, postmodernism did not believe in any foundation (Kozak 2020). The traditional homogeneous model of marriage has largely decreased in prominence in the form of modern and postmodern changes (Adams 1997). In light of the above, the present study aims at finding whether or not deterioration of family foundations and divorce are to the outcome of postmodernism. The French Revolution Declaration, American Declaration and Universal Declaration of Human Rights (UDHR) identified the modernism-oriented type of marriage. In fact, the UDHR itself was the result of Modernity and Modernization. The hypothesis in this analytical survey is that new marriage orientations are the result of the postmodernism era, which started in the 1980s.

According to John Andrews, postmodernism is a late 20th century concept in philosophy, art and architecture, which mistrusts the grand theories associated with modernism and argues that there is no absolute truth. Postmodernism, in many ways, a disillusioned reaction to the Second World War, has no central organizing 'principle' and has therefore often been the subject of parody. A leading theorist of this *-ism* was the French sociologist Jean Baudrillard (1929-2007). In art, postmodernism embraces installation art and 'happening'. In architecture, postmodernism rejects the stark functioning of modernism and attempts to add element of beauty. The modernist architect Mies Van der Rohe (1886-1969) had famously said, "Less is More" which the postmodernist Robert Venturi changed into "Less is a bore". It is seen that, for instance, modernism consented to a least number of spouses in marriage in reaching idealism while for postmodernism diversity and plurality in marriage was respected. Postmodernism aspires for a temporariness in everything but not eternality.[1]

1 . John Andrews, The Book of Ism, Economic Publication, (2010), 160.

1. Postmodernism Feature and Relationship

Originating in the 1980s, postmodernism soon became a prevalent ideology.[1] The theory defines a completely new era of the world as a society which is fragmenting and wherein authority is decentralized and the actual truth that modernism was searching for does not exist. It is a well-known fact that there are only representations of that. Those who are defenders of postmodernism believe "it is a mixture of past, present and future, specifically, the cultural and spatial elements of these different tenses."[2] Postmodern era is considered the intelligent and information (also called technological) age.[3] Both of these are evident through changes which have occurred within the typical marriage and family.

There is no idea of real or absolute truth existent in postmodernism which demonstrates opposition to what modernists stated. Postmodernism led to relativism- the idea that truth is relative.[4] The grand narrative says that truth is created only for the sole purpose of selling things. It is vividly seen in different manners in marriages and families nowadays. No real truth being in existence makes change in the typical marriage.

The institution of marriage (and kinds of family life) has been in constant change over the last decades. It has passed its route from the authoritarian and patriarchal family in the past, to the permissive family in the present and predictably the democratic family in the future.[5] With the transition from modern to postmodern era, typical life has altered to more of an isolated society than before. The concept of unity close ties has changed into plurality almost non-existent specially with the inexorable march of technology.

Personal communications got less, chances of meeting someone have become less, and alienation occurred as societies entered a new chaotic postmodern age. Thus, in the wake of such a variety, family structures are varied as well. They are freer and enjoy more freedom of choice for their aspect of lives compared to the past, even in personal relationships. There are a number of features of the postmodernism trend affecting marriage and ushering societies into polygamy.

1.1. Diversity

Societies are essentially culturally-disparate rather than emanating from a single shared culture, so people earn their own identities from a vast and diverse range of choices.

1.2. Social Change

Internet and particularly social network platforms have trespassed the borders and dismantled the barriers of time and space between communities of people. As a result, family lives are becoming diverse. No longer is a specific type of family such as nuclear predominant. Judith Stacy (1998) argues that "divorce extended families have increased and women enjoy more freedom than ever before in shaping a family while the patriarchal type of the traditional way is rejected." Stacy identified a *new type of family* in the postmodernism era which she called

1 . See Hans Bertens, *The Idea of the Postmodern*: *A History*, (New York: Routledge 1995).
2 . Charls Lemert, After Modernity. Social Theory: The Multicultural and Classic Readings (4th ed.), (2010).
3 . See more Andrew Rathmell Towards Postmodern Intelligence, Journal of Intelligence and National Security, volume 17, (2002), issue 3 (Published Online 4 June 2010).
4 . Quote by Feyerabend saying THE ONLY ABSOLUTE TRUTH is that there are NO ABSOLUTE TRUTHS. See https://www.spaceandmotion.com/philosophy-Postmodernism.htm.
5 . K. Slany, Alternatywne formy zycia malzenko-rodzinnego w ponowoczenym swiecie, Wydawnictwo, Nomos, Krakow, (2002), 53-54.

the "divorce-extended family" members of which are connected by divorce rather than through marriage as of ex-laws etc.[1]

Recent modernists like Anthony Giddens suggested that though people get more freedom, there is still a structure shaping people's mindset. Contemporary feminists also disagree with post-modernism pointing out that in traditional role many disadvantages remain as norms for women.

1.3. Globalization

Globalization is another milestone that sets new goals and norms on many subcultures in a global community. Thereof, the individuals express themselves freely and do not feel connected nor committed to the traditional norms or even taboos.

Nevertheless, unhappiness and to some extent failure in marital life is on the increase in the postmodern era, compared to that of the previous decades. Divorce may happen emotionally between the couples, but and the circumstances and mutual interests force them to stay married albeit unsatisfied. As postmodernism seeks transient satisfaction, contemporary marriage seems temporary in any respect. Postmodern divorce is crystal clear. The concept of marriage in the postmodern era is like that of modernism, but the precepts of love, happiness and permanence are gone. It has frequently been stated that in postmodern ideology, the couples being in love and exhilarated until death is not the truth to relish. The postmodern society injects beliefs of lasting happy marriages. Nonetheless, the conception of the types of marriage change in the same way the attitudes toward divorce are changing. Interracial marriage, homosexuality, polygamy, and polyandry are all accomplishments of the utopian life and world which postmodernism has promulgated.

Though modernity dealt with some essential features: firstly, industrialization which affected producing goods and material, elite as capitalists own the businesses and hired working class and urbanization and growth of cities. As a result, the rural population migrated to urban areas and centralization government which developed a very complex centralized bureaucratic state and rational thinking as tradition, religions were replaced by science or reason. Universality of social development, civilization variability and uniqueness of cultural programs, emancipation and antinomies, permanence of change and innovation, increase of productivity are of high importance in modernity.[2]

1.4. Postmodern Knowledge

Postmodernism has entangled the contemporary world in serious respects; individuals have lost faith in truths and metanarratives, and they have become more skeptical of the power of science. Postmodernists maintained an absence as well as unattainability of sheer truth.

2. Postmodern Marriage and a Lack of Criteria

When considering tangible changes in marital and family type life, one cannot ignore the

1 . See Judith Stacy, In the Name of the Family, Rethinking, Family Values in the Postmodern Age, (Beacon Press 1996 first ed.), (1998).

2 See Yuriy Savelyev, 'Multidimensional Modernity: Essential Features of Modern Society in Sociological Discourse', (2013), National Taras Shevchenko University of Kyiv, Journal of Siberian University Humanities & Social Sciences 11, 1673-1691.

strangeness and peculiarities of post-modernity. This kind of school of thought does not agree that family must be regarded as a firm and fixed foundation or concept. Some scholars such as Stacy (year) argue that "family in postmodernism is pluralistic, meaning that it is with diversity, variation and instability rather than by sameness in postmodern society" and that "the nature of family and family life is changing because no perfect and ideal family exists as there are ideal things in the world.

The processes that characterize contemporary realities are individualization, the reduction of the role of institutions, but also democratization, the plurality of values and norms. Why we sometimes see polygamy as a solution to our citizenship rights. Citizenship rights are consistent with human rights and, to distinguish them from other social and individual rights, it is enough for the individual to feel responsible in society and the community. Such a sense of responsibility in the mutual relationship of rights and duties with the government creates a criterion called "level of loyalty" to act as the source of the minimum and maximum rights of citizenship. The processes characterizing contemporary realities are individualization, the reduction of the role of institutions, but also democratization, the plurality of values and norms. Bauman (year) said: "Today, individuals are socially engaged primarily through their role as consumers, not producers, the awakening of new desires replaces prescriptive regulation, advertising replaces coercion, and seduction makes superfluous or invisible pressures of necessity. In this kind of context, the rigid and resilient structures of the type until death are part of us, indispensable in the panoptic system of power, lose their usefulness. polygamy is a means of assisting the government in its duties by wealthy citizens. Diverse sexual attitudes are the main results of postmodernism meaning that women are less likely to consider romantic love and marriage as their primary goal. Women are sexually more experienced than before specifically due to their divorce experiences. They expect more in sex, love, and equality compared to the past when everything was seemingly ideal to them and they did not expect a lot. The same holds true for men. Premarital sex, serial monogamy and homosexuality have become socially-accepted norms for both men and women in the postmodern era. The Sex Revolution of the 1960s has gifted women the pursuit of equal rights, the right to vote, the right to manage their lives, the chance to educate and earn professional careers, etc. However, some of these gifts have shaken the foundation of family and impacted their roles in the family. The role of men as the head in family has now weakened and women have emancipated themselves of the shackles of the viewpoint of domestic slavery they used to have. Nowadays it serves to weaken the structure and to reduce marital responsibilities.[1] Therefore, marriage is no longer considered as a community of interests. And one should marry because of love not calculation.

Furthermore, it is claimed that the family structure has changed to such a degree that it no longer corresponds to what has been identified as the modern form. The argument that it has moved into a postmodern phase should be related to the extent that modernization has been achieved in the wider society.[2] Choosing to lead a child-free life style is so common in postmodernism. Smaller families and an increase in childlessness are described as "one of the most

1 . Ibid, (2002), 97.
2 . Trevor Noble, 'The Nuclear Family and Postmodern Theory', (1995), Hitotsubashi University Journal of Social Studies 27, 127.

remarkable changes in the social behavior of the 20th century.[1] Declining fertility is one of the aspects of different inter-relational changes in household structure happening in recent decades. Fertility pattern has been altered significantly since 1960s in many levels. Regenerative medicine and development in reproductive techniques in embryo transplants and in vitro fertilization have led to important implications for traditional and classic notions of maternal love like single- heterosexual women, Lesbians, surrogate mothers and those who are in their sixties but they received fertility therapy. Financial independence of women is another element along with the possibility of divorce which causes the reduction in durability of marriage and turns it into a sort of Temporary Marriage.[2]

Single-parent lives have augmented due to the rise in divorces. Reconstituted families have been on the increase, too. Mac en Ghaill (year) suggests that "the crises of masculinity, which means role of men and women changed and men no longer see their futures in possibility of highly skilled job but as care takers of children at home". Moreover, leisurely consumption of time has become dominant as house appliances such as satellite have now become more important than genuine family interaction and intimacy with children. Children have become fashion accessories for some parents as the parents spend much time and money on their children to show off to others.[3] In the postmodern era, even the concept of personal life is replaced by family.

2.1. Islamic View on Polygamy

Polygamy and temporary marriage- which is an institution of Sharia- affiliates Muslims with the tenets of postmodernism in this regard. As stated above, classicists were misogynist, and modernists were monogamous and tried to compensate all inequality which happened in the classic period; while postmodernists revealed a tendency to polygamy and more interest in forging short-term bonds with women primarily for satisfaction. Conventional Sunni and Shia Islamic jurisprudence allows Muslim men to marry up to four women at the same time- a practice known as polygamy.

Verse 3 of Surah Al-Nisa of the Holy Quran reads:

> *"If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two or three or four; but if ye fear that ye shall not be able to deal justly with them, then only one or (a captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice."*

The context of utterance (revelation) of this verse is linked to the Battle of Uhud[4] in which many Muslim males (soldiers) were killed. It sounds sensible that the verse was transcended to the Islamic state in compassion toward women and children who were now vulnerable, but not

1 . R. Leete, Dynamic of Values in Fertility Change, (Oxford: Clarendon Press 1998), 3.
2 . Mohammad-Javad Javid, Tissue Engineering and Regenerative Medicine; From the Perspective of Ethics, Religions and Public Law, (Tehran: University of Tehran 2019).
3 . See more Christian Haywood, Martin Mac an Ghaill, Men and Masculinities, (open university press 2003).
4 . Battle of Uhud was a war between the early Muslims and the Qurayshi tribe Meccan enemies in 625 CE. See more at www.al-islam.org , M. Jawad Chirri, Islamic Center of America, (Harlo press 1988). the battle of Uhud.

to the relish of men nor their sexuality. It is an institution that has been misinterpreted, misunderstood and misused.

In western literature it is understood as a cruel and repressive custom but indeed the motivation of Muslim men to decide to marry multiple women is not evident either. Many would invoke the verse from the Quran as an endorsement to their position, yet others focus more on the propagation of their family lineage.

2.2. Islamic View on Postmodern Marriage

Marriage in Islam is a union of a male and a female under sharia conditions. So in Sharia, nikah is a holy relation between two people and they will become legally and morally responsible to each other. .Both the groom and the bride are to consent to the marriage of their own free wills. Sharia considers that membership in a family as a "natural condition among humans., "Moreover, the classical jurists regarded marriage as the "normal ultimate state of human being" In addition to the usual and permanent marriage until death or divorce, there is a different fixed-term marriage known as temporary marriage (*Ezdewāj al-mut'ah*) by Shiaa" scholars. There is also Nikah Misyar, (*Nikah Munqate'*) a non-temporary marriage with the removal of some conditions such as living together, permitted by some Sunni scholars.[1] For jurists, marriage is mostly a means regulating human procreation in such a way that the identification of offspring and assignment of responsibility for nature and maintenance will be assured. In fact, the preservation of lineage is one of the five objectives of Islamic law. Consequently, adult males are expected to guarantee the Muslim law of maintenance, which entails providing food, clothing, shelter for themselves, their dependent children and adult females in the family.

Marriage is not just a religious sacrament in Islam, but it is recommended for every Muslim. There are lots of cases both in the holy Quran and the tradition of the Prophet showing his support for this institution. The Prophet said: "marriage is my way and my custom." [2]He also said that, "when a man marries, he completes one half of his religion." The Great Prophet also recommends that, "whoever is able to marry, should marry." Marriage in Islam is seen as an important aspect of social life. In many Arab societies, polygamy was a common practice. There was no limit on the number of wives allowed at any one time. The doctrine of al-Mesyar marriage which recognizes no maximum or minimum for temporary marriage is completely adaptable with the tenets of postmodernism in this regard.

The actual quality of life for women in pre-Islamic time is not easy to gauge according to Smith. However, it is concluded that before the coming of the Prophet Muhammad, women did not enjoy a relatively advantageous position, and in the period immediately preceding the Quranic revelation, circumstances were deteriorating substantially. Islam thus brought certain rights to women that they were not given right before the time of the Prophet.

3. Citizenship Rights in Postmodern Society

In nature polygamy is a natural instinctive phenomenon which maintains the creatures generation. Human is not an exception because the continuation of generation is on the burden of

1 . Subḥānī, Jaʿfar. Izdiwāj-i muwaqqat dar kitāb wa sunnat. Fiqh-i Ahl al-Bayt (a), No 48. 1385 Sh

2 . قالَ رَسُولُ اللهِ(ص):النِّكَاحُ سُنّتِي فَمَنْ رَغِبَ عَنْ سُنّتِي فَلَيْسَ مِنّي:

Sahih Bukhari, vol.7, 2; Sunan Ibn Majah, vol. 1, 592; Sahih Muslim, vol. 2, 1020, H. 1401; Sunan al-Nasa'i, vol. 6, 60; Sunan al-Bayhaqi, vol. 7, 77; Jame Al-Akhbar, 118.

male part and cultivation of generation is a female duty. In human societies polygamy seems a natural phenomenon.[1] when a man is married to more than one wife at the same time, sociologists call this polygyny. By this definition, before advancement of Islam, polygamy was frequent among Persians, Romans, Arabs, Hindus, Africans, Chinese and so on.[2] In ancient Egypt, during the Pharaohs era, monogamy was a dominant rule in the society but pharaohs were exempt in this regard. The philosophy of monogamy was then to have a clean and honest generation but it did not mean that pharaohs were not permitted to make love and share bed with slave women or other ladies.[3]

Polygamy has never been rejected nor prohibited in the religions and it was usually tolerated as a permitted issue. in Christianity and Judaism with consideration of the Old Testament and New testament, it is seen that there are few prophets who were monogamous like Abraham. There are some documents, in Catholicism, claiming that abstinence was recommended as an alternative issue on the grounds that polygamy had roots in Christian teaching.[4] However, in some part of the US polygamy has been reported.[5]

In this regard, the great Islamic scholar, Morteza Motahari, stated that, "[p]olygamy in the East has not originated from Islam nor is its abandonment rooted in Christianity because the fact is there were records of polygamy before Islam in the East. In fact, there is no creditable evidence that reveals abandonment of polygamy in Christianity; if there is any argument, it belongs to the West not Christianity."[6] On the other hand, restricting this issue exclusively to the prophets era or the classic era is completely wrong.[7]

Also, to continue and proliferate generations, women need the support of men and their insemination and in many events like war, and etc. polygamy increased according to necessity of time and place. In some countries polygamy is the result of various conditions such as the political, social, and economic ones. For instance, polygamy is rejected in Catholic societies where divorce is abnegated while it is tolerated and rather accepted as a rite in the customary law in societies where divorce is not prohibited.[8]

3.1. The Social Philosophy of Polygamy

As mentioned above**,** the consensus on the issue of polygamy among the Islamic jurists is rooted in Al-Nisa Surah of the Holy Quran. However, the argument lies in its condition and limits. As Allame Tabatabaei contends, "Islam set the foundations of social life on the human faculty of reason but not his emotions. Yet it does not mean that emotions are to be neglected completely."[9]

1 . Mohammad Javad Javid, A Critique on Human Rights' Philosophical Foundations, vol. 2, Islamic Philosophy on Human Rights, (Tehran: Nashre-Mokhatab 1392), 122.
2 . Boserup Ester, "The economics of polygamy", in Grinker, Roy Richard; Steiner, Christopher B. (eds.), Perspectives on Africa: a reader in culture, history, and representation, Cambridge, (Massachusetts: Blackwell 1997), 506–517. https://archive.org/details/perspectivesonaf00royr/page/506/mode/2up
3 . Mohammad Javad Javid, Ibid, 123.
4 . GH. Bousquet, LES MORMONS, Collections Que sais-je? presses universitaires de France, (1949), cited in Mohammad Javad Javid, Supra note 15.
5 . Benjamin G. Bistline, Polygamists: A History of Colorado City, Arizona, (Agreka Books 2004), 432.
6 . Motahari, Morteza, The Law of Women's Rights in Islam, (Sadra Publication 1371), 282.
7 . See Riffat, Hassan Al– Islam wa Huquq al Mara'a, Le Islam et les droits de la femme, (Casablanca 2000).
8 . Chaumont, Eric "Polygamie", In Dictionnaire du Coran, MA. Amir Moezzi(dir), ed. (Robert Laffont, Paris 2007).
9 . Tabatabaei, M. H., Almizan, vol 2, 417.

Therefore, it should be restated that the wide range of traits of both men and women such as puberty, maturation process, strengths and weaknesses, life expectancy etc. has to be taken into account in marriage. Furthermore, in order for the polygamy to be allowed in Islam, certain circumstances must be met. The husband must act justly and equally with his wives in all aspects of his life, be that life expenses- called Nafaqa in Islamic jurisprudence- or sexual intimacy. Like many other social phenomena, polygamy was regarded as integral to social life in the past; however, it was rather convenient then and it has grown more complicated in the passage of time.

The right of citizenship is a basic human right which is also categorized under collective rights of a people that could warrant their prosperity. In other words, polygamy could be considered as a both individual and collective right typical of human instinct and social life, respectively. The French psychologist, Gustav Le Bon, investigating the Arab Civilization said that polygamy enables the society to reduce social crises, preclude disastrous problems, and safeguard the society against the birth of illegitimate children. He maintained that economical problems have usually hindered men from becoming polygamous within societies; otherwise, polygamy has existed throughout the history as a human right coming from the natural law. Le Bon preferred the expressive transparency of the Eastern in this regard over the western discord and hypocrisy.[1] Ultimately, from an individualistic point of view on human rights, it is satisfaction and right to satisfaction of the individual alone that counts, whereas from a societal and collective viewpoint, the needs of the whole individuals and members of a society in attaining prosperity is presupposed to be met by the state.

3.2. The Social Philosophy of Prosperity

From an individualistic perspective on rights, prosperity is due to warm-hearted situations, intimacy and sacrifice in unity and harmony. This can, though, be endangered when polygamy happens. Obviously, if a polygamous took care of the conditions stipulated in the Quran and followed the traditions of the Prophet of Islam in this regard, he might even be deemed as a benevolent man. The view toward wives must be held as if the second wife were always standing by the door and the first one may feel inconvenient by the new coming. This might seem at first an individual limit under individual human rights; but truth is quite the contrary.

Polygamy is a citizenship right and a societal one; therefore, by considering this right most of the onerous cost and duty the state shoulders might be levied in a specific given situation. Some States (and/ or governments) have adopted a secret policy showing their satisfaction with polygamy, as they believe that most of the crises will be solved through this type of marriage. Humans shall have both material and spiritual needs met. Procuring the material needs is by the government, however, satisfying the spiritual needs is outside the power of states as partners in a marriage think of something more than just materials. Objections of human rights defenders in this area are not logical at least in the demographic results. it is only fluctuation of population. Polygamy is a bilateral affair casting benefits for the both sides. Opponents are usually

1 . (Translated from the original source into English) Gustav Le Bon, La Civilization des Arab, livre 4: Les mours et les institutions des Arabs. Firmin- Didot, Paris, (1884). Edition reimprimee a Paris en 1980 par le Sycomore, Editeue, (1980).

married females who declare such a rule to be against the foundations of family thus they might interpret it as against equality or equally as inequality between the two. The permission to polygamy must be issued under the conditions of citizenship rights and only when the number of women is far higher than men in order to preserve the human generation. Therefore, besides the natural right to be polygamous in citizenship respects, there have been permissions to do so granted by the states regarding the civil status with efficient and effective enforcement and domain of freedom limit in citizenship rights.[1]

1 . Javid, Mohammad Javad, 'From polygamy Culture up to Polygamy Right', (2010), issue 2, no, 1, Journal of Women Research, 72-74.

Conclusion

While classicists were rather misogynist, modernists- being monogamous- were egoists who tried to compensate for the inequality prevailing in the classic period. In a giant leap away from the two, postmodernists revealed an inclination to polygamy and a corollary interest in enjoying the company of more women through temporary marriages. Subsequently, theories of postmodernism maintain that family life in the postmodern era involve variation, diversity, and relativity.

It comes to the conclusion that postmodernism impacts the communal relationships, especially marriage. As mentioned above, postmodern era deals with uncertainty, therefore, it embraces the idea of temporary marriage and cherishes immediate satisfaction rather than staying faithful a long-turn relationship, i.e. monogamously. A basic individual and collective human right, polygamy is celebrated in many states for the benefits it might entail for the society. It is a suitable type of marriage to the postmodern ideologists who search for plurality. Universality of human rights is made possible only through citizenship rights of which polygamy- an accomplishment of postmodernism- is an archetype. Perhaps the best way to understand this new movement is to perceive it as a natural consequence of subverting marriage. Polygamy as a citizen right does not seem immoral should equity and justice be taken care of among wives. The only argument contradicting this stand is its practicability. Polygamy is certainly not a new phenomenon, but it has reinvigorated in the wake of postmodernism in recent decades. Traditional polygamy suffered from some inequality features while the new version could be egalitarian.

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Legal Status of Child Marriage in International Human Rights Law and the Law of Iran

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ABSTRACT

Protection of the children is one of the most important concerns in international human rights law. Child marriage is recognized as one of the forms of child abuse. The first step for elimination of child marriage is legal definition of the child. Lots of treaties have tried to determine the minimum age of a person before which he or she cannot marry. This article examines the criteria for recognizing an individual as a child and consequently child marriage in the international human rights system and domestic laws of the Islamic Republic of Iran. Treaties relating rights of the child do not clarify a specified minimum age for marriage except the Convention on the Rights of the Child in which a child is defined as a person below the age of 18. This criterion is based on an age-oriented approach and is aimed at homogenization of girls and boys. In contrast, in the law of Iran it is based on an interest-oriented one and it is relied on a multiple-criteria approach comprised of legal (physical or sexual) maturity, mental growth, religious maturity and guardian consent which has resulted in a more rational and defensible approach.

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Introduction

Marriage or family formation is one of the oldest, most enduring and complex human actions that has a long history. According to some authors, marriage has a positive function for the whole social system if it is done at the right time and with the right person. So, if the couple is not married at the right age and does not have the mental maturity necessary to form a life, he/she will certainly not be able to choose the right person and the result is both individual injuries and social influences that affect society as a result of this marriage, ranging from physical and mental illness and dissatisfaction with marital life to low rates of social participation and incomplete socialization.[1] Adolescent marriage is associated with factors that are very effective in the quality and reliability of married life, including: dissatisfaction with parents, social and economic weaknesses, low educational achievement, less experience and maturity and more. Social scientists believe that people who marry as teenagers are financially, psychologically, and educationally disadvantaged and less prepared to accept the role of mother.[2]

It appears that child marriage is contradicted with assumption of some international instruments on human rights including Article 16(2) of the Universal Declaration of Human Rights (UDHR) which states that "Marriage shall be entered into only with the free and full consent of the intending spouses". Also, it is against lots of States' legislations such as Iran in which child marriage in certain conditions is banned. According to the latest official statistics on child marriage, this issue in Iran is still a challenge, a phenomenon that, despite the legislature's efforts to protect children, continues in some cases.[3]

Conducting a comparative study, the present article seeks to answer this question that what is the minimum age of marriage in the international human rights system and law of Iran? In an-

1. Ali Ahmad Panāhi, 'Marriage in Islam; With a View to Educational and Psychological Functions', (2006), 104 Journal of Knowledge, Religions and Mysticism, 38. [In Persian]
2. PR Amato and others, Alone Together: How Marriage in America Is Changing, Massachusetts (Harvard University Press 2008), 18.
3. According to recent statistics released by the Statistics Center for the spring of 2021, the number of marriages of girls aged 10 to 14 in the April of 2021 increased by about 32% compared to the same statistics in the spring of previous year and has reached 9753 marriages. Based on the same statistics, 45,522 girls aged 15 to 19 were married in 2021. On the other hand, according to the mentioned statistics, the marriage of six boys under 15 years old and 6573 boys aged 15 to 19 years old has been registered in the April of 2021. For more information, see: https://www.amar.org.ir

swering this question, the assumption of this article, which has been written with a descriptive and analytical approach and using library and Internet resources and valid domestic and international documents and laws, is based on the fact that 'international instruments and institutions have been silent or have had an 18 age-oriented status contrary to law of Iran which seems to be based on a multi-dimensional approach that has led to a more logical and progressive one.

Doing so, the article is comprised of four main sections. Section 1 is dedicated to defining the key concepts used in the research. Because in this category of research, it is necessary to first consider the difference in the definition of each term in the legal systems under study. Since the subject of the article is mainly comparative, the issue of child marriage is discussed in terms of international human rights law in section 2. In this regard, the discussion is divided into two parts, the documentary and the institutional approach, and four key documents and other international documents of lower importance on the issue are discussed. In all these documents, the focus of the research is on free consent and the appropriate age for marriage. In the institutional approach, the relevant opinions issued by the most active treaty bodies in this regard and other international institutions have been mentioned. We will not enter into a judicial review of this issue because there is basically no significant judicial procedure on this issue but just in the field of protection of child soldiers which is beyond the scope of the article. Section 3 examines the subject of research in the Iranian legal system. The main focus of the article in this section is on the age criterion identified and the legal developments on this issue. The fourth and final section enters the main comparative discussion and makes a comparison between the two systems.

1. Concepts

The main reason for the ambiguity in many issues is the existence of words and expressions that are incorrectly defined. Therefore, at the beginning of each research, first and foremost, it is necessary to dedicate a section to the definition of key concepts.

1.1. Child

"Child" is defined as "a young human being below the age of puberty or legal age of majority" in the Oxford Dictionary. Despite all UN General Assembly's emphasis on the importance of respect for the rights and freedoms of child in Universal Declaration of the Rights of the Child (1959), this concept has been abandoned without an absolute definition. But in the Convention on the Rights of the Child (CRC) the term "child" is defined as follows: "…a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" (Art. 1). So, if there is a prescribed age for maturity in domestic law of a member state this law will prevail.[1] The latter part of the Article can be flexibly changed according to different laws and does not provide a remarkable standard for all members.[2] Article 6(5) of International Covenant on Civil and Political Rights (ICCPR) (1966) and Article 6(4) of Protocol II to 1949 Geneva Conventions (1977) also stipulate that sentence of death shall not be imposed for crimes committed by persons below eighteen years of age. In Article 1(4) of 1957 Supplemen-

1. Rachel Hodgkin and Peter Newell, Implementation Handbook for the Convention on the Rights of the Child (third edition, UNICEF 2007), 4.
2. Akram Fazlī Khānī, 'Violation of Children's Rights in the United States', (2011), 18 Quarterly Journal of Women's Rights Studies, 57. [In Persian]

tary Convention on the Abolition of Slavery, Slave Trade and Institutions and Practices Similar to Slavery (CASSTIPSS) and Article 3 of the Worst Forms of Child Labor Convention (1999), the term "Child" refers to people under the age of 18 years. Although the above-mentioned documents set out a standard of 18 years for a child, the international standard for identifying a child is still variable and has not reached the nature of a uniform procedure. In the field of humanitarian law, Article 4 of Protocol II to Geneva Conventions and the Second Optional Protocol to the Convention on the Rights of the Child, the age limit of 15 years for the identification of a child are considered. Also, according to the Committee on the Rights of the Child, the most common age of criminal responsibility at the international level is 14 years;[1] therefore, it is difficult to believe that the age criterion of 18 years can be considered as a customary rule.

In Iranian legal terms, a child is a person who has not attained the physical and mental development required by age; so, this term also covers the neonatal period. The 1979 Constitution of Islamic Republic of Iran (as amended in 1989) does not define a child, but it uses the word "orphaned children" in Article 21. The famous Imamiyah jurists refer to "child" as someone who has not reached the age of religious maturity.[2] According to Article 1210 (1) of the Iranian Civil Code (1961) and Article 147 of the Islamic Penal Code (2013) of Iran, the age of puberty (religious maturity)[3] for a boy is 15 lunar years and for a girl is 9 lunar years. Thus, religious maturity is the main basis for defining a child and the religious and legal sign of it is reaching a certain age, which can be termed 'puberty'.[4] Furthermore, in Article 1 of the Iran's Child and Adolescent Protection Law (May 2020), child is defined as any person who has not reached the age of religious maturity and in the definition of adolescent: "Any person under the age of 18 who has reached puberty".

Therefore, it seems that according to the principle of the rule of will, in determining the age of the child, the principle is the freedom of states which is also mentioned in the Convention on the Rights of the Child. However, the 18-year-old standard is apparently applied in countries where the law is silence as to the age of the child is silent.

1.2. Age of Consent

Merriam Webster Dictionary has defined "Age of Consent" as "the age at which one is legally competent to give consent especially to marriage or to sexual intercourse".[5] In addition, according to some authors, age of consent is the age at which a person could be legally competent to consent to marriage/sexual acts. Therefore, when an adult engages in sexual activity with a person younger than the age of consent, could be accused by child sexual abuse or statutory rape.[6] So, it could be concluded that forced marriages are cases in which one or both parties have not personally expressed their full and free consent to the union.[7]

1 .CRC, 'General Comment No. 24 on Children's Rights in the Child Justice System', CRC/C/GC/24 (18 September 2019), para 21.
2 . Ja'far ibn Hasan Mohaqqeq Hellī, Riyāḍ al-Masā'il (T- Al-Hadithah), Volume 8 (first edition, Institute of Ahl-al-Bayt 1984), 5. [In Arabic]
3 . Signs of puberty in male are completion of fifteen lunar calendar years of age, ejaculation through sexual intercourse, or seminal discharge while awake or asleep, the presence of pubic hair, of the rough type and the presence of hair on the face and above the lips and in females She is considered adult at the completion of nine lunar years. Available at https://www.sistani.org/english/qa/01127/
4. Ātefeh Abbāsi Koleimānī, The Rights of the Child in Iranian Legal System (first edition, Mizān Publication 2016), 14 [In Persian]
5 . Webster, Merriam, Academic Content Dictionary, Available online at: www.merriam-webster.com
6. Matthew Waites, The Age of Consent: Young People, Sexuality and Citizenship (first edition, Palgrave Macmillan 2005), 85.
7. Office of the United Nations High Commissioner for Human Rights, 'Preventing and Eliminating Child, Early and Forced Marriage' A/HRC/26/22 (2 April 2014), 4.

Although the ICCPR (Art. 23), the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR) (Art.12) and the 1969 American Convention on Human Rights (ACHR) (Art.17) use the term "age of marriage", the term "age of puberty" is mentioned in the UDHR. "Age of puberty" can refer to both 'religious puberty' and 'physical puberty'.

Iran, after Guinea, has accepted the lowest age of marriage for girls. In accordance with Article 1041 of the Iranian Civil Code, girls lower than 13 solar years and boys under 15 solar years are permitted to marriage with the consent of legal caretaker on the basis of child's expediency and with the permission of the court.[1] It should be mentioned that in Iran, sexual relationship out of marriage tie is forbidden for anyone in any age.

1.3. Child marriage

Child marriage, also referred to as an early marriage, has been defined by treaty bodies and international organizations as: '[…] any marriage where at least one of the parties is under 18 years of age'.[2] A child marriage generally expects young girls to enter simultaneously into a sexual relationship, which could be physically and psychologically harmful.[3] The overwhelming majority of child marriages involve minor girls, although once in a while their spouses are below the age of 18 as well.[4]

It can be legally valuable to make a distinction between the marriage of two children who lack the full and free consent or sexual relationship and the marriage between a mature and a child. It seems that what is in the core concern of the international documents and jurisprudence is the latter one. It is the reason for using the term forced marriage instead of child marriage in some cases.

Child marriage, premarital marriage, early marriage and forced marriage are all interrelated but distinct terms at the same time. Although, they have been combined in every way possible and are used interchangeably without any explicit definitions or at least clarification as to the breadth of the ambiguity surrounding each label. But it seems that the CEDAW and CRC have agreed to use the term 'child marriage' and 'forced marriage' as the same concepts.[5]

A marriage arranged by the parents may not mean forced marriage in the literal sense. In this marriage, although the parents play a key role in the marriage arrangements, the child may not be forced into the marriage. However, in international documents it is assumed that child marriage is considered as an example of forced marriage even by direction of their parents because of lack of necessary ability of child to recognize and make decisions due to mental, emotional and social immaturity for a serious matter such as marriage.

2. International Approach towards Child Marriage

International human rights system provides a broad framework through which states can

1. Shādi Sharīfī, 'Studying the Phenomenon of Child Marriage and Its Relationship with Child Abuse and Mechanisms for Combating It', (2017), Third International Conference on Jurisprudence and Law, Law and Social Sciences 1, 8-9. [In Persian]
2. CEDAW and CRC, 'Joint General Recommendation/General Comment No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on Harmful Practices', U.N.Doc. CEDAW/C/GC/31-CRC/C/GC/18, (2014), 7.
3. R Gaffney-Rhys, 'International Law as an Instrument to Combat Child Marriage', (2011), 15 International Journal of Human Rights, 361.
4. CEDAW and CRC (no 13), 7.
5. European Institute for Gender Equality, 'Child Marriage' (2018); available at www.eige.europa.eu

operationalize their respect for human rights and pay particular attention to groups that are more vulnerable or marginalized.[1] Children in many countries face numerous difficulties including early marriage. In the past few decades, the international community has taken a number of measures to counter this phenomenon at the international level.

2.1. Approach of International Instruments

For a long period of time, the view to childhood and adolescence has been the look of a "big" man to a "small" one, a young man who is potentially an adult and should be credited. Numerous international supports for the child shows that this view has undergone a profound transformation. To reach the main goal of this research, we must evaluate the international instruments relevant to the study of the basis of states' obligations in this field.

2.1.1. Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages

This Convention (CCM) was ratified in 1962, the preamble of which considers marriage and consent to it as a fundamental human right. Referring to the history of international activities concerning marriage, including Article 16 of UDHR and Resolution 843 (1954) of the UN General Assembly, the main objectives of this convention are the abolition of ancient laws and practices relating to marriage in contrast with principles set out in the UN Charter and the UDHR, the guarantee of complete freedom in choosing a spouse, the complete abolition of child marriages and the nomination of young girls before puberty and the imposition of appropriate punishments.[2]

Issues related to marriage in the Convention are divided into three categories: the need to determine the minimum legal age for marriage, the need for any marriage to occur with the consent of parties and the need to register all marriages in the appropriate notary. Article 2 of the Convention relating to minimum age for marriage reads: ‘States Parties to the present Convention shall take legislative action to specify a minimum age for marriage. No marriage shall be legally entered into by any person under this age, except where a competent authority has granted a dispensation as to age, for serious reasons, in the interest of the intending spouses’. "No marriage below this age should be legally registered by any person...".

In this regard, it should be noted that the Recommendation issued in 1965 by the General Assembly in form of Resolution No. 2018, states that ‘member States should take the necessary legal measures to determine the minimum age for marriage, which in any case is not less than 15 years’.[3] Although the resolution of the UN General Assembly is merely a recommendation and basically is not legally binding, it can be taken into account by the views expressed by some delegations and Agencies during the drafting of the Covenant.[4]

Therefore, this document does not stipulate the minimum age for marriage, but confirms

1. UNICEF, Children's Rights in Impact Assessment: A Guide for Integrating Children’s Rights into Impact Assessments and Taking Action for Children (UNICEF and Danish Institute for Human Rights 2013), 6.
2. Joseph Jackson, 'Consent of the Parties to Their Marriage', (1951), 14 Modern Law Review 1, 12.
3. UNGA, 'Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages' (1 November 1965) A/RES/2018(XX), para 4.
4. Māhrū Ghadīrī, 'Age and Consent to Marriage in Light of International Human Rights Law', (2017), 12 Journal of Family Research, 121. [In Persian]

its determination by member States. Member states are obliged to legislate the minimum age of marriage and make marriage registration mandatory.

2.1.2. International Covenant on Civil and Political Rights

Having followed Resolution 2200, the ICCPR was ratified by UN General Assembly on 1966 and entered into force on 1976.[1] The most important feature of the Covenant is that it is a universal instrument containing binding legal obligations.[2]

Article 23 (2) of the ICCPR specifies the right of marriage for men and women who have reached the age of marriage. This article reiterates that 'No marriage shall be entered into without the free and full consent of the intending spouses'. During the drafting of the Covenant in the Third Committee of the General Assembly, several delegations referred to the CCM. CCM requires State Parties to determine the minimum age of marriage by law. Therefore, it appears that the Covenant member states should set a minimum age for the right to marry. Although the Covenant mentions terms of child, juvenile and adult, without distinguishing between them, it just emphasizes the acquisition of free and full consent.

2.1.3. Convention on the Elimination of all Forms of Discrimination against Women

The General Assembly adopted Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) in 1979. The main objective of the Convention is to guarantee de jure and de facto equality between women and men.[3] It could be said that "the only global human rights instrument that explicitly prohibits child marriages is CEDAW".[4]

Article 16 of CEDAW is the focus of this sub-section. The mentioned Article, without specifying an age, includes *prohibition of betrothal and the marriage of a child* (our emphasis). So, only adults should be permitted to enter into marriage. Also, child marriage is banned through the CEDAW's Committee's statements in condemning forced marriages in its General Recommendation no. 21. Article 16 includes equal legal rights related to matrimony and to family relations, including the right of women to freely get married, to decide the number and timing of their children, and to exercise their rights to administer property without interference.[5]

The treaty only mentions the commitment of states to eliminate discrimination against women in all matters relating to marriage and family relations. Avoidance of this document to deal with the essential discussion of the definition of family indicates an awareness of the fact that the family is a culture-based concept and can vary from community to community, despite the commonalities.

2.1.4. Convention on the Rights of the Child

The Convention on the Rights of the Child (CRC) was adopted by the UN General Assembly on 1989 and entered into force 0n 1990. The truth is that the Convention on the Rights of the Child has not paid any direct and effective attention to the issue of child marriage. Howev-

1 . Reyhaneh Zandi, A Comparative Study of the Right to Proper Nutrition for Children in International Human Rights Law and Law of Iran (MA Dissertation in International law, The University of Qom 2016), 58. [In Persian]
2. Aulona Haxhitaj, 'The Covenant on Civil and Political Rights', (2013), 3 Juridical Tribune, 314.
3. de Silva de Alwis Rangita, Child Marriage and the Law: Legislative Reform Initiative Paper Series (UNICEF 2007), 9.
4. CEDAW, 'General Recommendation No. 21: Equality in Marriage and Family Relations', U.N. Doc. HRI/GEN/1/Rev.9. (1994), para 36.
5. Rangita (no 23), 11.

er, what we can say is that the CRC defines a child as *every human being below the age of 18 years*.[1] Furthermore, it obliges States Parties to protect child against domestic violence, war and prostitution and take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or *sexual abuse*, torture or any other form of cruel, inhuman or degrading treatment or punishment (Art. 19) (our emphasis). States Parties shall take all effective and appropriate measures with a view to abolishing *traditional practices* prejudicial to the health of children as well (Art. 24, para. 3) (our emphasis). This provision implies that persons under 18 years old (children) couldn't marry because it can be defined as a 'sexual abuse' or 'traditional practice'.

As Price Cohen states it, "while the CRC, alone, cannot be expected to eradicate years of discrimination against girls, it is, however, providing the framework for the possibility of worldwide change…despite the fact that all human rights treaties contain the principle of non-discrimination, it is only in the Convention on the Rights of the Child in which both genders are given true equality in the exercise of their rights".[2]

In general, and in the international approach, forced and early marriages are recognized as human rights violations. The international legal instruments discussed above condemn forced and early marriage. Both CCM and CEDAW require the consent of both parties, recommend determination of a minimum age for marriage, and the need to register marriages to better investigate the occurrence of forced and early marriages and to ensure that both parties have equal rights and protections. Although CRC does not contain specific principles regarding consent and registration of marriage, it specifically defines children as persons under 18 years of age.

Generally speaking, it seems that the tendency of CRC to determine the equal age for girls and boys for marriage results from non-consideration of the criterion of the age of physical, psychological and social maturity which can be the basis for a significant difference in marriage age for girls and boys.

2.1.5. Other Instruments

Besides the above mentioned instruments, early marriages have been taken into consideration in some of other international human rights treaties. For instance, CASSTIPSS implicitly prohibits early marriage, as it requires State Parties to abolish certain practices associated with child marriages. Under Article 1(c) the abolition of any institution or practice whereby 'a woman […] is promised or given in marriage on payment […] to her parents, guardian, family or other person or group' is stipulated. On the other hand, Article 2 recalls urges states, *inter alia*, to *determine a suitable minimum age of marriage* with a view to eradicate the practice mentioned in Article 1 (our emphasis).[3] "The principle of free, full and informed consent also provides critical insight into the conceptual links that may exist between slavery and child marriage" and proves how a child spouse can be an example of forced child slavery.[4]

As for the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treat-

1. Ghadīrī (no 20), 118.
2. Cynthia Price Cohen, 'The United Nations Convention of the Rights of the Child: A Feminist Landmark', (1997), 3 William & Mary Journal of Women and the Law, 45 and 47.
3. Gaffney-Rhys (no 14), 363.
4. Eliana Riggio Chaudhuri, Thematic Report: Unrecognized Sexual Abuse and Exploitation of Children in Child, Early and Forced Marriage (ECPAT International 2018), 18.

ment or Punishment (CATOCIDTP), Committee against Torture, has specifically criticized laws that permit child marriage, since it considers this as violence against child as well as inhuman and degrading treatment.[1] The Committee has recognized *child marriage as a harmful practice* which leads to the infliction of physical, mental or sexual harm or suffering and negatively affects the capacity of victims to realize the full range of their rights.[2]

In addition, regarding United Nations Resolution on Recommendation on Marriage Consent,[3] marriage registration requires the consent of both parties, and *15 years is set as the minimum recommended age for marriage* (our emphasis). However, similar to CCM convention, this recommendation allows exceptions for this minimum age.

2.2. Approach of Treaty Bodies

Considering that states have made various commitments to curb the phenomenon of child marriage over the years, in the following, we will outline some of the most important measures taken by treaty bodies on child marriage.

2.2.1. Human Rights Committee

There is no specific age limit in ICCPR, but according to the Committee, the age should be such that each spouse can make a free and full decision. It emphasizes that States parties' reports should indicate whether there are restrictions or impediments to the exercise of the right to marry based on special factors such as degree of kinship or mental incapacity.[4]

Although the Covenant does not determine a specified age for definition of childhood, CCPR implicitly uncovers its intention about concerned age. It states that 'the Covenant does not indicate the age at which he attains his majority. This is to be determined by each State party in the light of the relevant social and cultural conditions... However, the Committee notes that the age for the above purposes should not be set unreasonably low and that in any case *a State party cannot absolve itself from its obligations under the Covenant regarding persons under the age of 18*, notwithstanding that they have reached the age of majority under domestic law' (our emphasis).[5]

It reveals an uncertain tendency of CCPR for normalizing 18-year-old as a legal age of consent contrary to obligatory provisions of the Covenant. Maybe the psychological reason is that this commentary was issued in the year in which CCR was concluded i.e. 1989.

2.2.2. Committee on the Elimination of all Discrimination against Women

This is the body that monitors the implementation of CEDAW. Acknowledging that marriage makes men and women take serious responsibility, this Committee considers full maturity to be a prerequisite for marriage and *the minimum age for both men and women is 18 years and has banned all forms of formal and legal marriage under this age* (our emphasis).[6]

Interpreting article 16 of the Convention, the Committee has recognized that *the minimum*

1. CRR, 'Fact Sheet: Accountability for Child Marriage', Centre for Reproductive Rights, (2013), 27.
2. CAT, 'Concluding Observations on Bulgaria', CAT/C/BGR/CO, (2011), 4-5.
3. A/RES/2018(XX).
4. CCPR, 'General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses, Adopted at the Thirty-ninth session of the Human Rights Committee (27 July 1990), para 4.
5. Ibid.
6. CEDAW (no 26), para 36.

age for marriage should be 18 years for both men and women (our emphasis).[1] The Joint General Recommendation issued by the CRC and the CEDAW Committees on harmful practices establishes that states parties have a "due diligence" obligation to ban child marriage through legislation and supplement legal prohibitions "with a comprehensive set of measures to facilitate its implementation, enforcement, follow-up, monitoring and evaluation of the results achieved".[2] The Committee also emphasizes the right to register marriages in order to have the necessary support in the domestic judicial system.[3]

It is obvious that contrary to the main instrument i.e. CEDAW, the Committee asserts the 18-year-old criterion as a basic test for a legal marriage. Legitimacy of this kind of recommendation regarding to Committee's competency should be challengeable.

2.2.3. United Nations Committee on the Rights of the Child

This body was established by Article 43 and is responsible for examining the member state's progress in achieving the obligations arising from CRC. In 2011, the Committee expressed concern about child marriage and urged Bangladesh "to take all appropriate measures to end the practice". In recommendations issued by the Committee, little trace of problem of child bride can be found; however, in its consideration of the combined third to fifth periodic reports of Niger and its initial report on the implementation of the obligations under the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (25 September 2018) admitted that despite the fact that National Strategic Plan to End Child Marriages by 2018 was in place, the Spotlight Initiative addressed violence against women, including child marriages, Niger still needed to prohibit child marriage, *raise the age for marriage for girls to 18*, and lift its reservations to the Convention, including on polygamy (our emphasis).[4]

Although it seems that the issue of child marriage has been a matter of concern from the point of view of the CRC Committee, it neglected to address this issue properly and has only taken note of this in its brief references to the periodic reports. The lack of any formal, comprehensive and independent comment on this issue is one of the criticisms that can be made to the Committee in this regard.

2.2.4. Other Bodies

The UN High Commissioner for Human Rights states that forced marriage could be considered under certain circumstances an act of slavery and slavery-like practices.[5] Furthermore, the Special Rapporteur on Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment maintains that child marriage constitutes torture or ill-treatment, especially where states fail to establish a minimum age for marriage that complies with international standards or allow child marriage despite the existence of such laws.[6]

The Assembly of the Council of Europe urges the national parliaments of the Council of Europe Member States to adapt their domestic legislation so as to fix at or raise *the minimum*

1. CEDAW, 'Supplementary Information on the Bangladesh', Scheduled for Review, 65th Session (October 3, 2016), 1.
2. CEDAW and CRC (no 13), 7.
3. CEDAW (no 35), 5.
4. CRC, 'Public reports from children's rights defenders- Niger' (July 26, 2018), 4; available at www.childrightsconnect.org
5. OHCHR (no 11), 3.
6. UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', UN-Doc A/HRC/31/57, (2016), 18 and 23.

statutory age of marriage to 18 years (our emphasis). Moreover, the Assembly encourages States to refrain from recognizing forced marriages and child marriages contracted abroad.[1]

In addition, UN Security Council has passed a number of resolutions regarding sexual violence against children. Resolution 1612 'welcomes… Secretary-General's zero-tolerance policy on sexual exploitation and abuse' and resolution 1882 identifies sexual violence against children during armed conflict as a top priority and requires parties to the conflict to create and enact plans to stop these crimes.[2] Furthermore, Human Rights Council Resolution 7/29 condemns child sexual abuse and exploitation during armed conflict.[3]

3. National Approach: Islamic Republic of Iran

The Iranian legal regime has undergone many changes in terms of determining minimum age of marriage, limits of mandatory, legal caretaker of child authority and the penalties of his negligent. The article examines these different pieces of legislation.

3.1. Civil Laws

In 1934, the Iranian legislator ratified Article 1041 of Civil Code that set the minimum age of marriage 15 solar years for girls and 18 solar years for boys. But under special circumstances the court could have reduced the age to 13 for girls and 15 for boys. In 1982' reforms after the 1979 Islamic Revolution, Article 1041 was recognized to be in conflict with Sharia and pre-puberty marriages held possible by the permission of legal caretaker. The draft amendment was submitted to the Parliament in 2002, and finally, as amended by the Expediency Discernment Council it was amended as follows: "The marriage contract between girl before reaching the age of 13 and boy before reaching the age of 15 is subject to the permission of guardian, provided that there is expediency at the discretion of a competent court".[4] Furthermore, articles 1034 to 1206 of the Civil Code of Iran define the rules governing family and describes in detail the legal effects and consequences of marriage and the rights and obligations of couples.[5] In fact, the minimum age for marriage was reduced and more credit was given to the decision of the child's legal guardian.

According to the Iranian legal system, what makes an adult person able to distinguish between true and wrong in personal and social life is the principle of [mental] growth; so that he/she can handle his/her finances in a conventional way.[6] If rational and customary balance between the child's age of marriage and the child's development is not maintained, then surely from the beginning, the property and financial rights of the married child will be subject to de-

1. Anne Wijffelman, 'Child Marriage and Family Reunification: An Analysis under the European Convention on Human Rights and Dutch Forced Marriage Prevention Act', (2017), 35 Netherlands Quarterly of Human Rights, 109.
2. UNSC Resolution 2122 [on women and peace and security] S/RES/2122, (2013), (18 October 2013).
3. UN High Commissioner for Human Rights, 'Preventing and Eliminating Child, Early and Forced Marriage' UN-Doc A/HRC/26/22, (2016).
4. Ghadīrī (no 20), 124.
5. These issues are represented in the Iranian Civil Code in some parts of its Seventh Book (marriage and divorce– Articles 1034 to1157), Eighth Book (children- Articles 1158 to1194) and Ninth Book (family- Articles 1195 to 1206), including important issues such as: request for marriage, barriers to marriage, rights and obligations of spouses to each other and children, the right to form a family, age at marriage, custody, alimony, guardianship in marriage, dissolution of marriage, divorce and other cases are mentioned.
6. Seyed Mahdī Shahīdī, Civil Law: Obligations (ninth edition, Majd Publication 2006), 126. [In Persian]

struction. Therefore, due to insufficient growth, child does not have the right to take possession of her/his property. How can he/she pay alimony and dowry and other rights to his spouse or even claim and receive financial rights?

The other question is whether it is possible to stipulate in the marriage contract that the husband should not have a marital relationship with his wife? Some Islamic thinkers and jurists have argued that the main purpose of marriage is procreation which requires the existence of a marital relationship, so such a condition is an invalid one which also invalidates the contract because is contrary to its nature.[1] In contrast, some religious scholars and jurists have pointed out that marriage has several purposes; the marital relationship is not the only goal and it is based on the participation, empathy and harmony. So, the condition of not having a marital relationship in marriage is not contrary to the nature of marriage and is not considered an illegitimate condition.[2]

In the Iranian Civil Code, this issue is not explicitly stated and the judicial procedure is silent about it. Therefore, according to Article 167 of the Constitution, the judicial authority must refer to reliable Islamic sources. The principle of the validity of contracts and agreements requires the correctness of the condition. If a woman stipulates with her husband for an important interest or purpose, for example, that they do not have a marital relationship for a certain period of time or temporarily, such a stipulation seems to be equal to the principle of the rule of will (Article 10 of the Civil Code).[3]

3.2. Criminal Laws

The first law to address this subject is Article 3 of the Marriage Act Adopted in 1931 which states that: "It is forbidden to marry someone who has not yet been physically able to marry. Everyone who marries a person, who is not yet physically fit, will be sentenced to 1 to 3 years in prison. In addition, the offender may be sentenced to a fine ranging from 200 to 2000 Rials". In 1937, this law was amended as: "Anyone who marries a person, who has not reached the legal age of marriage in violation of Article 1041 of the Civil Code, will be sentenced to imprisonment of 6 months to 2 years. Husband is sentenced to at least 2-3 years of imprisonment if the girl is not over 13 years... the registrar and other persons involved in the crime shall also be subject to the same punishment or penalty provided for the assistant of the crime…".[4]

This article was also repealed by the adoption of article 646 of the Islamic Penal Code, approved in 1996 which holds premarital marriage is prohibited without the permission of the caretaker. If a man marries a girl who has not reached the age of majority in violation of Article 1041 of the Civil Code, he will be sentenced to imprisonment from 6 months to 2 years.[5]

Article 50 of the Family Protection Act adopted in 2013 provides for punishment resulting from organ failure and death in a marital intercourse with anyone contrary to Article 1041 of the Civil Code, as well as punishment for father, mother, legal caretaker and the registrar. In

1. Seyed Hossein Safāī and Assadollāh Emāmī, Introductory Course in Civil Law, Volume 2 (tenth edition, Mizān Publication 2010), 190. [In Persian]
2. Zayn al-Dīn ibn Ali Shahīd Thānī, Al-Rawḍah al-Bahiyyah fi Sharh al-Lama'ah al-Damashqiyyah (Islāmiyah Publication 1988), 164. [Arabic & Persian]
3 . Safāī and Emāmī (no 47), 190.
4. Law on Marriage (1973).
5. Islamic Penal Code (1995).

addition, pursuant to Article 660 of the Islamic Penal Code paragraph B "Whenever the spouse is [religiously] immature and has been severely harmed by sexual intercourse, in addition to the full dowry and full blood money, also the alimony would be on the husband to the time of one mate's death, even if the woman has been already divorced…".[1] In addition, regarding to Article 224 of the Islamic Penal Code, in some conditions death penalty would be executed if an adult have a forced intercourse with a [religiously] immature girl, like with intimidating, defrauding, raping etc.

The Child and Adolescent Protection Act, which was passed in 2020, also defines a child as a person who has not yet reached the age of religious maturity, and adolescent as any person a person under the age of 18 who has passed the age of religious maturity in Article 1. It lists punishments such as imprisonment and fines for any sexual assault (not marriage) of a child or adolescent. Such a crime is limited to child abuse and not forced marriage.

4. A Comparative Study of IHRL and Law of Iran

After a brief review of international and domestic approaches to child marriage, this section is devoted to a comparative study of the issue between international legal system and the Law of Iran.

4.1. Rules

The rights of the child are those rights that a person enjoys as a child. The basic principles governing children's rights in this regard are as follows:

4.1.1. Preserving the Best Interests of the Child

According to Article 3 of CRC, "the best interests of the child shall be a primary consideration in all actions affecting children". OP-CRC(I)[2] and OP-CRC(II)[3], the HCCH[4], Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect to Parental Responsibility and Measures for the Protection of Children, 1996; African Charter on the Rights and Welfare of the Child, 1990; ILO Conventions No. 182 (1999) and No. 138 (1973) have considered this principle. This is a fundamental legal principle developed to limit the extent of adult authority over children.[5] This principle is relative and in any case should be interpreted and implemented according to its specific time, place and facilities.[6]

Legal exceptions to minimum age regulations based on parental consent and customary or religious law reduce the legal minimum age for marriage to under 18 in many countries.[7]

1. Islamic Penal Code (2013).
2. Optional Protocol to the Convention on the Rights of the Child (I) (2000) on the sale of children, child prostitution and child pornography, 2000
3. Optional Protocol to the Convention on the Rights of the Child (II) (2000) on the involvement of children in armed conflict, 2000
4. Convention on the Civil Aspects of International Child Abduction, (1980)
5. Jean Zermatten, Jean, 'The Best Interests of the Child Principle: Literal Analysis, Function and Implementation', (2010), 18 The International Journal of Children's Rights, 488.
6. Mostafā Mir Mohammadī, Child Rights (Mofīd University Press and UNICEF 2013), 41. [In Persian]
7. In Afghanistan, for example, the minimum legal age for marriage is 16, which can be reduced to 15 with parental consent; In Andorra the minimum legal age of marriage is 16 years for both women and men and as early as 14 years with judicial authority. In 2014, the most recent year for available data, authorities did not record any marriages below the age of 18 years; In Angola the legal age for marriage with parental consent is 15 years. The government did not enforce this restriction effectively, and the traditional age of marriage in lower income groups coincided with the onset of puberty; In Antigua and Barbuda the legal minimum age for marriage is 18 years for both men and women and persons between 15 and 18 could marry with parental

In Iran, as an example, the age of religious maturity is 9 years for girls and 15 lunar years for boys, but because of the incompatibility of marriage and puberty age with psychological and sociological realities due to early childhood marriage, children may be exposed to a great deal of harms. That is why the Iranian legislature increased the age of marriage for girls to 13 and for boys 15 full solar years. In addition, marriage before that age is permitted subject to the permission of the father or paternal ancestor, but provided that the expediency of the child is recognized at the discretion of the competent court. It can be said that the interests of the child as to marriage before 13 or 15 years old have been largely left to the judges of the competent courts and there are no clear criteria for recognizing this expediency in the laws. The judge's diagnosis and the reasons he has accepted in this regard are different in each case. Studies show that in practice, judges often find the absence of harm (negative expediency) sufficient to issue a marriage license. However, a case regarding the consideration of a positive expediency meaning "no harm plus personal benefit to the child" is less considered. Judges also often consider customary interests, and the child's personal interests are often overshadowed by other interests.[1]

Also, criminalization of some injuries like harm by sexual intercourse or incompatible treats like intimidating, defrauding and raping with an immature spouse which even can result to death penalty, indicate the Iranian legislature's concern for protecting the interest of children who are not mature in the time of marriage.

4.1.2. Respect for Views and Opinions of the Child

According to Article 12 of CRC, a child who is able to form her/his own idea and opinion has the right to freely express her/his views on all matters affecting her/him and these opinions must be valued according to her/his age, maturity, and intellectual development. Article 19 of UDHR provides that everyone has the right to freedom of opinion and expression. Article 21 of the Islamic Declaration of Human Rights (as amended in 2020), also stipulates the right to freedom of expression for human beings. Article 19 of the ICCPR, Article13 ACHR, and Article 9 of ACPHR[2] also address freedom of expression.

Paying attention to child as a human being and giving her/him an active role in determining her/his own destiny requires accepting this kind of rights for her/him. Therefore, all actors involved in child protection should consider children as able to make choices and involve them when making decisions affecting them.[3] Marriage is one of the most important of them.

To exercise full, free and informed consent when getting married, Article 16 of CEDAW provides that a woman needs to have the capability to understand the meaning and responsibility of marriage; access to full information about her future spouse; knowledge of the institution of marriage and her rights to make a choice as to whether or not to marry, who to marry and when to marry.[4] Children's rights to have their views heard reinforces the status of a children as an active participant in promotion, protection and monitoring of their rights.[5] According to Article 12, older children have the right to participate in decisions about whom and when they

consent. See US Department of State, '2015 Country Reports on Human Rights Practices- Sri Lanka' (13 April 2016) http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport

1. Hājar Azari and Monīreh Mīrahmadī, 'Judicial Approaches to Determining the Expediency of Child Marriage', (2020), 10 Journal of Women and Society, 5-6. [In Persian]
2. African Charter on Human and Peoples' Rights, (1981).
3. Roberta Bosisio, 'Children's Right to Be Heard: What Children Think', (2012), 20 The International Journal of Children's' Rights, 141.
4. Rangita (no 23), 22.
5. Jane Fortin, Children Rights and the Developing Laws, (second edition, Bulterworths 2003), 102.

marry as soon as they have the maturity to understand the implications of their decisions.[1] However, the devil is in the detail. There are challenges in recognizing the age of a child before she/he can 'consent' fully and freely to marriage and sexual relations. In this regard, the CCR stipulates that no marriage shall take place without free consent of the parties. Such consent must be expressed personally in the presence of the authoritative power according to national law. Member States must pass national laws on the minimum age for marriage. CRC determine implicitly age of 18 as the age of consent. In addition, the General Assembly, in the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1965), advised member states that the minimum age for marriage should be 15 and no marriage shall take place below that age. Except in cases where the authority grants this age exemption for serious reasons and for the benefit of the parties to the marriage.

In Law of Iran, Civil Liability Law regarding the legal consequences of forced marriage states: "a girl who has accepted illegitimate cohabitation due to tricks or threats or abuse of subordination can also claim spiritual damages from the perpetrator in addition to financial losses" (Art. 9). However, the compatibility of this rule with the child marriage is limited to two cases of threat or abuse of subordination. One of the problems that can be raised regarding the compatibility of forced marriage with the provisions of this article is the issue of the girl's unwillingness to have illicit intercourse.[2]

It is unclear that why international instruments take an age-oriented criterion for the acceptance of a full and free consent of a person, while, besides the legal (physical or sexual) maturity, mental growth, religious maturity guardian consent by the guardian and *et*. can be supposed as main factors in approving that consent. So, it seems that a 'mixed approach' would work better. The law of Iran took this method by indicating a specific age of 13 and 15 years old (as the legal age of consent),[3] mental growth (as the age of financial affairs[4]), religious puberty (lack of consent in the harm resulting from sexual intercourse)[5] and guardian consent by the guardian (before the age of consent)[6]. It appears that this view is generally more progressive than a mere age-oriented view.

4.1.3. Prohibition of Child Abuse and Exploitation

The Council of Europe Convention on Action against Trafficking in Human Beings and articles 2, 5, 10 and 11 of CEDAW have addressed this issue. Articles 34, 35 and 36 of CRC and OP-CRC(I) oblige member states to protect children from all forms of sexual abuse and exploitation. State Parties shall take all appropriate measures to protect the child against all forms of exploitation that are contrary to any aspect of child's welfare. According to above, early marriage without the consent of the child can be considered as an example of sexual abuse of the child.[7]

1. Human Rights Watch, 'This Old Man Can Feed Us, You Will Marry Him, Child and Forced Marriage in South Sudan', (2013); available at www.hrw.org
2. Mahmūd Rezā Ābed Khorāsānī, An Introduction to the Rights of the Child (first edition, Mizān Publication 2010), 206-207. [In Persian]
3. Article 1041 of the Civil Code.
4. Articles 1207, 1210, 1212 and 1214 of the Civil Code.
5. Articles 2, 9 and 10 of the Law on the Protection of Children and Adolescents.
6. Article 1043 of the Civil Code.
7. Sharīfī (no 12), 16.

It seems that these topics to some extent are acceptable in the Iranian criminal law as well. It is important to distinct between child abuse resulting from lack of consent and child abuse resulting from lack of marital relationship. In other words, international instruments, like a notable number of countries,[1] simply prohibit child abuse because of deficiency in child consent;[2] but, in law of Iran it is forbidden because of lack of a true marital tie, so if there is a marital relationship between them respecting the legal framework, the term of child abuse and exploitation are not relevant.

In Iranian legal system, sexual intercourse between individuals beyond the scope of marriage contract is prohibited and punishable even by their consent. Articles 114(2), 221(2), 224(2), 228, 244, 658(2) and 660 of the 2013 Islamic Penal Code provide that sexual intercourse with children is punishable in different ways such as imprisonment and execution if there were not a marriage relationship.

4.2. Domestic Concerns

Like many Islamic states, the main basis of Iranian law is Islamic law. According to Article 167 of the Constitution, the judge is obliged to try to find the verdict of any lawsuit in the codified laws and if he does not find it, he should issue his judgment based on valid Islamic sources or orders. The content of Article 167 has been repeated many times in other cases and has resulted to the invocation of Sharia in all cases including criminal and civil ones. The Islamic legal system has certain characteristics, sources and goals that are different from other legal systems. In the first place, the text of the Holy Qur'an and Sunnah is considered as written laws, and in the second place, the consensus of jurists and rational reason. One of the most important methods of Islam to deal with the new situation is *Ijtihad* or trying to extract and deduce the rules of jurisprudence.[3] Therefore, as in examining the laws of any country, it is necessary to first assess the origin of those rules in examination of the laws and regulations of the Islamic Republic of Iran on the issue of minimum age for marriage.

Resolving the conflict between individual rights and collective interests has always been a point of contention and the absolute priority of one over the other is questionable. The supremacy of public interests over individual rights and freedoms leads to dictatorship and violates human rights, and disregarding the interests of society and the public interest leads to chaos and disintegrates the collective life.[4] Therefore, a balance must be struck between the two necessities. Discretion of states in this regard is defined as margin of appreciation. Although this doctrine has been widely considered in the European Court of Human Rights, it has become a growing practice in interpreting of human rights by other courts and States.[5] In the question of the minimum age required for marriage the question is whether the doctrine of margin appreciation can be applied in this regard? Therefore, the next section is devoted to examining the margin of appropriation in analyzing the principles of the Iranian legislator in determining the minimum age different from international documents.

1. For example: England, Germany, Japan, France, Spain and the Netherlands.
2. Exceptionally Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962) has mentioned both sides: legal age for marriage and consent of the parties.
3. George Curzon, Persia and the Persian Question, (Longman, Green & Co 1892), 454.
4. Ayyūb Abdī and Seyed Qāsem Zamānī, 'Margin of Appreciation in Freedom of Religion in the Light of the European Court of Human Rights', (2016), 19 Quarterly Journal of Public Law Research, 78. [In Persian]
5. Onder Bakircioglu, 'The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases', (2007), 8 German Law Journal, 713.

4.2.1. Islamic Approach

According to the popular belief among Islamic jurists, the child's legal guardian can marry his immature daughter or son to another. Jurists do not have the same opinion on the scope of this ruling and the guardian's ability. While some of them believe that this guardianship power is dedicated only to father and paternal grandfather, others generalize it to the child's executor and legal protector too.[1] Considering the meaning of the word "permission" in Islamic literature, it can be said that the opinion based on the right of a child to refuse marriage, formed by father and grandfather, after reaching the age of puberty has been more accepted.[2]

However, assuming that the Qur'anic Ayahs[3] implying the permission to marry a minor do not have an encouraging tone, they only indicate the current situation in the early Islamic society. First, because marriage is a social and interpersonal topic. In order for a subject to be the source of legal effects, it must have rational validity. Nowadays, rational people do not consider marriage relationship between two children or one child and one adult to be valid. Marital credibility must be rational and the source of the effect. In particular, the marriage of minors is not one of the foundations of Islam. Islam has adopted a number of common practices of that time due to the urgency and impossibility of sudden change. These affirmations cannot be considered a sign of Islam's satisfaction with those practices. Second, since the essence of all the guardianships that have been legislated in Islam is to observe the interests of the person under guardianship, maintenance legislation is never for the benefit of guardian or trustee. Therefore, if the minor marriage was decided by guardian, it has been for the purpose of observing minor interest. With expulsion of this expediency, that guardianship will also be eliminated.[4]

4.2.2. Margin of Appreciation

One of the questions that have been raised is whether the doctrine of margin of appreciation can be used to justify non-compliance of international rules with domestic law? The dynamic interpretation of human rights treaties is not unrelated to the sources of will and opinion of legitimate democratic institutions such as the legislature.[5] The term 'margin of appreciation' was first used in 1958 report of European Commission of Human Rights in the Cyprus v. Britain, and has since been widely used. Some authors argue that this doctrine refers to the powers given to states. Because they are in charge of assessing the real situation and implementing rules listed in convention.[6]

The reasons for using this doctrine are in line with the reasons that can be mentioned in the justification of relativism. The right of every society to have a degree of freedom in resolving conflicts arising from moral issues related to religious teachings, cultural backgrounds and the common denominator of any society and the need to respect the social, economic, cultural and political traditions of any society can be mentioned in justifying the acceptance of relativism.[7]

1. Mostafā Mohaqqeq Dāmād, Family Law, (twentieth edition, SAMT 2021), 86. [In Persian]
2. Assadollāh Emāmī, Family Law, (sixth edition, Mizān Publication 2019), 78. [In Persian]
3. The Women/6; Hūd/78; The Stories/27.
4. Mohsen Kadīvar, The Rights of the People: Islam and Human Rights, (fifth edition, Kavīr 2014), 290. [In Persian]
5. Mohsen Mohebbī and Esmā'īl Samāvī, 'The Contribution of Precedent of the European Court of Human Rights to Dynamic Interpretation of Human Rights Treaties', (Spring and Summer 2018), 35 International Law Review, 28. [In Persian]
6. Abdī and Zamānī (no 75), 64.
7. Hossein Sharīfī Tarāzkūhī and Javād Mobīnī, 'The Application of the Margin of Appreciation Doctrine in the Jurisprudence of the European Court of Human Rights', (2014), 16 Quarterly Journal of Public Law Research, 79. [In Persian]

Nevertheless, the fact is in the margin of appreciation doctrine, interpretation is mixed with practice and usually when it comes to doctrine, the issue of interpretation and performance is raised simultaneously, to the extent that the authors can say this doctrine is considered as the practice of interpretation in the executive position.[1]

It is possible for member states of the related conventions to define age of consent in their domestic legal framework if that age is not explicitly forbidden in those conventions. As was mentioned previously, without determining of a specified age, most of the treaties refer to some interpretable terms. For example, CCM refers to '*interest of the intending spouses'*, ICCPR stipulates *'free and full consent of the intending spouses*', and CEDAW provides '*prohibition of betrothal and the marriage of a child'* (our emphasis). Interpretation of these terms can be subject to a margin of appreciation. It seems that emphasis of Iranian legal policy makers, and indeed Islam, on interest of the child in any treatment which include marriage of children can make the accusation of child abuse or prejudice to the health of the child baseless. Anyway, a legal margin of interpretation of these provisions remains for Iran.

1. Alastair Mowbray, 'The Creativity of the European Court of Human Rights', (2005), 5 Human Rights Law Review, 63.

Conclusion

Finally, using this standard and not paying attention to the standards of Islamic countries which have more than a quarter of the world's children, despite the fact that the minimum age for marriage is not specified in international documents, would be problematic. Ambiguity in several international instruments such as CCM, ICCPR, CEDAW in which a minimum age of consent has not been identified and the authority for determination of the age of consent of a child rests with states parties has led to the elimination of the possibility of the formation of *erga omnes* obligations, *jus cogens* or customary rules regarding the age of consent of children. The only instrument in which age of marriage is determined is CRC that expresses 18 as a minimum age for marriage.

It can be said that identifying a child with a purely one-dimensional age-oriented attitude has several negative effects. On this basis, providing a purely age-oriented definition of a child, although its scope is broad and tolerant in setting positive criteria, is incomplete and lacks scientific validity and therefore is criticized.

In most societies where the age of puberty is the legal age for marriage, the age of marriage and consent to that for girls is usually lower than for boys since physical, behavioral and emotional changes in girls usually begin earlier than boys. Given that in addition to the age of sexual maturity, mental maturity and intellectual understanding are necessary to enter into cohabitation, it would be more reasonable and logical if a country differentiates between the age of marriage of a girl and a boy. Owing to the fact that puberty is a gradual and occasional process, accepting the absolute age criterion for the age of consent and without considering other conditions is not logical, because it cannot be said that a person is ready to get married on the day he/she has reached a certain age!

Hence, the mixed approach of Iran can be defensible which include a specific legal (also physical or sexual) age of 13 and 15 years old (as the legal age of consent), mental growth (as the age of financial affairs), religious maturity (as the age of consent for sexual intercourse) and guardian consent by the guardian before legal age (as approved age of interest of child without sexual intercourse). It appears that this view is generally more progressive than a mere age-oriented view.

International instruments just prohibit child abuse because of deficiency in child consent, but in the law of Iran it is forbidden because of lack of a true marital tie; so, if there is a marital relationship between them, the term of child abuse and exploitation are not relevant anymore. Therefore, the difference is in the criteria of definition of abuse. It should be noticed that preventing persons, for example, under 18 age from marriage can cause to a practically social abuse, while permitting such persons to get married, with respecting their interests, do not necessarily lead to their abuse.

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Syrian Asylum Seekers in Türkiye in Light of Internal and International Law: Lessons from Today for the Future

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ABSTRACT

International refugee law has its origins in the aftermath of World War II as well as the refugee crises of the interwar years that preceded it. In the context of the Syrian conflict, more than 3.6 million Syrian asylum seekers are under temporary protection in Türkiye. As this country is the number one host country for Syrian asylum seekers in the world. One of the current discussions about the fate of Syrian asylum seekers in Türkiye is their status after the end of temporary protection. In this context, the regulations on the end of temporary protection in Turkish legislation will be discussed in light of global standards on international protection. The aim of this study is to discuss Article 11 of the Turkish Temporary Protection Regulation in comparison with the UNHCR Guidelines on Temporary Protection or Residence Arrangements and International Humanitarian Law. In this context, the conditions for the termination of temporary protection, the legal and policy basis for a decision to return asylum seekers, the conditions for acquiring Turkish citizenship, and the compliance of Turkish legislation with global standards are discussed. This study will stand for a decision to terminate based on the voluntariness of asylum seekers in accordance with UNHCR guideline.

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Introduction

The "right to seek and be granted asylum in a foreign territory" is enshrined in Article 14 (1) of the Universal Declaration of Human Rights (1948) and subsequent regional human rights instruments. The 1951 Convention relating to the Refugees and its 1967 Optional Protocol relating to the status of Refugees laid the foundation upon which subsequent regional instruments have built, including the 1969 OAU Convention,[1] the 1984 Cartagena Declaration,[2] the EU Qualification Directive[3] and other relevant instruments of the EU asylum acquis communautaire, and the 1966 Bangkok Principles.[4] Collectively, this body of law, complemented by international human rights law, makes up the international refugee protection regime under which UNHCR exercises its mandate responsibilities. [5]Consistent with Article 1(A) (2) of the 1951 Convention, a refugee is "an individual who is outside his or her country of nationality or habitual residence who is unable or unwilling to return due to a well-founded fear of persecution based on his or her race, religion, nationality, political opinion, or membership in a particular social group."

As for the situation in Syria, it should be noted that the civil war in Syria has led to a mass

1. The 1969 OAU Convention refugee definition set out at Article I covers, in addition to those included in the 1951 Convention definition, 'every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.' Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (September 10, 1969) 1001 UNTS 45, http://www.refworld.org/docid/3ae6b36018.html

2. Conclusion III (3) of the Cartagena Declaration recommends a refugee definition that covers, in addition to those included in the 1951 Convention definition, 'persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.' Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, (November 22, 1984), http://www.refworld.org/docid/3ae6b36ec.html

3. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), (December 20, 2011), OJ L 337.

4. Asian-African Legal Consultative Organization (AALCO) Bangkok Principles on the Status and Treatment of Refugees, (December 31, 1966) (final text adopted June 24, 2001).

5. UN General Assembly, 'Statute of the Office of the United Nations High Commissioner for Refugees', (December 14, 1950), A/RES/428(V), http://www.refworld.org/docid/3ae6b3628.html; UNHCR, 'Note on the Mandate of the High Commissioner for Refugees and his Office', (October 2013), http://www.refworld.org/docid/5268c9474.html

influx into neighboring countries including Türkiye. Since 2011, when the clashes began, approximately 5.6 million Syrian citizens have been forced to migrate to other countries, mainly Türkiye, Lebanon, and Jordan (Table 1).

TABLE 1: SYRIAN ASYLUM SEEKERS PER COUNTRY

Total Persons of Concern by Country of Asylum JSON

Location name	Source	Data date	Population	
Turkey	*Government of Turkey*	7 Jan 2022	65.7%	3,736,925
Lebanon	*UNHCR*	31 Dec 2021	14.8%	840,929
Jordan	*UNHCR*	31 Dec 2021	11.8%	672,952
Iraq	*UNHCR*	31 Dec 2021	4.5%	254,561
Egypt	*UNHCR*	31 Dec 2021	2.4%	136,727
Other (North Africa)	*UNHCR*	31 Dec 2020	0.7%	42,578

Total Registered Syrian Refugees JSON

5,684,672

Last updated 07 Jan 2022

Source - UNHCR, Government of Turkey

Source: (UNHCR, 2021a;[1] TDGMM, 2021[2])

When examining the records of the United Nations Refugee Agency (UNHCR) based on the data of the Turkish Directorate of Migration Management (TDGMM), one finds that Türkiye is the country most affected by the aforementioned migration wave.[3] UNHCR also reports that Türkiye will be the leading country in receiving refugees by the end of 2020.[4] Since the beginning of the Syrian civil war, Türkiye has had an open-door policy for Syrian refugees. However, the influx created confusion and debate over the legal status of asylum seekers due to a lack of appropriate legal provisions.

Türkiye is a signatory to the Convention Relating to the Status of Refugees (hereinafter 1951 Convention) and its 1967 Protocol, with one geographical restriction. Of course, Grandi, the UN High Commissioner for Refugees said the treaty was a crucial component of international human rights law and remained as relevant now as it was when it was drafted and agreed.[5] Türkiye made a declaration under Article 1(B) of the 1951 Convention that it would apply the Convention only to persons who became refugees as a result of "events which took place in Europe before January 1, 1951". By a declaration with its instrument of accession to the 1967 Protocol, Türkiye has maintained the geographical limitation of the 1951 Convention. As a result, Türkiye does not grant 'refugee status' and does not apply the 1951 Convention to asylum seekers coming from Syria. Subsequently, Türkiye adopted its legislation on interna-

1. United Nations High Commissioner of Refugees [UNHCR], 'Operational Data Portal', (2021a), available at: https://data2.unhcr.org/en/situations/syria
2. Turkish Directorate General of Migration Management [TDGMM], 'Yıllara Göre Geçici Koruma Altındaki Suriyeliler' (2021), available at: https://www.goc.gov.tr/gecici-koruma5638
3. For more information see: https://en.goc.gov.tr/international-protection and https://en.goc.gov.tr/irregular-migration
4. United Nations High Commissioner of Refugees [UNHCR], 'Refugee Data Finder', (2021b), available at: https://www.unhcr.org/refugee-statistics/
5. UNCHR, 'The 1951 Refugee Convention: 70 Years of Life-Saving Protection', (July 28, 2021), available at: https://www.unhcr.org/neu/64169-the-1951-refugee-convention-70-years-of-life-saving-protection-for-people-forced-to-flee.html

tional protection of refugees under the Law on Foreigners and International Protection[1] (hereinafter LFIP). Part three of the LFIP, similar to the 1951 Convention, emphasizes their various rights, including the right to a fair trial. In fact, in the third part the Turkish law specifies kinds of international protection, general procedures for applications, administrative reviews and judicial remedies, exclusion, termination and cancellation of international protection, rights and obligations, and temporary protection status. The LFIP, in turn, designates three statuses of 'refugees' as refugees, conditional refugees and subsidiary protection. Art. 61 describes 'refugees' as follows:

> *"A person who, as a result of events occurring in European countries, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of former residence as a result of such events, is unable or, owing to such fear, is unwilling to return there."*

The LFIP obviously borrows from the 1951 Convention the definition, but with a geographic restriction in accordance with Türkiye's declaration to the Convention. Thus, Türkiye undertakes to grant refugee status to those who have forcibly left their country in Europe for one of the five reasons listed above. Article 62 provides a transitional regime, namely conditional refugees, for asylum seekers who come from outside Europe for the five reasons mentioned above. These persons are allowed to stay temporarily in Türkiye until they are resettled in a third country. In the analysis of this article of Turkish law, it should be said that this article complies with the provisions of the 1951 Convention, including Article 6. Art. 63 further grants asylum to an alien or stateless person who cannot be classified as a refugee or a conditional refugee but who "upon return to the country of origin or country of [former] habitual residence:

1. would face death sentence or execution;
2. (b) be subjected to torture or inhuman and degrading treatment or punishment;
3. is seriously threatened by indiscriminate violence in international or national armed conflicts."

Consequently, none of the three international protection categories cover Syrian asylum seekers. On the other hand, LFIP Art. 91(1) defines temporary protection as: "Temporary protection may be granted to foreigners who have been forced to leave their country, who cannot return to the country they left, and who have arrived in Türkiye in a situation of mass influx or have crossed the borders of Türkiye and are seeking immediate and temporary protection".

1. Leagal Status of Syrian Asulum Seekers in TÜRKIYE

As mentioned above, although Türkiye is a party to the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Additional Protocol, the asylum seekers who arrive

1. See https://www.unhcr.org/tr/wp-content/uploads/sites/14/2017/04/LoFIP_ENG_DGMM_revised-2017.pdf

at Türkiye from Syria cannot be considered refugees due to Türkiye's geographical limitation that the Convention only applies to events in Europe. Türkiye is now one of the 145 countries of the 1951 Convention. In this regard, asylum seekers who come from outside Europe are not accepted as asylum seekers in Türkiye. The LFIP also excluded Syrian asylum seekers from refugee status. Against this background, Türkiye issued the Temporary Protection Regulation (TPR) in 2014, referring to Article 91(2) of the LFIP. The TPR defines its objective in Article 1 as:

> *"To establish the procedures and principles for temporary protection procedures for foreigners who have been forced to leave their countries and who cannot return to the countries they left and arrived in, or who have crossed our borders en masse to seek urgent and temporary protection and whose applications for international protection cannot be accepted on a case-by-case basis; To determine the procedures to be carried out in connection with their reception in Türkiye, their stay in Türkiye, their rights and obligations and their departure from Türkiye, to regulate the measures to be taken against mass movements and the provisions related to cooperation between national and international organizations."*

Art. 5(1) of the TPR provides that illegal entry and stay shall not be punished in the case of a mass influx placed under temporary protection by the Council of Ministers. Accordingly, the Council of Ministers is empowered to decide on persons placed under temporary protection and on the commencement, duration, extension or termination of temporary protection (TPR Art. 10).

An international call for the declaration of temporary protection is not addressed in the Turkish legislature, however, LFIP Art. 92 allows the Ministry of Interior to cooperate with UNHCR, the International Organization for Migration, other international organizations and non-governmental organizations on issues related to the procedures and implementation of temporary protection. On the other hand, temporary protection may not be granted or revoked for the same reasons as exclusion from international protection (TPR Art. 8): if a person enjoying temporary protection has died, if he or she leaves Türkiye of his or her own free will, if he or she claims the protection of a third country, or if he or she is admitted to a third country for humanitarian reasons or in the context of resettlement (TPR Art. 12). The TPR recognizes the right to health care (Art. 27), the right to education (Art. 28), the right to settle in the country, the right to housing and the right to travel freely (Art. 25), the issuance of an ID card (Art. 22), the right to social security and housing (Art. 27), the right to employment (Art. 29), the right to social assistance (Art. 30), administrative services and interpretation services (Art. 31(1)) for persons placed under temporary protection.

Apart from these services, the TPR allows additional services provided by other public institutions and organizations within the scope of services (Art. 26(2)). The Temporary Protection Card ID gives its holder a residence permits in Türkiye, but this does not mean full freedom in terms of residence and is subject to compliance with certain regulations, which can be adjusted according to the criteria of security, order, economy and society. The Temporary Protection Card ID does not provide the right to apply for citizenship (TPR Art. 25). In addition, asylum seekers under temporary protection who do not have a valid travel document have the right to a "travel card" issued in accordance with the Passport Law (TPR Art. 43).

1.1. Scope of Temporary Protection

The 1951 Convention on the refugee protection system suffers from serious inconsistencies. It is lamentable that a greater number of states are passive by shrinking their duties and obligations under international refugee law, and in effect fewer asylum seekers have access to protection today. Restrictive and selective refugee policies are, indeed, not a new trend in Western countries as they tend to keep problems away from their borders and expect the rest of the world to accept refugees.[1]

Another fundamental flaw in international refugee law is individual state responsibility, where states' responsibility to refugees is based primarily on the relative ability of states to control their borders.[2] Another problem[3] arises from the individualistic nature of the refugee process, which may mean that, at the very least, the process cannot be effectively and properly applied in the event of a mass influx. Moreover, victims of intricate contemporary social and political problems, as well as environmental disasters, might be excluded from international protection mainly due to the limitative nature of the definition of refugee in international law.

In this regard, temporary protection has been viewed as an exceptional measure and a pragmatic tool to address particular situations of mass influx where national asylum systems may be overwhelmed.[4] The temporary protection regime does not have a uniform and agreed-upon definition in international law and has different meanings and applications depending on the context and country. It is most commonly understood as a short-term emergency response to a 'mass influx' of asylum seekers to mitigate the severity of the situation when it is difficult to manage the mass movement and effectively distinguish between asylum seekers and others.[5] Temporary protection thus has two faces: first, in a positive sense, extending emergency humanitarian assistance and improving the situation of masses who unfortunately fall outside the scope of the 1951 Convention. Second, temporary protection may be used suspiciously by some countries to displace regulation and protection under international refugee law and to shirk their corresponding responsibilities.[6]

According to Article 2 of the European Commission Directive 20 01/55/ EC of July 20, 2001, the persons covered by the temporary protection regime are, in other words, "displaced persons":

> *"Third country nationals or stateless persons who have had to leave or have been evacuated from their country or region of origin, in particular as a result of an appeal by international organizations, and who cannot return under safe and*

1. Bhupinder Chimni, 'Globalisation, Humanitarianism and the Erosion of Refugee Protection', (2000), 13 Journal of Refugee Studies, 251-252.
2. James Hathaway, 'Temporary Protection of Refugees: Threat or Solution' in Jonathan Klaaren, Jeff Handmaker and Lee Anne de la Hunt (eds), Perspective on Refugee Protection in South Africa, (Lawyers for Human Rights 2001), 43-44.
3. For some problems of refugees see: drc.ngo/it-matters/current-affairs/2020/12/syrian-refugees-struggling-to-find-a-new-life/
4. UNHCR, 'UNHCR Summary Observations on the Commission Proposal for a Council Directive on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx (COM(2000) 303, 24 May 2000)', (September 15, 2000), available at: http://www.refworld.org/docid/437c64b04.html
5. Alice Edwards, 'Temporary Protection, Derogation and the 1951 Refugee Convention', (2012), 13 Melbourne Journal of International Law, 5-6.
6. Joan Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalized Regime', (2000), 94 American Journal of International Law, 279.

durable conditions because of the situation prevailing in that country, and who may fall within the scope of Article 1A of the Geneva Convention relating to the Status of Refugees or other international or national instruments granting international protection, in particular:

(i) Persons who have fled areas of armed conflict or endemic violence;

(ii) Persons who are at serious risk of becoming victims of systematic or generalized human rights violations or who have suffered such violations.

For its part, as noted in paragraph 9 of the UNHCR Guidelines on Temporary Protection or Residence Arrangements[1]*, UNHCR advocates temporary protection arrangements in particular as an appropriate response to:*

(i) large flows of asylum-seekers or other similar humanitarian crises;

(ii) Complex or mixed cross-border population movements, including boat arrivals and sea rescue scenarios;

(iii) fluid or transitory contexts [e.g., at the beginning of a crisis when the exact cause and character of the movement may be uncertain, or at the end of a crisis when the motivation for departure may require further assessment]; and

(iv) other exceptional and temporary circumstances in the country of origin that require international protection and prevent return in safety and dignity".

Evidently, both definitions are intent on providing emergency measures in the event of a mass influx of people who may fall within the scope of the 1951 Convention to normalize circumstances at least to a point their lives and human dignity are in no more danger. In this sense, these regulations are not able to cover new threats to people under the influence of climate change and victims of probable environmental disasters not mentioned in the 1951 Convention. According to the Executive Committee of UNHCR, "asylum seekers who are part of these large refugee flows include persons who are refugees within the meaning of the 1951 United Nations Convention and the 1967 Protocol relating to the Status of Refugees, or who are forced to seek refuge outside that country as a result of external aggression, occupation, foreign domination, or events seriously disturbing public order in part or all of the country of their origin or nationality".[2] On the other hand, UNHCR recognizes the risk of displacement due to climate change and calls on all concerned parties to work together and cooperate to find the available responses to climate-induced displacement, which "must be guided by the fundamental principles of humanity, human dignity, human rights and international cooperation".[3]

1.2. Rights of Asylum Seekers Under Temporary Protection in TÜRKIYE

The TPR grants persons under temporary protection the right to health, education, residence in the country, housing, access to the labor market, social assistance, interpreters and similar services (Arts. 26-32), which covers the main obligations of the host states as mentioned above.

1 . See https://www.refworld.org/pdfid/52fba2404.pdf; see also UNHCR, 'Guidelines on Temporary Protection or Stay Arrangements', (2014), available at: https://cms.emergency.unhcr.org/documents/11982/44933/UNHCR,+Guidelines+on+Temporary+Protection+or+Stay+Arrangements,+2014/373af576-cd03-4134-9d49-e03a1add6a9e

2. Executive Committee of the High Commissioner's Programme, 'Protection of Asylum-Seekers in Situations of Large-Scale Influx No. 22 (XXXII) – 1981', October 21, 1981, No. 22 (XXXII), available at: https://www.refworld.org/docid/3ae68c6e10.html

3. UNHCR, 'Summary of Deliberations on Climate Change and Displacement' (2011b), available at: http://www.refworld.org/docid/3ae68c6e10.html

Within this framework, most of the work is done in cooperation with UNHCR and other international charities. Moreover, Türkiye has not imposed any special requirements for foreigners to access the labor market and has issued the necessary work permits to Syrian immigrants. In this regard, Türkiye has adopted a self-regulatory approach to the labor market for immigrants and avoided a potential social and economic crisis.[1]

A) Healthcare: Article 27 of the TPR regulates healthcare for asylum seekers with temporary protection status. Asylum seekers are entitled to all basic health care services available to Turkish citizens. Health care for asylum seekers in Türkiye is provided by the Ministry of Health inside or outside temporary accommodation centers. The TPR requires the Ministry of Health to establish a sufficient number of health centers and to provide sufficient medical personnel and ambulances at the established health centers. The ministry has increased equipment and personnel accordingly.[2] However, it is frequently reported that health care for Syrian asylum seekers often falls short due to the insufficient number of medical staff and language and cultural differences.[3] Another shortcoming in access to health services for Syrian asylum seekers is that they are required to pay a "contribution fee" for health care, like all Turkish citizens, except for patients in emergencies. Since those with temporary protection status come from other countries, the necessary examinations and vaccinations are carried out with regard to infectious diseases. The legislation also stipulates that the environmental conditions in which the temporary shelters for asylum seekers are located must be made suitable for health. Under Article 27(5) of the TPR, assurances are given that "psychosocial services for persons enjoying temporary protection are carried out [in cooperation] with partners for support solutions, which are also listed in Türkiye's Disaster Plan published by the Ministry of Family and Social Policy."

B) Educational Services: The Ministry of National Education provides the Syrian asylum seekers under temporary protection with educational services for within or outside the temporary accommodation centers. Regulations regarding educational services are stipulated in Art. 28 of the TPR. Consistent with it, preschool, primary and secondary education and trainings are given to children. It is considered the exclusive right of children of all ages who wish to have access to courses such as obtaining professions and learning foreign languages. The Presidency of the Council of Higher Education decides whether higher education be given outside the specified trainings.. In line with Art. 28(3) of the TPR, in the event that an asylum seeker had received education under a different curriculum, documents must be submitted for evaluation by relevant units of the Ministry of National Education or Presidency of Council of Higher Education. The equivalence proceedings issued accordingly entitles the asylum seeker the right to perform their profession.

C) Access to the Job Market: Under Art. 29 of the TPR, the Ministry of Labor and Social Security (MLSS) is the authority to decide on the right to employment to be given to asylum seekers under temporary protection by the Government.. Submitting their temporary protection certificates to the MLSS, and one can apply to receive a work permit. It includes both paid

1. Arda Akçiçek, 'Turkiye'de Suriyelilerin Toplumsal ve Ekonomik Uyumu', (2018), 80 Liberal Düşünce, 51-61.
2. Nagihan Önder, 'Türkiye'de Geçici Koruma Altındaki Suriyelilere Yönelik Sağlık Politikalarının Analizi', (2019), 5 The Journal of Migration Studies, 141.
3. Ömer Yavuz, 'Türkiye'de Suriyeli Mültecilere Yapılan Sağlık Yardımlarının Yasal ve Etik Temelleri', (2015), 12 Mustafa Kemal University Journal of Social Sciences Institute, 269.

works and self-employment. All persons under temporary protection who are employed shall have access to ordinary social security facilities. Although numerous projects have been developed for the employment of the Syrian asylum seekers, sadly, reports indicate that most of the employment is cheap, unrecorded and without social and job security.

D) Social Assistance and Services: Regulations regarding social assistance and services for the people under temporary protection are enshrined in Art. 30 of the TPR. The Article provides that access to social assistances shall be given to asylum seekers under temporary protection who are in need. Social benefits for asylum seekers are carried out by the Ministry of Family and Social Policies.

E) Family Reunion: Under Art. 49 of the TPR stipulates that asylum seekers under temporary protection may apply for family reunification in Türkiye to reunify with a spouse, an underage child who has not attained maturity and a dependent child who is in another country. The applications are evaluated by the TDGMM and appropriate actions may be taken in collaboration with relevant public institutions and organizations, international organizations, and civil society organizations. Minors who are found unaccompanied proceed with the process of family reunification without prior request. Consistent with Article 3 of TPR, family members include the beneficiary's spouse, minor children and dependent adult children. The Article also provides that "family reunification steps [for the unaccompanied children] shall be initiated without delay and without the need for the child to make a request". Family reunification applications, especially reunification of children with their families inside Türkiye and in the border regions are typically examined by Türk Kızılay and AFAD, respectively.. The Türk Kızılay also provide accompaniment in case of child reunification in Türkiye and family tracing services.[1] Statistics reveal that as of January 2021 a total number of 3,239 family reunification requests have been received by the Türk Kızılay.[2]

F) Right to Nationality and Right to Property: The UNHCR Guideline underlines that TPSA's are complementary tools to international protection and shall not obstacle the rights of an asylum seeker. It is, as well, stipulated in Art. 18 of EC Directive that "persons enjoying temporary protection must be able to lodge an application for asylum at any time". However, the TPR maintains that persons under the scope of temporary protection may not proceed with individual international protection applications during the temporary protection period. It is especially evident in applying for citizenship. According to Art. 11(b) of Turkish Citizenship Law (TCL) , to qualify for a citizenship, a foreigner must have lived in Türkiye continuously for at least five years. A relevant regulation, Art. 16 of the TCL maintains that persons under temporary protection regime who are married to a Turkish national for at least for three years could apply for citizenship.. The obstacle before the right of citizenship also affects the right of property acquisition for Syrians in light of the 1927 Law of Reciprocity which prohibits the acquisition of immovable in Türkiye to the nationals of Albania, Lebanon, Syria, Bulgaria and Greece. However, long-term residence rental contracts are possible.

Findings of surveys indicate that Syrian asylum seekers under temporary protection in Tür-

1 . See https://asylumineurope.org/reports/country/turkey/content-temporary-protection/family-reunification/

2. Türk Kızılay, Syrian Crisis Humanitarian Relief Operation, (January 2021) 4, available at: https://www.kizilay.org.tr/Upload/Dokuman/Dosya/january-2021-syria-crisis-humanitarian-relief-operation-09-03-2021-41886931.pdf

kiye still suffer mostly from language problem, access to fundamental needs and unemployment in spite of the many legislations, regulations and projects which have been implemented.[1]

1.3. Non-refulement Under Temporary Protection TÜRKIYE

Reaffirming the universally-acclaimed principle of non-refoulement, Art. 6(1) of the TPR maintains that:

> *"No one within the scope of this Regulation shall be returned to a place where he or she may be subjected to torture, inhuman or degrading punishment or treatment or, where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion."*

2. Termination of Temporary Protection Under Turkish Law

Consistent with Art. 11 of the TPR, upon the proposal of the Minister of Interior Affairs, the Head of Republic may use his authority to declare the termination of temporary protection regime with a Decree. The Head of Republic, in this case, is able to either make the decision on his own or inquire consultations of other States or international organizations. Neither LFIP nor TPR contain objective criteria for the termination of the international protection. Furthermore, there is no requirement to take the voluntariness of the asylum seeker into consideration. In the Decree of Termination, the Head of Republic may also decide: a) To fully suspend the temporary protection and to return of persons benefiting from temporary protection to their countries; b) To collectively grant the status, the conditions of which are satisfied by persons benefiting from temporary protection, or to assess the applications of those who applied for international protection on an individual basis; c) To allow persons benefiting from temporary protection to stay in Türkiye subject to conditions to be determined within the scope of Art. 11 of the TPR.

Excluding the refugee status, the following possibilities are available for Syrian asylum seekers upon the termination decision:

- A collective expulsion;
- Granting citizenship to some or all the asylum seekers under TCL Art. 12;
- Granting conditional refugee or subsidiary protection until their removal to a third country under LFIP Art. 62 and 63;
- Allowing some or all asylum seekers to stay in Türkiye as foreigners;
- Making a special regulation for Syrian asylum seekers.

Furthermore, in line with Article 57 (2) of LFIP, detention for the purpose of removal may be issued to persons who: "1) Present a risk of absconding; 2) Have breached the rules of entry into and exit from Türkiye; 3) Have used false or forged documents; 4) Have not left Türkiye after the period of voluntary departure, without a reasonable excuse; 5) Pose a threat to public or-

1 . Hamza Ateş and Mücahit Bektaş, 'Suriyelilerin Toplumsal, Kültürel ve Ekonomik Entegrasyonu', in Yıldırım Deniz and Fatih Bilgin (eds), Uluslararası Sosyal Bilimler Sempozyumu, (TESAM 2016), 3-31; Sait Yılmaz, Özlem Arzu Azer and, Dikran M Zenginkuzucu, İstanbul Esenyurt İlçesi Suriyeli Sığınmacıların Sosyal ve Ekonomik Durumları (Istanbul Esenyurt Universitesi 2019), 60.

der, public security or public health." The law furthers that "detention shall immediately cease where it is no longer necessary."[1] Orders from Magistrates' Courts of Antalya and Hatay in 2018 held that there is no basis for detention under Article 57 of LFIP in the event that the removal process cannot be carried out in light of interim measures from the Constitutional Court and the Administrative Court.[2] Conversely, the Magistrates' Court of Van has held an opposite view in similar cases.[3]

According to RFIP, in the event that a person who is detained in a Removal Center applies for an international protection , he/she will remain in detention without being subject to a separate detention order for the purposes of the international protection procedure.[4] This not only is contrary to the LFIP, which provides that applicants for international protection shall be protected from deportation, but it also raises the risk that grounds for detention under Article 68 of LFIP will not be adequately assessed with a view to maintaining or releasing an applicant from pre-removal detention. In practice, asylum seekers remain subject to pre-removal detention orders, although some persons are released after their application for international protection has been registered.[5] Even this can nevertheless entail a prolonged period of pre-removal detention due to the significant obstacles to the Registration of applications from Removal Centers. There is limited information on how the new provision on alternatives to detention from December 2019 has been implemented but practice in 2020 seems to indicate an increased use of reporting duties and being placed at a residential address.[6]

1. Article ۴)۵۷) LFIP.
2 2 .nd Magistrates' Court of Antalya, 'Decision 2018/1761' (2 April 2018); 2nd Magistrates' Court of Hatay, 'Decision 2018/4659' (26 December 2018).
3 2 .nd Magistrates' Court of Van, 'Decision 2018/6023', (November 27, 2018); 2nd Magistrates' Court of Van, 'Decision 2018/6166', (January 7, 2018).
4. Article 96(7) RFIP.
5. Information provided by a stakeholder, February 2018.
6. See section on Alternatives to detention in: https://asylumineurope.org/reports/country/turkey/detention-asylum-seekers/legal-framework-detention/grounds-detention/

Conclusion

Türkiye has reviewed its existing laws on international protection and temporary protection in the wake of the mass influx from Syria. As a result, more than 3.715 million Syrian asylum seekers were hosted in the country. Turkish legislature, to some extent, fulfils its obligation under human rights law. However, suspension of international protection procedures during temporary protection and insufficiency on naturalization of persons under temporary protection are the main basic issues to be revisited and improved. In this respect, it is incumbent to make modifications to Art. 16 of the TPR in line with international developments on international treatment principles under temporary protection. It is hoped that Türkiye amend Art. 16 pursuant to the EC Directive Art. 3(1) as temporary protection shall not prejudge recognition of refugee status under the 1951 Convention.

Furthermore, the international arena has changed greatly recently, more specifically, since Türkiye was founded. In the same vein, it is suggested that Türkiye revise its position regarding the 1927 Law of Reciprocity upon meticulous negotiations with the corresponding countries.

Finally, even if Turkish Constitution adopted a monist approach in case of protection of fundamental human rights and the 1951 Convention prevails in case of a gap or contradiction in domestic law –which does not exist in fact- it will be more appropriate that LFIP codifies literally the rights and freedoms of refugees, which shall be equal to a national such as freedom from discrimination, freedom of religion, intellectual property rights, right to fundamental education and other special regulations such as exception from prosecution for unlawful entrance, transfer of assets for refugees as recognized in the 1951 Convention.

In this respect, the following suggestions are made for the improvement in Turkish legislation on international protection and temporary protection:

- The withdrawal of Türkiye's geographical reservation to the 1951 Convention;
- The content of the rights and freedoms enshrined in the TPR shall be extended to cover all the international protection law;
- The 1927 Law of Reciprocity shall be revised and the right to property of the Syrian asylum seekers under temporary protection shall be provided;
- Individual applications for a relevant international protection status shall be allowed to persons under temporary protection;
- Naturalization procedures shall be established and application for citizenship shall be allowed for persons under temporary protection;
- The conditions for the termination of temporary protection shall be clearly fixed in the laws and regulations, especially the determination of the availability of the situation shall be assessed in cooperation with the UNHCR and other concerned international organizations;
- After the termination of temporary protection, the asylum seekers shall not be forced to return unwillingly and regardless of their concerns for legitimate threats.

All in all, greater compliance with international human rights law to protect the rights of refugees is a value that countries, including Türkiye, can consider.

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An Investigation into the Right of Return* of the Palestinian Refugees from the Perspective of International Human Rights Law

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ABSTRACT

The return of Palestinian refugees to their ancestral lands remains a pressing human, political and legal issue in the third millennium. The present study aims at exploring the legal status of Palestinian refugees as well as investigating their right of return to their lands in an international law framework. In so doing, the role of nationality and the principle of genuine link between claimants of the right of return and the country of origin are examined. It is concluded that considering the historical context of the Palestinian territories, part of which is now called Israel and the other part is under the control of the Palestinian state, Palestinian refugees can pursue and demand their right of return. Obviously, neither the passage of time nor the refusal of the Israeli side undermines the existence and validity of their claim for the right of return. Library data and field studies are used in delineating concepts, analyzing theories and confirming research hypothesis in the study.

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* "right of return" and "right to return" are used in this paper interchangeably to mean the same.

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Introduction

Palestine-related issues have been controversial for decades. Current status of Palestinian refugees is one of the compounded unresolved issues in the international arena and a pivotal point of dispute between Israel and its neighboring Arab countries[1]. The chronicle is a nebulous long story to recount, though, the present study zeroes in exclusively on whether the Palestinians scattered around the world deserve a legitimate claim to a right of return to the lands that were called Palestine before the rise of the Israeli regime. The issue has been investigated from a variety of perspectives. Most notably, some scholars have argued that the right to return of Palestinian refugees is predominantly a political issue which falls outside the scope of freedom of entry and exit in international law[2]. However, and to the contrary, this is not as *much* a political issue as it is for the Hutu refugees in Rwanda[3] nor for the Bosnian refugees in Bosnia[4]. Apparently, it is also not as *less* a legal issue as they are. In the same vein, excluding the political perspective, the present study examines the issue in light of the international law paradigms. Notably, the decisive role such factor plays in the objective reality of the issue cannot be neglected[5]. Palestinian refugees have suffered more forced displacement and homelessness than any other comparable group[6], therefore, the application of international law standards to the return of Palestinian refugees brings us to a case study that can be effective in the development and transformation of these rights to be applied in similar cases. In examining the legitimacy

1 . Don Peretz, Palestinians, Refugees, and the Middle East Peace Process (Washington: US Institute of Peace Press 1993), 3.
2 . Paul Weis, Nationality and Statelessness in International Law (Alphen aan den Rijn: Sijthoff & Noordhoff 1979), 318.
3 . From April 1994, between 500,000 and one million Rwandan Tutsi were systematically exterminated by militiamen under Rwandan Armed Forces (FAR in French) control. The genocide was the culmination of long-standing strategies practiced by politico-military extremists who roused ethnic resentments against the Tutsi. The extremists also killed many Rwandan Hutu who opposed the massacres. See: Medecins Sans Frontieres MSF Speaks Out, Rwandan Refugee Camps in Zaire and Tanzania, 1994-1995, p. 8. April 2004- April 2014, visited on 1 December 2022 at msf.org/sites/default/files/2019-04/MSF%20Speaking.
4 . In April 1992, a second, more bloody conflict broke out in Bosnia-Herzegovina when it, too, declared independence after Slovenia and Croatia— pitting Bosnia's three main constituent communities, ethnic Serbs, Croats and Muslims, against each other. The war resulted in massive displacement. In less than three months, the number of Bosnian refugees and internally displaced persons reached 2.6 million. See: Kirsten Young, UNHCR and ICRC in the former Yugoslavia: Bosnia – Herzegovina, p. 782. RICR September 2001, vol. 83, No. 843, p. 782, visited on 1 DESEMBER 2022, at icrc.org/en/doc/assets/files/other/781-806-Yougoslavia.pdf.
5 . Don Peretz, Palestinians, Refugees, and the Middle East Peace Process (Washington: US Institute of Peace Press 1993), 69 – 85.
6 . UNHCR Report, 1993, P: 47.

of their claim to the right of return, we first present a succinct overview of the events underlying the origins of the Palestinian refugee case. The right of return, as deployed in the current study is enshrined in the international human rights system. International Refugee Law (IRL) and International Humanitarian Law (IHL) will also be resorted to insofar as the Principles of Repatriation, as a facilitative base to the right of return, has been developed and thrived with deference to these two law systems. The right to return will then be discussed in customary international law and human rights instruments governing the Middle East. An attempt is made to discuss the main subject matter of the right of return as set out in Article 12 (4) of the International Covenant on Civil and Political Rights (hereinafter the Covenant or ICCPR), particularly the meaning of the phrase "to one's own country". The concept of "nationality" is of particular importance because the term "country" by definition refers to the relationship between the claimant and the state from which he/she claims the right to return.

1. Scope of the Subject

1.1. Historical Review of the Palestinian Refugees Case

Historically, Palestine was home to Muslim, Christian, and Jewish inhabitants who were ruled by the Ottoman Empire for centuries[1]. As the Empire waned in the wake of the overwhelming defeat of the Ottoman Turks at the end of World War I, Palestine was occupied by the British, and the League of Nations declared British trusteeship over the land. Meanwhile, an incremental wave of Jewish migration on the Arab nation began which triggered unprecedented hostility and bellicosity between the Jewish and Arab populations[2]. Eventually, the British trusteeship was called a halt under Resolution 181 (adopted by the UN General Assembly on November 29, 1947). The Resolution also stipulated the partition of the Arab and Jewish states, while Jerusalem was governed by an international system and all three regions formed a united economy[3].

Enactment of the Resolution aggravated the conflict between the Arab and Jewish communities. As the British withdrew their troops from Palestine, the conflict culminated to its highest point when the State of Israel declared its independent existence on May 14, 1948. The Palestinian Arabs engaged in full-scale wars with the neighboring Arab countries *and* the Jewish forces on the same day of the Declaration[4]. After the secession of the United Nations in Palestine and as the Arab-Israeli tension escalated, a large wave of forced migration emerged from December 1947 to September 1949[5]. "It is estimated that approximately 750,000 Palestinians fled their homes in the Palestinian territories that were to be under Israeli rule under the resolution"[6]. The second large-scale migration took place in 1967, following the Six-Day War, during

1 . The Ottoman Empire ruled Palestine from early sixteen century (1516) to the end of First world war (1918), see: International Journal of Humanities Social Sciences and Education (IJHSSE) Volume 6, Issue 1, January 2019, PP 43-51 ISSN 2349-0373 (Print) & ISSN 2349-0381 (Online) http://dx.doi.org/10.20431/2349-0381.0601005 www.arcjournals.org

2 . Jacob Tovy, Israel and the Palestinian Refugee Issue: The Formulation of a Policy, 1948-1956; (Routledge 2014), 15.

3 . UNGA Res. 181(11), (1947), P: 173.

4 . Francesca Albanese, 'Lex Takkenberg; Palestinian Refugees in International Law', (Oxford University Press 2020), 51.

5 . Benny Morris, The Birth of the Palestinian Refugee Problem 1947-48 (Cambridge: Cambridge University Press 1987), 285.

6 . Ibid, 297 – 298.

which approximately 500,000 Palestinians fled the West Bank and Gaza, more than 200,000 of whom were second-time refugees[1]. Of course, the tragedy of Palestinian displacement is much worse than figures can represent. Particularly, after many years of displacement their population has increased significantly.

All Palestinians deserve compensation for the sufferings and losses they have endured for many decades away from their homes and homeland. Most evidently, they hold a legitimate right to return.

The right of return of the Palestinian refugees cannot be simply rendered invalid in light of claims for reparation on account of past injustices. As Meyer duly puts it "[n]either the questions arising from the non-identity problem nor those arising from the supersession thesis significantly undermine the Palestinian refugees' claims to reparations and their right of return."

1.2. Concept and Scope of "Refugee"

The term "refugee" in this study, is used in its broadest sense to denote to a person who was forced to leave his/her home country due to untenable circumstances which could be the result of the direct and deliberate actions (such as expulsion, deportation or refusal to readmit) or equally indirect and unintentional actions (such as armed conflict or internal unrest) of the authorities of a given country[2]. According to the 1951 Convention Relating to the Status of Refugees- which also defines a refugee in reference to previous international instruments, including the Charter of the International Organization for Refugees- a displaced person or refugee is a person who, for a well-founded fear, due to the occurrence of war or any other justified reason- is outside the country of which he is a citizen or has normally resided. Similarly, the term is used interchangeably with involuntary deportation. Thus, this definition is inclusive but not limited to the three million Palestinian refugees registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (ANRWA)[3]. Nor should it be confused with those refugees who fall under the limited jurisdiction of the United Nations High Commissioner for Refugees (UNHCR) i.e. people who are able to show that they have fled their country of origin for fear of persecution, or because of race, religion, nationality, or membership in a particular social group, or because of political beliefs[4].

The case of the Palestinian refugees is a multifaceted phenomenon which has been investigated from multiple perspectives. Some scholars, including Radley[5], have analyzed the case on grounds of the reasons and voluntary motives of refugees in the international law framework. The Right of return of the Palestinian refugees, however, may not be conditional on or subjected to involuntary migration from the country. Whether the Palestinians have left their country voluntarily or against their will is not conclusive in this case. Indeed, they preserve the right in accordance with the international law on freedom of movement.

1 . Quincy Wright, 'Legal Aspects of the Middle-East Situation', (1969), 33 Law & Contemporary Problems, 3 – 8.
2 . GJ.L. Coles, The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry in A.E. Nash, ed., Human Rights and the Protection of Refugees Under International Law (Halifax: Institute for Research on Public Policy 1988), 198.
3 . UN docs. A/49/13, (1994), P: 10.
4 . Convention relating to the Status of Refugees, 28 Jul., (1951), P: 189.
5 . Kurt Rene Radley, 'The Palestinian Refugees: The Right to Return in International Law', (1978), 72 AJIL, 586 – 595.

In the same vein, Abu Sitta[1] contends that "[a]ll Palestinians who fled the war- especially the 1948 and 1967 wars- as well as ordinary residents of the West Bank and Gaza who temporarily lived abroad during the 1967 war, mostly for work or study or those who were forcibly deported or expelled from Israeli-occupied lands in the 1967 war" hold a right to return.

2. The Right to Return

2.1. Fundamentals and Resources of the Right to Return

2.1.1. The Right to Return from the Perspective of Customary International Law

The right to return is indefeasible and inalienable to all mankind as enshrined in international human rights instruments and declarations, as well as in the constitutions, laws and judicial procedures of many countries. Also, several resolutions passed by various UN bodies have consistently referred to it with deference to the general rights of displaced persons. It is thereby well-enshrined in customary international law, although the perfect definition of its content may seem difficult[2]. At the very least, the general trend of governments shows that the right of a resident to return to his or her home country should not be denied[3]. One of the first statements on the right to return can be traced back to the UN mediation report to the General Assembly in 1948 where it says:

> *"[t]he right of the Arab refugees to return to their homes in Jewish-controlled territory at the earliest possible date should be affirmed by the United Nations, and their repatriation, resettlement and economic and social rehabilitation, and payment of adequate compensation for the property of those choosing not to return, should be supervised and assisted by the United Nations"*[4].

On the basis of this proposal, the General Assembly adopted Resolution 194 (3) (Peace Agreement, 1994: 199) on December 11, 1948, which stipulated in paragraph 11:

> *"[t]hat the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law and in equity, should be made good by the Governments or authorities responsible."*

The paragraph is repeated annually in subsequent General Assembly resolutions and is endorsed by the United States and virtually all UN member states except Israel[5]. Furthermore, the return of Palestinian refugees is explicitly called for in many other UN resolutions[6]. One study explicitly states that international law may grant a special right to the return of the Palestinian people to their homeland which is recognized on the basis of the principle of "good relations be-

1 . Salman, Abu Sitta, 'The Implementation of the Right of Return', (2009), Palestine-Israel Journal, 6.
2 . Hurst Hannum, The Right to Leave and Return in International Law and Practice, (Dordrecht Martinus Nijhoff 1987), 139 – 141.
3 . Rosalyn Higgins, 'The right in international law of an individual to enter, stay in and leave a country', (1973), 49 Internaa tional Affairs, 348.
4 . UN docs. A/648, 18 Sept., (1948).
5 . Rashid Khalidi, 'Observations on the Right to Return', (1992), 21 Journal of Palestine Studies, 33.
6 . RJ Zedalis, 'Right to Return: A Closer Look', (1992), 6 Georgetown Immigration Law Journal, 508 – 513.

tween nations"[1]. The recognition *and* repetition of the right of return since early 1984 confirm its existence, more specifically in customary international law, ever since.

2.1.2. The Right to Return in International Treaties

The right to return is also enshrined in Article 12 (4) of the Covenant where it is stated: "[n]o one shall be arbitrarily deprived of the right to enter his own country". Israel, Jordan, Egypt and Syria are all parties to the Covenant and none has voiced reservations about this article. The countries are also members of the Committee on the Elimination of Racial Discrimination and have not voiced reservations about Article 5 (d) (ii) of the Committee's statute either, under which:

> *"States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:*
>
> *[…] (d) Other civil rights, in particular:*
>
> *[…] (ii) The right to leave any country, including one's own, and to return to one's country…"*

2.2. Interpretation of Article 12 (4) of the Covenant

The words in the Article 12 (4) are rather open-textured which leave ambiguity in their readings. Several questions might be raised in this regard: What is the meaning of the phrase "his own country"? What does the word "entry" mean to the right in comparison with the word "return"? What effect does the word "arbitrary" have on the right in question? As mentioned above, the first question to determine is whether the Palestinians scattered around the world have the right to return, and if so, where to return?

The meaning of "entry" is not a point of contention. It has a broader meaning than the word "return" and is used in reference to people who were born abroad. Therefore, it allows such people to "enter" their country for the first time[2]. The travaux preparatoires for preparing the text of the Covenant indicate the same interpretation[3]. This is important in the case of Palestinians who have the potential to return, as many of the second and third generation refugees are living abroad.

The term "arbitrary" in Article 12 (4) implies a restriction on the right of return. It implies that the government can interfere in a person's right to enter his country as long as he does not do so arbitrarily, that is, outside the legal formalities. As a limitation, this "must be interpreted strictly and narrowly"[4]. The right to leave the country guaranteed by Article 12 (2) is subject to the stricter restrictions of paragraph 3[5] appearing right under it, which include legal restrictions

1 . UN docs. ST/SG/SER.F/2, P: 7.

2 . Chipoya Mubanga, 'Analysis of the current trends and developments regarding the right to leave any country including one's own, and to return to one's own country, and some other rights or considerations arising therefrom', (1988), UN ESC, Commission on Human Rights, 40th Sess., UN doc. E/CN.4/Sub.2/1988/35 (20Jun), 21.

3 . Marc Bossuyt, 'Grade to the Traoaux Preparatories' of the International Covenant on Civil and Political Rights' (Dordrecht: Martinus Nijhoff 1987), 261.

4 . Louis Henkin, ed., The International Bill of Rights, The Covenant on Civil and Political Rights (New York: Columbia University Press 1981), 26.

5 . "The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant."

based on national security, public order or health, and ethics. However, the right to return is "not subject to such restrictions"[1]. The main reason could be related to "a state's special responsibility to its nationals"[2] which are in fact the main beneficiaries of the right of return. As it was previously mentioned, the term "right of return" in Article 12 (4) indicates that persons may be deprived or restricted of the right to enter their own country in accordance with the law provided that such deprivation or restriction is not "fundamentally incompatible with the right to personal liberty and the right to freedom of movement"[3].

2.2.1. The Meaning of the Phrase "His Own Country"

References to the term "country" in connection with the right to leave and to return may be found in the Convention on the Elimination of All Forms of Racial Discrimination (Article 5 (d) (ii))[4], the Universal Declaration of Human Rights (Article 13 (2))[5] and the African Charter on Human and People's Rights (Article 12 (2))[6]. This phrase differs from the phrase used in the provisions of the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and in the Fourth Protocol to the European Convention on Human Rights and Fundamental Freedoms i.e. "the State of which he is a national". Differences in the wordings of Article 12 (4) and Article 3 (2)[7] of Protocol IV to the European Convention led the Committee of Experts of the Council of Europe to conclude that the semantic scope of the former was broader such that it may "include stateless persons and nationals of another State who have very close ties with the country in question"[8].

A more meticulous look into Article 12 of the Covenant reinforces this conclusion. The provisions of the documents that refer to the right to leave and return use the word "country". Assuming that the Covenant has been coherently drafted and that the Contracting Parties have considered the common use of language, the term "country" has a various meaning from "state" and certainly a broader meaning than that of which a person is a national[9]. In this regard, the important point is that international human rights instruments restrict the right of nationals to leave and return, and they do so by referring to the "state" and not the "country". The wording of paragraph 4, which means in the context of the text and in comparison with the above-cited documents, indicates that "the right to enter one's own country" in the official sense of the term is not limited to nationals.

1 . Marc Bossuyt, 'Grade to the Traoaux Preparatories' of the International Covenant on Civil and Political Rights' (Dordree cht: Martinus Nijhoff 1987), 262.
2 . Chipoya Mubanga, 'Analysis of the current trends and developments regarding the right to leave any country including one's own, and to return to one's own country, and some other rights or considerations arising therefrom', (1988), UN ESC, Commission on Human Rights, 40th Sess., UN doc. E/CN.4/Sub.2/1988/35 (20Jun), 51.
3 . Ingles, J.D., 'Study of Discrimination in Respect of the Right of Everyone to Leave any Country including His Own, and to Return to His Country', (1963), New York, (UN doc. E/CN.4/Sub. 2/229/Rev., 39.
4 . "In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to proo hibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: d (ii): The right to leave any country, including one's own, and to return to one's country."
5 . Everyone has the right to leave any country, including his own, and to return to his country.
6 . Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.
7 . No one shall be deprived of the right to enter the territory of the state of which he is a national.
8 . Pieter Van Dijk. and Godefridus van Hoof, Theory and Practice of the European Coraxntion on Human Rights, 2nd ed. (Deventen Kluwer Law and Taxation Publishers 1990), 147.
9 . Jalal Al Husseini and Riccardo Bocco, 'the status of the Palestinian refugees in the near east: the right of return and unrwa in perspective', (2010), at Universite de Geneve on March 29, http://rsq.oxfordjournals.org, 263.

If the phrase "one's country" has a meaning more than the country to which one belongs, a question arises: what is its exact meaning in this phrase? This is where the interpretation of the phrase becomes so ambiguous which makes it necessary to refer to the travaux preparatoires of the Covenant and to examine the legal basis of the nationality requirement.

2.2.2. Legal Grounds of the Nationality Requirement

According to Lawand[1], the draft provisions of the Covenant on the right of entry were discussed in three separate sessions of the UN Commission on Human Rights before being presented to the Fourteenth Session of the Third Committee of the General Assembly in 1959, where the final version was adopted. Initial drafts before the fifth (1949) and sixth (1950) sessions of the Commission referred to the right to enter "the country of which he is a national". The summary of the discussions indicated that there were problems with the provisions of the right of entry into country for countries where the right of return is governed not by the rules of nationality and citizenship but by the idea of permanent residence[2]. Thus, at the Eighth Session (1952), "pursuant to Article 13, paragraph 2, of the Universal Declaration of Human Rights, it was agreed to replace the 'country of which he is a national' with the phrase 'his own country'[3].

Some state representatives raised questions in the Third Committee about the meaning of the phrase "one's own country" and finally, it was decided that "one's own country" should mean the country of which the person is a national. Some scholars have used this view to reinforce their position that Article 12 (4) is limited to nationals only[4]. Nevertheless, two points should be emphasized. First, the discussions of the Third Committee show that the considerations that led the Human Rights Commission to use the term "his own country" were unknown to the representatives of the states. In other words, the members of the Third Committee as Zieck[5] contends were oblivious of the fact that the text of the commission itself was the result of an agreement, so they have given their interpretation of the phrase "one's own country" as stated above. The second point is that a more attentive look at the issues of the Third Committee clearly shows that this view was not a point of unanimous agreement[6]. Ultimately, it can be seen that the phrase "one's own country" can be subject to various interpretations but since no action has been taken to remove this ambiguity, there may have been an implicit agreement to leave the exact meaning of the words to future international developments.

Therefore, the preliminary discussions of the Covenant are not bound to limit the phrase "one's own country" to one's national country nor do they express the precise meaning of the

1 . Kathleen Lawand, 'The Right to Return of Palestinians in International Law', (1996), Vol. 8 No. 4, International Journal of Refugee Law, 549.
2 . Luigi Achilli, Palestinian Refugees and Identity: Nationalism, Politics and the Everyday, (Bloomsbury Publishing 2015), 33.
3 . Marc Bossuyt, 'Grade to the Traoaux Preparatories' of the International Covenant on Civil and Political Rights' (Dordrecht: Martinus Nijhoff 1987), 262.
4 . Paul Weis, "The Middle East", in K. Vasak and S. Liskofsky, eds., The Right to Leave and to Return, Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-20 June 1972 (Ann Arbour, The American Jewish Committee 1976), 318.
5 . Marjoleine Zieck, 'Voluntary Repatriation: An Analysis of the Refugee's Right to Return to His Own Country', (1992), 44 Austrian J. PuiL lnd. Law, 146.
6 . UN docs. A/C.3/SR.957, para: 25.

phrase. In any case, the application of the rules set forth in Articles 31[1] and 32[2] of the Vienna Convention to the Law of Treaties does not allow such a restriction on interpretation using the preconditions for the formation of a convention. Because this interpretation is not consistent with the meaning that is usually construed by the phrase "one's own country".

2.2.3. Interpretation of the Phrase "One's Own Country"

As stated earlier the phrase “one’s own country” is elusive and no clear proposition has been made so far on the meaning of the phrase by the Human Rights Council. The phrase is left to much academic debate for interpretation. Some jurists maintain that the phrase is applicable to the country of origin as well as the country where an individual is a permanent resident of[3]. Yet some argue that it is applicable as well to the country an individual is connected through history, race, religion, family, etc.[4]. According to Randelzhofer[5], the phrase entails a connection between a claimant and the country he/she claims the right to. He continues the concept of nationality- which implies the existence of a legal bond between the individual and the state and creates mutual rights and obligations- is then the starting point for the interpretation of the phrase. The concept of nationality, though, raises problems with the right to return, in the international law settings.

In light of the fact that the determination of nationality is basically and inherently a matter of internal jurisdiction of states, curbing the interpretation of Article 12 (4) of the Covenant to the State to which the individual has effective nationality repositions the State as the determining factor in the individual's enjoyment of the benefits of nationality. Such a state-centric definition could jeopardize the purpose and subject matter of protecting the right to return under the Covenant. The same considerations apply to restricting a person's country to the country in which he or she has acquired the right of permanent residence. Because this right can be based

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1 . General rule of interpretation

1.A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2.The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3.There shall be taken into account, together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.4.A special meaning shall be given to a term if it is established that the parties so intended.

2 . Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

3 . Rosalyn Higgins, ‘The right in international law of an individual to enter, stay in and leave a country’, (1973), 49 International Affairs, 349 – 350.

4 . Hurst Hannum, The Right to Leave and Return in International Law and Practice, (Dordrecht Martinus Nijhoff 1987), 56.

5 . Albrecht Randelzhofer, "Nationality", in Encyclopedia of Public International Law, vol. 8 (Amsterdam: Elsevier Science Publishers B.V. 1985), 416.

on the official grant of the right of permanent residence and not the actual residence of the person in that country.

A state's authority in determining the nationality of its citizens is questioned in that the states are essentially and inherently representatives of their people and the sovereign lies in the people. There are accordingly inherent limitations with state jurisdiction that provide the necessary protection against possible abuse. At the very least, the sovereignty of one state in granting its nationality is limited by the that of other states. According to the customary international law, states have a duty to accept the nationality of their citizens, a preliminary concomitant of their right to deport foreign nationals[1]. This argument is built on the premise that a state must accept its citizens because refusing to accept them is forcing other countries to "keep aliens on their territory who have the right to expel them under international law" and this is a clear violation of "their territorial sovereignty"[2]. These principles are set out in the context of the issue of refugee reception, which states that the duty of admission forms the basis of the legal relationship between the country of destination of the refugee and the country of origin. In this respect, the State of origin may ignore the link of nationality and ignore those who have left that country, which in turn violates the commitment to the refugee destination country and even the international community[3].

Restrictions on state sovereignty over nationality only impose requirements on and among states, and cannot be invoked by the victims themselves. The concept of nationality in international law is primarily aimed at assigning jurisdiction and responsibility to states over individuals. Therefore, since the rules of international law on nationality do not guarantee the right of the individual under Article 12 (4), the criteria for determining nationality to determine the existence of "one's country" are so appropriate for individuals that there is the standard criterion between effective interpersonal relations and the country to which he/she claims the right to return. Thus, the term "own country" refers to the country of which a person has official nationality or, in the case of non-official nationality, the country with which he or she has a genuine or effective link.

2.2.4. "Genuine Link" and the Concept of "One's Own Country"

The above-cited restrictions in international law on the capacity of the state in relation to nationality are in line with the concept of nationality as an actual link between the individual and the state that cannot be frivolously neglected. Such objective criterion of the link between the State and the individual is conclusive in an interpretation of the phrase "one's own country" within the scope of Article 12 (4) of the Covenant. Therefore, the non-determination of official nationality does not play a role in determining whether or not a person can exercise the right to return. A yet more warranted evidence could be detected in the application of the rules of voluntary return to international law of refugees[4]. For example, UNHCR Executive Committee Resolution 18 on the voluntary return of refugees requires the government of the country of

1 . Guy Goodwin-Gill, 'Voluntary Repatriation — Legal and Policy Issues', (1989), in G. Loescher & L. Monahan, eds., Refugees and International Relations, Oxford: Clarendon Press, 259.
2 . Paul Weis, Nationality and Statelessness in International Law (Alphen aan den Rijn: Sijthoff & Noordhoff 1979), 45 – 47.
3 . Guy Goodwin-Gill, 'Voluntary Repatriation — Legal and Policy Issues', (1989), in G. Loescher & L. Monahan, eds., Refugees and International Relations, Oxford: Clarendon Press, 261.
4 . UNGA res. 36/148, 16 Dec. 1981.

origin to provide refugees with the necessary travel documents, visas, entry permits and transportation facilities and if the refugees have lost their nationality, make arrangements to return it in accordance with national law (Executive Committee, 1980: No. 18(XXXI)). This means that refugees who have lost their nationality because of the revocation of nationality or otherwise maintain their connection to the country of origin and as a result, they enjoy the right to return. The government of the country of origin is also obliged to not only allow them to return to the country, but also restore their official nationality.

In general, to achieve the goal of the right to return, one must differentiate between the concept of nationality in domestic and international law in the sense presented in the case of Nottebohm. Therefore, the term "country" in Article 12 (4), in addition to the country of which there is official nationality, also includes the country with which a person has actual "nationality" and he/she has a "genuine link". This conclusion is consistent with the subject matter and purpose of the right to return. The intent in the heart of repatriation of refugees and internally displaced persons (IDPs) is allegedly to re-establish an effective relationship between the citizen and the government[1] or to normalize the relationship between the country of origin and the refugee[2]. Associated with the concepts of attachment and belonging, the purpose of return, in effect, derives from the concept of nationality in international law. Return, therefore, refers to the re-establishment of a pre-existing relationship with the country of origin, which is typically witnessed by official nationality. Accordingly, the right of repatriation guaranteed by Article 12 (4) of the Covenant prohibits the government from depriving a former citizen of his or her nationality, where the primary aim and effect of this deprivation of nationality is to prevent the former citizen from returning to his or her country[3]. Thus, the prohibition of deprivation of nationality when there is a lack of plausible reasons averts the arbitrary severing of the government's relationship with its citizen. In addition, deprivation of nationality on the basis of race or ethnic origin constitutes a violation of the general principles of non-discrimination in customary international law and Articles 2[4] and 26[5] of the Covenant as well as Article 5 (d) (ii) of the Convention on the Elimination of All Forms of Racial Discrimination.

1 . Guy Goodwin-Gill, 'Voluntary Repatriation — Legal and Policy Issues', (1989), in G. Loescher & L. Monahan, eds., Refugees and International Relations, Oxford: Clarendon Press, 255.

2 . Peter Van Krieken, 'Repatriation of Refugees under International Law', (1982), 13 Netherlands Yearbook of International Law, 99.

3 . Hurst Hannum, The Right to Leave and Return in International Law and Practice, (Dordrecht Martinus Nijhoff 1987), 62.

4 . Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

5 . All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. 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, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.2.5. The Effect of Time on the Concept of "Genuine Link"

The Nottebohm case is said to reflect the fundamental importance of the relationship between the people and the land, and to reflect the implications for both state sovereignty and accountability (Goodwin-Gill, 1989: 259). In this regard, the right to return implies that there must be a natural identity between people and places (Plender, 1988: 147). The political reality in what was called the Occupied Palestinian Territories is that the organism has changed in such a way that populations, ethnic groups, patterns of affiliation, and national aspirations are no longer what they once were when the refugees settled[1]. In fact, most of the villages and property left by the refugees who fled in 1948 have either been demolished, occupied and looted by new immigrants, or considerably changed so that they have lost their Arab identity[2]. This does not mean that the right to return is a form of the concept of "full return". Rather, recognizing the mental and credit element in the definition of "one's own country" means the home and society to which one belongs. In this regard, there is a gap between what the claimant considers as an individual or in relation to others as his own country and the fact that the country of origin has changed over time. The main criticism of the UNHCR policy on the voluntary return of refugees is that it ignores this "element of time"[3].

It is undeniable that sometimes the passage of time involves several generations and brings about changes in the country of origin and the country of residence of the refugees which may in turn cause a time lag in the "genuine link" and "real social relationship" of the person, and this will become more or less a permanent issue. Time will certainly undermine the "genuine link". On the other hand, the passage of time does not legitimize the situation resulting from the occupation. For the Palestinian refugees of 1967 and 1948, the time difference is more than half a century. Whenever a significant period of time has elapsed since the departure of right holders from their country of origin, the reasons for non-return during this period should be considered. If these reasons are due to factors that are beyond the control and will of the right holders, they should be analyzed in favor of these right holders. This is especially the case where a country to which they are claiming the right to return has consistently and unjustifiably prevented their return by arbitrary or discriminatory measures, assuming that other criteria are met. Such a country cannot claim that there is no genuine link between the individual and the country due to the passage of time; because, by doing so, it is in fact showing its incompetence. The arbitrary and discriminatory refusal of a government in allowing a person to enter "his/her country" and denying the claimant of his right to return merely on account of the time factor is clearly contrary to Article 12 (4) of the Covenant[4].

2.2.6. Criteria for Determining "One's Own Country"

It is logical that the determination of a person's country be based on a unified and cogent assessment standard that applies equally to all claimants and is not vulnerable to specific features of domestic law. Whereas formal citizenship or legal recognition by domestic law is incontest-

1 . Benny Morris, The Birth of the Palestinian Refugee Problem 1947-48 (Cambridge: Cambridge University Press 1987), 155.
2 . Don Peretz, Palestinians, Refugees, and the Middle East Peace Process (Washington: US Institute of Peace Press 1993), 74.
3 . Daniel Warner, 'Voluntary Repatriation and the Meaning of Return to Home: A Critique of Liberal Mathematics', (1994), 7 JRS, 171.
4 . Kathleen Lawand, 'The Right to Return of Palestinians in International Law', (1996), Vol. 8 No. 4, International Journal of Refugee Law, 556.

able evidence of "one's own country", the individual's claim to the right of return to the country is still legitimate upon meeting of a number of objective and subjective criteria that reflect his close ties with the country in question and based on the criteria accepted by the International Court of Justice (ICJ) in the Nottebohm case. A determining criterion in this regard is permanent residence[1]. The existence of assets, family relationships, the center of important affairs, dependence on the country in question and a clear intention to have a relationship with that country in the future are other legitimizing criteria. The claimant thereupon has to demonstrate that these criteria existed in the past and were arbitrarily terminated, and as a result he has the right to revive them by claiming the right to return.

These criteria are applicable on a case-by-case basis to any Palestinian claiming the right to return. Furthermore, it is undeniable in general that all Palestinians who were forced to leave their country involuntarily, as like IDPs, do possess a genuine relationship with their country. Nevertheless, as noted earlier, the problem of Palestinian refugees has been compounded by the fact that there has been no state of origin since 1948[2].

3. The Nationality of the Palestinian and Its Changes

After World War I, there was a practice whereby treaties relating to the transfer of land included explicit provisions on the nationality of the inhabitants[3]. For example, Article 30 of the 1923 Treaty of Lausanne[4] ((24 July 1923), 28 LNTS 15) required that Ottoman citizens who were ordinary residents of the Palestinian Territories be ipso facto nationals of Palestine. In addition, Article 7 of the 1922 Palestinian Mandate[5] provided for the enactment of the nationality law[6]. Accordingly, in 1925, Britain, the trusteeship country granted Palestinian citizenship which regulated the issue of Palestinian citizenship and declared that ordinary Palestinians are considered Palestinian citizens, regardless of their religion[7].

The United Nations was wary of the citizenship issue of the Palestinians after the end of the British mandate pursuant to UN General Assembly Resolution 181. It was recommended in the Resolution that Palestine be partitioned into an Arab state and a Jewish state. Moreover, it was provided that it behooves the interim government of each state to submit a declaration to the UN in which they stipulate that all residents of the respective government, whether Arab or Jewish, are citizens of the country and enjoy full civil and political rights.

1 . Johannes Man Chan, 'The Right to a Nationality as a Human Right', (1991), 12 Human Rights Law Journal, 12.
2 . Kathleen Lawand, 'The Right to Return of Palestinians in International Law', (1996), Vol. 8 No. 4, International Journal of Refugee Law, 557.
3 . Clive Parry, ed., A British Digest of International Law, Part VI, The Individual in International Law, Chapter 15, Nationality and Protection (London: Stevens & Sons 1965), 30.
4 . "Turkish subjects habitually resident in territory which in accordance with the provisions of the present Treaty is detached from Turkey will become ipsofacto, in the conditions laid down by the local law, nationals of the State to which such territory is transferred."
5 . "The Administration of Palestine shall be responsible for enacting a nationality law. There shall be included in this law provisions framed so as to facilitate the acquisition of Palestinian citizenship by Jews who take up their permanent residence in Palestine."
6 . George Tomeh, 'Legal Status of Arab Refugees', (1968), 33 Law and Contemporary problems, 113.
7 . Paul Ghali, La Nationality ditachees de l'Empire Ottoman a la suite de la Gurre, (Paris, Domat-Montchrestien 1934), 367.

3.1. Nationality of Palestinians Who Were Originally from the Current Territories of Israel

The Jewish state emerged with a declaration of independence on May 14, 1948. However, the declaration did not conform to the requirements of the Resolution 181. By 1952 no law on Israeli nationality had been passed. This legal vacuum has led to conflicting views in Israeli courts on the impact of the end of the trusteeship regime on the nationality of Palestinian citizens residing in Israel. According to one view, the Palestinian Citizenship Order of 1925 lost its effect after the end of the trusteeship regime and, as a consequence, Palestinian citizenship no longer existed, and in effect the Palestinian inhabitants of the lands which were now under Israeli territory were considered stateless.

Lawand[1] contends that "in the case of transfer of a portion of the territory of a State to another State, every individual and inhabitant of the ceding State becomes automatically a national of the receiving State". In other words, all the inhabitants in the territory which today constitutes the State of Israel on its establishment date are in also ipso facto a national of Israel. That is, the residency is transformed into the nationality of the new state. He continues that the idea of a state without nationals is unprecedented, ahistorical and "absurd".

This view of the effect of land transfer on nationality is consistent with what has been cited by some jurists as a correct interpretation of the rules of international law. At least until 1952, citizens who were normal residents of areas of Palestine that later became Israel during the 1948 war were automatically considered Israeli citizens. The fact that many of them have fled or been deported and displaced insofar as their migration was involuntary and interim at least from their own point of view does not change this conclusion. In 1952, Israel passed a new nationality law, repealing the 1925 citizenship order. The new law read that all Jewish residents, including those born in the country, automatically acquired Israeli nationality through the right to return[2].

Plus, all non-Jewish residents who were previously Palestinian citizens were now eligible to be considered as Israeli nationals should they meet three specific conditions: Israeli citizenship at the time of its establishment, Israeli residency at the time the Citizenship Law enters into force, and registration of residency under the March 1, 1952 instruction[3]. When Israel passed its citizenship law in 1952, it exercised its sovereignty to impose further restrictions on the conditions for the citizenship of that country[4]. The legitimacy of this law can be questioned in light of the fact that the law enacted by the occupying government, which deprives the displaced indigenous people of their rights, is not an original law in the first place, but a situation resulting from the occupation.

3.2. Nationality of Palestinians Belonging to the Palestinian Territories 1948

The territories that were to become the Palestinian state, namely the West Bank and Gaza, have a definite history, and so there are various considerations regarding the succession of states. These lands have been practically occupied by war since 1948. A decisive epoch occurred pursuant to the Jordan government in the region. From 1948 to 1967, the West Bank

1 . Kathleen Lawand, 'The Right to Return of Palestinians in International Law', (1996), Vol. 8 No. 4, International Journal of Refugee Law, 561.
2 . David Kretzmer, The Legal Status of the Arabs in Israel, (Boulder West view Press 1990), 36.
3 Ibid, 38.
4 . James Crawford, The Citation of States in International Law, (Oxford: Clarendon Press 1979), 41.

was occupied by Jordan. Since 1950, Jordan has sought to annex the West Bank to the entire non-Jewish Palestinian population of the West Bank and grant them Jordanian citizenship[1]. From 1967 to 1988, Jordan continued to issue passports to Palestinians living in the West Bank. As of July 31, 1988, the Jordanian government no longer recognized them as Jordanian citizens; but as Palestinian citizens. Meanwhile, Jordan issued travel documents for them[2].

After the end of the British rule, the Palestinians in the Gaza Strip were stateless. From 1948 to 1967, the Gaza Strip was under the administration of the Egyptian government, which issued ID cards to each Palestinian living there, indicating their residence in the Gaza Strip and their Palestinian nationality[3]. Since 1967, Israel has issued ID cards to Palestinian residents of Gaza stating their status as "displaced Palestinians" and their nationality as "undefined"[4]. The Palestinian Authority in the West Bank and Gaza Strip was considered Britain's first legal successor to rule the territories, and all previous rulers were considered "rebel occupiers". In fact, the principle is that the use of force by military conquest, whether it leads to occupation or annexation, does not change nationality because it does not mean a valid change of government[5]. This means that all ordinary residents of the West Bank and Gaza Strip will automatically become citizens of the new Palestinian government. All former residents who are able to demonstrate their true connection to their country of origin by the above criteria can claim the right to return to Palestine. Thus, granting Jordanian citizenship to residents of the West Bank between 1950 and 1988 was illegal and had no effect on the right of possible return to Palestine.

1 . Anis Kassim, 'Legal Systems and Developments in Palestine', (1984), 1 Palatine Yearbook of International Law 19, 28.
2 . Blandine Destremau, 'Le statut juridique des Palestiniens vivant au Proche-Orient', (1993), 48 Revue d'etudes palestiniennes, 48.
3 . Ibid, 43.
4 . Ibid, 44.
5 . Ruth Donner, 77K Regulation of Nationality in International Law (Helsinki: The Finnish Society of Sciences and Letters 1983), 215.

Conclusion

Although its exact scope is not clear, the right to return exists in customary international law. Since 1948, numerous resolutions of the General Assembly have stated that the international community recognizes the right to return of Palestinian refugees as part of customary international law.

The Israeli regime and its neighboring countries are bound by Article 12 (4) of the Covenant, according to which “no one shall be arbitrarily deprived of the right to return to his country.” Establishing the legitimacy of the claim to the right of return under this Article is bound to the interpretation of the phrase "one's own country". In the absence of a clear-cut interpretation in the context of the relevant texts, it follows from the preliminary provisions and writings of the jurists that the phrase should be interpreted as a human rights treaty in accordance with the purpose and subject matter of the Covenant. In this regard, the preferred interpretation of Article 12 (4) is an interpretation that provides a standard set of uniform criteria applicable to all claimants of the right to return. Such criteria have been set by the ICJ in the Nottebohm case, albeit in different contexts.

The right to return, as part of the right to freedom of movement, is inextricably linked to the concept of nationality in international law. In this sense, nationals are the main beneficiaries of the right to return. However, since it has in principle the right to grant and deny nationality by restricting the right of return to nationals, the government is considered the final arbiter as to who would enjoy the right. Thus, although official nationality is at first glance evidence of the meaning of "one's own country", in its absence it has no bearing on whether one has the right to return. A person who is not a citizen of a particular country can continue to claim the right to return to hiscountry by showing that he has a "genuine link" with that country. The criterion for determining "own country" means that Article 12 (4) is based on the criteria set out in the Nottebohm case, which include normal residence, the existence of property, family relations, the center of important affairs, dependence on that country and a clear intention to have a relationship with that country in the future.

The passage of time changes the status and identity of the claimant and the country of origin, thus destroying the "genuine link". In assessing the right to return, the reasons for the impossibility of exercising this right in a significant period of time should be considered. In cases where a person's long-term deportation is due to factors beyond his control and against the will of the claimant, these factors should be analyzed in favor of the claimant of the right to return in the face of a weakened link with the country of origin. The claimant, on the other hand, cannot rely solely on factors beyond his control to confirm his right of return. He must show that he has a weak allegiance to the country of origin. It should be noted that the passage of time and the prolongation of the occupation do not affect the situation of the displaced and do not legitimize the situation resulting from the occupation and any legislation in this regard.

Regarding the Palestinians, factors such as the existence of a weak relationship with the occupied territories (the whole of Palestine), even if it is only based on previous normal residence and the continuous expression of their intention to return to it, as well as the absence of fundamental integration in another country's population can be sufficient to substantiate the claim of the right to return. In a way, it can be said that the transformation of the "state of Palestine" over time is the result of Israel's constant denial of the right to return.

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A Critical View Toward US Claim of Preemptive Self-Defense in the Assassination of General Qasem Soleimani

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ABSTRACT

The reason claimed by the Government of the United States (hereinafter the US) for the assassination of General Qasem Soleimani (General Soleimani) was to prevent imminent attacks. This allegation implicitly evokes the Doctrine of "Preemptive Self-Defense". This article evaluates the US claim in the attack of General Soleimani as a preemptive self-defense through a critical analysis. The US resort to the doctrine of preemptive self-defense for the assassination lacks legal validity and is especially contrary to the provisions of the UN Charter, particularly Article (51). This assassination can be considered the illegal use of force by the US. According to the principle of prohibition on the use of force in international law practice, any premeditated attack before the beginning of armed aggression is not considered self-defense. Moreover, the US evidence in proving an imminent strike from General Soleimani is inadequate and unjustifying.

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Introduction

In a military operation on the morning of January 3, 2020, the US launched an air strike near Baghdad Airport in which General Soleimani[1] and his companions, including Abu Mahdi al-Mohandes[2] were killed. The US attributed its act of aggression to the explicit order of President Donald Trump. Trump had already made false accusations and baseless allegations against this senior military commander, stating that: "Qasem Soleimani has killed or severely wounded thousands of Americans in a long period of time and is plotting to kill countless Americans..."[3]. Hence, this claim was used as a pretext by the US to target a convoy of vehicles carrying General Soleimani and killing him. In fact, the US defense is based on the premise that General Soleimani was planning an attack on US forces abroad and the US action in the assassination of General Soleimani was taken as a precaution to prevent harm to American citizens in Iraq.

A statement issued by the Pentagon shortly after the announcement of the US terrorist attack without explicitly and expressively invoking the doctrine of "preemptive self-defense", has implicitly referred to this theory as a justification for their illegitimate action in the international arena; The reason for this cowardly assassination as stated in that statement is: "a strong defense in order to intimidate the Iranians for imminent attacks"[4], which refers to the background of the doctrine of "preemptive self-defense". The statement also described the January 3, 2020 attack on the IRGC's foreign border commander as: "a precautionary measure against the US and its allied forces in Iraq"[5] and citing US reference to the same doctrine in the attack. Other remarks by US officials after the assassination of General Soleimani also point to US reliance on the doctrine of "preemptive self-defense" in justifying their act of aggression. The tweets of then-president Trump[6], as well as the remarks by Secretary of State and Defense Secretary,

1. General Soleimani was the commander of the Quds Force of the Islamic Revolutionary Guard Corps (IRGC).
2. Abu Mahdi al-Mohandes was the deputy commander of the Iraqi Popular Mobilization
3. https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-killing-qasem-soleimani/
4. https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-killing-qasem-soleimani/
5. ibid.
6. https://twitter.com/donaldj.trump.

Mike Pompeo[1] and Mark Speer[2], are among the cases that seem to justify the US action as a kind of self-defense in the General Soleimani's assassination case.

The assassination of General Soleimani has caused numerous legal and international debates. Using a descriptive-analytical method, the present study aims at scrutinizing sources and documents in this regard to examine the legitimacy of the US in invoking the doctrine of "preemptive self-defense" in the international arena, by considering its foundations. Therefore, the primary question to contemplate is whether the US allegation in invoking to the doctrine of preemptive self-defense has the necessary legitimacy and validity. In so doing, the legitimacy of the doctrine among jurists will be discussed first, and then, the reasons of the US will be analyzed and evaluated.

1. Doctrine of preemptive self-defense

Classical self-defense is one of the well-stablished principles of world legal systems and international criminal law[3]; An inherent right that restricts the chances of disruption in international peace and security against the authority of states and the United Nations Security Council (UNSC). It is officially recognized as the only exception to the strategic principle of non-use of force against other states in Article 51 of the Charter of the United Nations (UN)[4]. Based on the history of the right to self-defense in international relations, its first form is the responsibility of the country under military attack of another country, which is realized either individually or collectively[5].

In fact, self-defense in its traditional form is considered as a military response of a country to the imminent and effective attack of the aggressor state, which includes defensive operations by the armed forces of the attacked country. It should be noted that the concept of aggression is one of the most controversial and complex issues in the international community and much effort has been made over the years to achieve a common definition of aggression. Finally, in December 1974, the General Assembly passed 3314 resolution defining aggression, paving the way for a review of the draft statute of the International Criminal Court and the Law on Crimes for Human Peace and Security[6].

The definition of aggression in the resolution is still considered as one of the legal sources that can be cited in the field, which is also used in international judicial decisions[7]. Aggression in this resolution is defined as "the use of force by one state against the sovereignty, territorial integrity or political independence of another state or its use in other ways contrary to the Charter of the UN". Accordingly, aggression, including instances of invasion by one state's armed forces into another state's territory, temporary military occupation of part of another state's territory by force, use of any weapon by another state's counterinsurgency state, invasion of forces

1. https://twitter.com/secpompeo.
2. https://ir.voanews.com/a/us-iran/5315444.html.
3. Siamak Karamzadeh, 'Terrorism and self Defense in International Law', (2003), No. 28, Volume 7, Quarterly Journal of Teacher of Humanitie, 178.
4. Jamshid Mumtaz and Behzad Saberi Ansari, 'The effect of the next practice of governments on the principle of prohibition of threats and use of force', (2012), Strategy Quarterly, 196.
5. Hossein Taleghani and Peyman Namamian, 'Applying preemptive defense in the fight against terrorism; Denial or Proof of Legitimacy', (2013), No. 16, Volume 4, Quarterly Journal of International Police Studies, 97;
Rebeca Wallace, and Olga Ortega, International law, (University of Glasgow 2019), 183.
6. However, the definition of aggression was not mentioned in these two latter resolutions (Bishop, 2001, 112).
7. Yoram Dinstein, War, Aggression and Self-defense, (Cambridge University Press 2005), 76.

by one state's armed forces of another state and the presence of armed forces of one state will be contrary to the conditions agreed with another state. In addition, the definition of aggression provided in Article 8 of the Resolution of the Conference on the Review of the Statute of the International Criminal Court in Kampala (2010) is similar to the definition of aggression in the General Assembly[1]; The first paragraph of the article states: "The crime of aggression means the planning, preparation, initiation or execution of acts by individuals who, in an effective situation, exercise control or direct government political or military action. An act of aggression which, given its nature, severity and extent, is a clear violation of the Charter of the UN"[2].

After creating a new chapter in the movement of the international community towards an effective and decisive fight against terrorism, following the September 11, 2001 incident as the largest terrorist operation in history, the UNSC issued two important resolutions on countering terrorism[3]. In its resolution 1368 (on September 12, 2001), while expressing sympathy with the families of the victims of terrorist incidents in the United States of America, and strongly condemning terrorism as a threat to international peace and security, the UNSC emphasized the inherent right of self-defense for the victim government[4]. In the resolution 1373, which was approved 17 days later, the UNSC predicted extensive measures with legal effects to be a duty for all governments to fight terrorism. After that, the obligation of countries to cooperate and to help each other fight against the financing, non-direct and indirect support of, and criminalization and criminal prosecution of terrorism was implemented[5]. Therefore, The UNSC, despite the occurrence of a major terrorist incident, did not mention preemptive self-defense, but only emphasized self-defense in its classic form[6].

However, in recent decades, self-defense has undergone a conceptual evolution, and with a broad interpretation of it, the concept of "preemptive" has been introduced into self-defense, which is called "preemptive self-defense"[7]. Of course, it is sometimes called "preventive self-defense." In the preemptive self-defense hypothesis, the attacking country is allowed to respond militarily to impending attacks from another country[8]. While in concept of "preventive self-defense", the existence of conclusive evidence of an attack by another country is considered as a definitive attack. According to the doctrine of preventive self-defense, the victim state's armed response to an attack in the course of its imposition or the planning of an attack following an at-

1. Matthias Schuster, 'The Rome statute, crime of aggression, a gordian knot in search of sword', (2003), 21.
2. Michael Glennon, The Blank Prose Crime of Aggression, (Yale International Law 2010), 98.
3. James Fry, 'Terrorism as a crime against humanity and genocide: the back door to universal jurisdiction', (2003), UCLA Journal of International Law and Foreign Affairs, 34.
4. UNSC Resolution 1368, adopted unanimously on 12 September 2001. after expressing its determination to combat threats to international peace and security caused by acts of terrorism and recognizing the right of individual and collective self-defense, the Council condemned the September 11 attacks in the United States. The Security Counc il strongly condemned the attacks in New York City, Washington D.C. and Pennsylvania and regarded the incidents as a threat to international peace and security. It expressed sympathy and condolence to the victims and their families and the United States government. Resolution 1368 concluded with the Council expressing its readiness to take steps to respond to the attacks and combat all forms of terrorism in accordance with the United Nations Charter.
5. UNSC Resolution 1373, adopted unanimously on 28 September 2001, is a counterterrorism measure passed following the 11 September terrorist attacks on the United States. The resolution was adopted under Chapter VII of the United Nations Charter, and is therefore binding on all UN member states.
6. Eric Rosand, 'Security Council Resolution 1373, the Counter - Terrorism Committee, and the Fight against Terrorism', (2003), Vol. 97, the American Journal of International Law, 335.
7. Elham Rasooli Sanieabadi, Introduction to the most important concepts and terms of international relations, (1st ed, Tehran, Tisa Publication 2014), 196.
8. Sean Murphy, 'Terrorism and the concept of armed attack in article 51 of the UN charter', (2005), No. 43, Harvard International Law, 703.

tack or military attacks by another state is permitted[1]. Therefore, generally two options for this type of defense are considered: First; there is conclusive evidences that an attack is imminent, not merely based on a potential threat; and second; the victim government has been attacked in the past and now there are obvious and compelling reasons for re-attack in the future[2]. Thus, the doctrine of preventive self-defense differs from the doctrine of preemptive self-defense; In the latter case, the defense is not against imminent attacks, but merely in a state of danger, a permission to combat a potential threat is issued[3], which has of course been legally rejected[4]. Because preemptive self-defense is primarily linked to any possibility of a future attack by a state's repressive action, it is named preemptive warfare[5].

The basis of preemptive self-defense is based on the urgency of another state's armed attack, explaining that destroying enemy forces before they get the opportunity of attack is the best form of defense[6]. Hence, the exercise of the right to preemptive self-defense is one of the emerging concepts that is used by some countries to justify their armed actions. It is perhaps the manifest example of exercising the right to self-defense to have occurred after the event of September 11, 2001, which set the basis for military actions by the US in Afghanistan[7]. U.S military actions against Iraq over concerns about the ownership and possession of weapons of mass destruction by the Iraqi government and its alleged links to specific terrorist organizations and the transfer of such weapons to terrorists is another example of the using the doctrine of "preemptive self-defense". Subsequently, the Strategic National Security Document of the United States in 2002 clearly sought to develop a traditional concept of self-defense and a forward-looking view of it, supporting any preemptive use of force[8]. The issuance of UNSC Resolutions 1989[9] and 1994[10] in relation to US military operations in Afghanistan also confirms the same conceptual development of Article 51 of the UN Charter[11]. Also, in paragraph (124) of the report of March 21, 2005, the Secretary General of the UN mentions the inclusion of the inherent right of countries to defend imminent attacks alongside the happened attacks[12].

1. Malcom Shaw, International Law, (Cambridge University Press 2008), 1104.
2. Seyed Fazlollah Mousavi and Mahdi Hatami, 'Preliminary Self-Defense in International Law', (2006), No. 72, Journal of the Faculty of Law and Political Science, University of Tehran, 305-310.
3. Robert Delahunty and John Yoo, 'The Bush Doctrine: Can Preventive War Be Justified', (2009), 32 Harv. J. L. & Pub. Pol'y, 67.
4. Mahmood Jalali and Reza Zabib, 'Evaluation of preventive defense against terrorism', (2019), No. 82, Volume 23, Quarterly Journal of Judicial Legal Perspectives, 55.
5. Christine Gray, International Law and Use of Force, (Oxford University Press 2000), 91.
6. Hossein Sharifi Tarazkoohi and Viktor Chaharbakhsh, 'Legitimate Deterrent Defense in the 21st Century', (2013), Year 15, Issue 40, Quarterly Journal of Public Law Research, 12.
7. Hossein Taleghani and Peyman Namamian, 'Applying preemptive defense in the fight against terrorism; Denial or Proof of Legitimacy', (2013), No. 16, Volume 4, Quarterly Journal of International Police Studies, 99.
8. https://georgewbush-whitehouse.archives.gov/nsc/nss/2002/.
9. UNSC Resolution 1989, adopted unanimously on June 17, 2011, after recalling resolutions on terrorism and the threat to Afghanistan, the Council imposed separate sanctions regimes on Al-Qaeda and the Taliban. Resolution 1989 dealt with sanctions relating to Al-Qaeda, while Resolution 1988 (2011) addressed sanctions against the Taliban. Until the passing of both the resolutions, sanctions on the Taliban and Al-Qaeda had been handled by the same committee.
10. During discussions, some Council members expressed concern that recent violence along Israel's border with Syria had been instigated by the Syrian government in an attempt to divert attention away from a domestic uprising as part of the Arab Spring; however, other Council members said the issues should not be interlinked, nor were on the Council's agenda. UNSC 1994, adopted unanimously on 30 June 2011, after considering a report by the Secretary-General Ban Ki-moon regarding the United Nations Disengagement Observer Force (UNDOF), the Council extended its mandate for a further six months until 31 December 2011. The Security Council called for the implementation of Resolution 338 (1973) which demanded that negotiations take place between the parties for a peaceful settlement of the situation in the Middle East. It called for all parties to respect the 1974 ceasefire agreement, which had been placed in "jeopardy" due to recent violence.
11. Hossein Sharifi Tarazkoohi and Viktor Chaharbakhsh, 'Legitimate Deterrent Defense in the 21st Century', (2013), Year 15, Issue 40, Quarterly Journal of Public Law Research, 12.
12. Mohammad Reza Ziai bigdeli, International Public Law, (Ganje Danesh Publication 2019), 267.

Ultimately, the exercise of the right of preemptive self-defense is subject to the necessity and proportionality of armed attacks that have reached the threshold of intensity. Contrary to the objective interpretation of Article 51 of the Charter of the United Nations, a potential attack also justifies the defense of the interests of the country and does not seem necessary for the attacks to be effective (Bowett, 1958, 192). The concept of preemptive self-defense is a description of one country's self-defense against an immediate attack of another country, and therefore, the pillar of this type of self-defense is the urgency and seriousness of the attack. In any case, the discussion of preemptive self-defense is based on the existence of convincing evidence that the attack is imminent.

2. Legitimacy of the doctrine of preemptive self-defense

The text of Article 51 of the Charter of the UN has been drafted in such a way that leaves no room for any doubt in its interpretation[1]. Broad interpretation is used in cases where there are general and extensible expressions, but the aforementioned article has been formulated in such a way that it leaves no room for a misunderstanding of its expressions and what the supporters of preemptive self-defense express in the argument of this theory is a reason other than the one stated in the article[2]. What is more, the notion of self-defense in the above-cited article relates to the category of armed attack. On the other hand, the rule of "prohibition on the use of force" in international law also prevents the unfounded expansion of the scope of self-defense. In fact, self-defense is an exception to this rule and cannot be extended to other cases[3]; for this reason, the doctrine of preemptive self-defense has not been accepted by the majority of international law scholars[4]. Therefore, the only self-defense formally recognized in Article 51 of the Charter of the UN is the defense against armed attack, and any other defense under this article, including preemptive defense, is not acceptable. The special provision of the Charter on the legal issue of self-defense explicitly states its limitations and narrows the exercise of this right to an imminent attack and denies the wider scope of defense to preemptive action[5]. Otherwise, the likelihood of abuse of the rules of self-defense increases and the use of force is easily facilitated.

Relying on international custom in justifying preemptive self-defense is also not actually valid; claiming the formation of customary rule in preemptive self-defense is not considered as a legal obligation due to its non-repetition in the international arena. Even if there is an international custom in this regard, the customary law of the time of the drafting of the UN Charter should be taken into account[6]. Description of the "Caroline Case"[7] as an example of preemptive

1. Mohammad Reza Ziai bigdeli, International Public Law, (Ganje Danesh Publication 2019), 269.
2. Mostafa Fazaeli, 'The Assassination of General Soleimani from the Perspective of International Law on the Use of Force', (2021), Year 7, Issue 2, Quarterly Journal of Comparative Research in Islamic and Western Law, 172.
3. Hossein Sharifi Tarazkoohi and Viktor Chaharbakhsh, 'Legitimate Deterrent Defense in the 21st Century', (2013), Year 15, Issue 40, Quarterly Journal of Public Law Research, 16.
4. Antonio Cassese, International Law in a Divided World, Translated by Morteza Kalantarian, (Office of International Law Services of the Islamic Republic of Iran 1991), 268;
Aiden Warren and Ingvild Bode, Governing the Use of Force in International Relations, (Springer Nature Switzerland AG 2021), 47.
5. Ian Brownlie, International Law and the Use of the Force by States, (Oxford, Clarendon Press 1963), 273.
6. Ibid.
7. During the Canadian Rebellion of 1837 against the British colonial rule, some New Yorkers voluntarily joined the insurgency in the American part of the Niagara River and then opened fire on a British military base on Canadian splatfor. During the day, a Canadian ship belonging to Canada anchored on New Island, which had previously been occupied by American volunteers, and its ammunition was transported to the island; In response to repeated insurgent attacks and the occupation of British territory, British

self-defense is a misunderstanding; because there was no preemptive action against the Caroline ship. It could be considered as the conventional example of self-defense in its classical sense[1]. Hence, the argument for preemptive self-defense is more than a legal concept, it is a political justification for resorting to force[2]. All in all, taking into account preemptive self-defense in the form of a customary rule does not seem plausible. Ultimately, international custom does not accept the precedence of states in the early exercise of self-defense; In fact, the negative reaction and objection of other countries against the military action of one country with the legal justification of self-defense is a precondition for the non-fulfillment of international custom regarding this type of self-defense.

Another stand in preemptive self-defense doctrine is that the complexity of discovering and deciding the decision of one country to take up arms against another country in the age of missiles and nuclear weapons will lead to the destruction of that country and it will no longer be able to exercise its right of self-defense after an attack on that country. Thus, imposing a state of passive expectation on countries in the face of an impending armed attack is not considered correct[3]. It should also be noted that making such an argument to legitimize preemptive self-defense is subject to a violation of international peace and security by simply relying on this legal issue; For example, at the beginning of the imposed war on Iran, the Iraqi government invoked the right of preemptive self-defense in advance and in a statement of September 22, 1980 stated that Iran's military actions have created the immediate need for Iraq to take deterrent blows to Iran in order to maintain its security and interests[4]. In other words, the draft doctrine of preemptive self-defense creates problems in international relations and does not have a proper legal status. This doctrine is based on a military necessity according to which the best defense is considered the initial attack before the enemy has a chance to invade. According to this statement, waiting in the era of nuclear weapons and advanced missile systems is considered a kind of suicide[5]. In the same way that the International Court of Justice (ICJ) in its advisory opinion regarding "legality of the threat or use of nuclear weapons" has been decisively unable to determine the legitimacy or illegitimacy of the threat to use or use nuclear weapons in very acute situations of legitimate defense in which the survival of the state is at risk[6].

The introduction of such unacceptable arguments is the attempt of a minority of countries, led by the US, to find a way to use force against other countries in the international arena, which is not only incompatible with international law but it is also considered as an emerging and dangerous innovation[7]. In other words, the doctrine of preemptive self-defense is an ex-

forces boarded the deck of the Caroline and, after firing, led it down Niagara Falls, killing two Americans (Jennings, 1938, 84).

1. Yoram Dinstein, War, Aggression and Self-defense, (Cambridge University Press 2005), 184.
2. Hossein Sharifi Tarazkoohi and Viktor Chaharbakhsh, 'Legitimate Deterrent Defense in the 21st Century', (2013), Year 15, Issue 40, Quarterly Journal of Public Law Research, 16.
3. Antonio Cassese, International Law in a Divided World, Translated by Morteza Kalantarian, (Office of International Law Services of the Islamic Republic of Iran 1991), 268.
4. Seyed Fazlollah Mousavi and Mahdi Hatami, 'Preliminary Self-Defense in International Law', (2006), No. 72, Journal of the Faculty of Law and Political Science, University of Tehran, 308;
Nicola Frizli, Edition du moude Arab; the Iran-Iraq conflict, Institute of Studies and Research, (Paris 1981), 112.
5. Hossein Sharifi Tarazkoohi and Viktor Chaharbakhsh, 'Legitimate Deterrent Defense in the 21st Century', (2013), Year 15, Issue 40, Quarterly Journal of Public Law Research, 16.
6. ICJ Reports, 1996, Pp: 226, 245.
7. Hossein Taleghani and Peyman Namamian, 'Applying preemptive defense in the fight against terrorism; Denial or Proof of Legitimacy', (2013), No. 16, Volume 4, Quarterly Journal of International Police Studies, 103.

cuse to pursue the illegal policies of powerful countries to justify military intervention in other countries[1]. Preemptive self-defense against a military threat of another country in a world full of unimaginable potential threats poses dangers that can alter or damage international order and security. Finally, by weighing the justifications for the legitimacy of the doctrine of preemptive self-defense against the negative consequences and impacts it ensues in the international arena, one can obviously conclude that the application of this theory is dangerous and the conditions included could beget a multifaceted war.

The ICJ has repeatedly stated that self-defense depends on the claimant government being the victim of an armed attack. For example, in the case of the US military attack platforms of the Islamic Republic of Iran, the court acknowledged that the legal validity of this attack in the exercise of its right of defense depends on proving an armed attack on the US[2]. Or similarly, in the case of US military and paramilitary activities in Nicaragua in April 1984, the Court stated that the existence of an armed attack is necessary for the other side to invoke self-defense[3]. Also, in the case of the Republic of Congo against Uganda, the Court referring to the case of Nicaragua reminded the conditions for self-defense that the defense must be against certain attack[4]. Hence, the doctrine of preemptive self-defense does not have the legal status and is considered as an example of the use of force and intimidation in the international arena to justify the illegitimate military intervention against another country. The exercise of the right of self-defense is an instrument for powerful states to legitimize their military actions against other states and it pinpoints the scope of defense to the point where a state is on the threshold of an attack.

3. evaluation of the US invoking the doctrine of self-defense in the assassination of General Soleimani

The various statements made by the US officials regarding the grounds for the assassination of General Soleimani do not explicitly refer to the doctrine of "preemptive self-defense". But, they implicitly seek to incite the claim that General Soleimani, in addition to being involved in military attacks on US military bases and the attack on the US Embassy in Iraq in December 2019, was planning more attacks against US forces in Iraq, in order to prove the necessity of his assassination by resorting to the doctrine of preemptive self-defense. In fact, the basis of the US claims is self-defense, which must be analyzed in the light of international rules and regulations governing the use of force. The reason for this act against the Iranian senior military commander in the statement issued by the White House was: "a strong defense to intimidate the Iranians for imminent attacks"[5].

According to the US, General Soleimani has been preparing for another attack on US bases and forces[6]. This statement based on the prevention of possible future Iranian attacks, seeks to justify the assassination under the right of self-defense. Meanwhile, the US President, in his tweets regarding the assassination of General Soleimani, blamed the General for the at-

1. Marry Ellen O'Connell, The Myth of Preemptive Self-Defense, (ASIL Publication 2002), 27.
2. ICJ Reports, 2003, P: 161.
3. ICJ Reports, 1986, Pp: 14 - 94 - 76.
4. ICJ Reports, 2005, P: 179.
5. https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-killing-qasem-soleimani/
6. https://twitter.com/donald j. trump.

tack on American diplomats and soldiers in Iraq and said that his intention was to prevent a war followed by General Soleimani's plan for an imminent and decisive operation. Certainly, preemptive defense is a response to a definite and imminent attack, and it cannot be interpreted as a preemptive defense against the threat of a future attack, which often lacks information and evidence. Planning cannot be considered as the basis for justifying preemptive self-defense, as this does not imply the existence of a severe and immediate attack. Therefore, it is said that the practice of governments implies the permission to defend a definite and imminent attack and is not plausible in anticipation of a threat for which there is a lack of evidence[1]. Thus, merely planning an action for an attack does not indicate that it is definite and imminent.

Regardless of the objections to the legitimacy of the doctrine of "preemptive self-defense", it can be seen that the US reliance on this theory in the assassination of General Soleimani is not valid. Assuming that this doctrine is considered valid in the field of international law, the US resort to preemptive self-defense is based solely on a mere claim. Indeed, the lack of positive evidence for an imminent and decisive attack on US interests under the command of General Soleimani clearly challenges the invocation of the doctrine of preemptive self-defense. Furthermore, if the US deemed it necessary to attack General Soleimani in order to thwart a threat to its forces by resorting to self-defense, then there ought to be plausible evidence that he actually intended to do so. The fact is that the US does not have sufficient and convincing evidence to prove the existence of an immediate and definitive attack.

In conclusion, the attack on General Soleimani cannot be justified legally on the basis of the doctrine of "preemptive self-defense" and the accusations made against General Soleimani are in no way qualified. These allegations were even vehemently denied by the US Congress members and there has been no specific report that such a threat is real[2]. Hence, the basis of the doctrine of "preemptive self-defense" which is to ward off the future aggression of another country, seems distorted in this case in view of the US uncorroborated evidence in proving an imminent and inevitable attack[3]. There is also no convincing reason for attributing the rocket attack to the US military base in Kirkuk[4] or the site of the US embassy in Baghdad to General Soleimani. Obviously, the allegations that General Soleimani planned a major military strike against US forces were completely baseless. It is worth noting that the January-3rd visit of the high-ranking Iranian military commander was by the invitation of the Iraqi government and he was on a diplomatic mission to help de-escalating the tensions in the region[5].

Failing to provide sufficient evidence to substantiate its allegations against General Soleimani, the US is held accountable for this act of aggression and an illegal use of force. A threat form General Soleimani was unrealistic and a lack of evidence was enough to disqualify a

1. Mostafa Fazaeli, 'The Assassination of General Soleimani from the Perspective of International Law on the Use of Force', (2021), Year 7, Issue 2, Quarterly Journal of Comparative Research in Islamic and Western Law, 172 - 173.
2. Thomas Clayton, 'Killing of Qasem Soleimani; Frequently Asked Questions', (2020), Congressional Research Service (CRS), 2.
3. Mostafa Fazaeli, 'The Assassination of General Soleimani from the Perspective of International Law on the Use of Force', (2021), Year 7, Issue 2, Quarterly Journal of Comparative Research in Islamic and Western Law, 170.
4. The K-1 Air Base attack (2019 K-1 Air Base attack) was a missile attack that took place on December 27, 2019 in Kirkuk province, Iraq. An American civilian contractor was killed in this Katyusha attack.
5. Iraq's Foreign Minister told the Washington Post that General Soleimani was supposed to meet with him on the day he was martyred and that he had come to Iraq to convey a message from Iran to him in response to Saudi Arabia's message to Iran (http://www.washingtonpost.com).

danger threshold for an attack by the US. Moreover, the US response to the assassination of General Soleimani is inconsistent with the rule of necessity and proportionality in the theory of preemptive self-defense; Because according to the provisions of Article 51 of the Charter of the UN and the numerous rulings of the ICJ on self-defense, the existence of elements of necessity and proportionality in justification is the only exception to the principle of prohibition on the use of force. While the absence of these two elements is evident in the assassination of General Soleimani[1], this US military attack is more intense than other attacks by this government and does not in any way justify the necessity of such an action against General Soleimani. Assuming that the attribution of responsibility for earlier attacks on US forces in Iraq was correct, there is not a congruence between the attack on these people and the assassination of General Soleimani. Therefore, in no way the US armed attack on General Soleimani seem defensible within the framework of international law governing the use of force and the elements of the doctrine of self-defense in this attack lacks objectivity. Eventually, it can be considered as an example of resorting to force.

1. Mostafa Fazaeli, 'The Assassination of General Soleimani from the Perspective of International Law on the Use of Force', (2021), Year 7, Issue 2, Quarterly Journal of Comparative Research in Islamic and Western Law, 171.

Conclusion

The tragedy of the assassination of General Soleimani, as justified by the US under the doctrine of preemptive self-defense, is examined in the light of the international law governing the use of force or in its classical term, the war law. The US extremist approach to extending the exception to the principle of non-use of force has developed to the point that the legal justification for the assassination of General Soleimani has repeatedly and implicitly invoked the doctrine of "preemptive self-defense"; a kind of predictability based on which a definite and imminent attack on the citizens of that country has been mentioned with a planning by General Soleimani. On the one hand, no word in the Charter of the UN on the permissible use of force, especially in Article 51 on the issue of self-defense permits the possibility of an anticipation in the pursuit of self-defense and the UN practice also denies this doctrine. This extension of self-defense against illegitimate potential threats disrupts international peace and security.

Certainly, invoking the theory of preemptive self-defense, instead of being able to help maintain international peace and security for the benefit of human societies, is a threat itself. Resorting to this theory is currently limited to some countries- including the US and Israel, based on the available evidence, and is considered merely the subject of aggressive military action. Therefore, the theory of preemptive self-defense is illegitimate; In a way, from a legal point of view, there is no place for this doctrine in the international law and its role can only be considered as a tool for politicians who legitimize their military aggression against other states. From a military point of view, due to the complexity of military affairs, the real criterion for assessing an imminent attack of one country on the positions of another country could not be presented, and therefore, the certainty of the decision to launch a military attack by one country and be exposed to aggression by another country is not possible. It is because the evidence for a military strike will never be conclusive. In this way, the rationale for the doctrine of preemptive self- defense is rejected, both legally and militarily, and in general, the legitimacy of this doctrine is seriously questioned.

In other words, the doctrine of "preemptive self-defense" not only lacks a proper legal status, but it also is an innovation that undermines the international relations of countries. Even in case of assuming the legal legitimacy of this doctrine established, the US reliance on this doctrine in the case of the assassination of General Soleimani suffers from a lack of evidence. In fact, the US claim that General Soleimani planned a military attack on its citizens does not imply the existence of an immediate and definitive attack in order to advance the defense. Therefore, the claim that another country is on the verge of a military attack does not constitute a right of defense for the country under attack, and yet the US military operation on January 3, 2020 in the assassination of General Soleimani lacks the necessary elements and convincing documents for that doctrine. What can be deduced as a result of this critical analysis on the legitimacy of the military attack on General Soleimani is the deliberate and premeditated action of the U.S government in the assassination of Iranian senior military commander, which is an example of illegal actions in the international arena and considered as a violation of international law.

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Armed Conflict in Yemen; An Illustration of the Pertinence and Deficiencies of Existing IHL Rules

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ABSTRACT

The armed conflict in Yemen is one of the most devastating and catastrophic crises the international community is currently facing. It is entering its seventh year. This situation has raised numerous questions under International Humanitarian Law (IHL) as the set of rules the main aim of which is to limit the effects of armed conflicts for humanitarian reasons. This is also an occasion to test the pertinence and efficiency of IHL rules in the face of current armed conflicts. Accordingly, the present article seeks to study certain important issues in IHL raised by Yemen armed conflict. Doing so, firstly, the type of armed conflict in Yemen is addressed (1). Then, it goes through the principles of distinction, proportionality and precautions (2). Thereafter, the issues of blockade and siege are dealt with (3). After that, the situation of certain persons is examined (4). And finally, the very challenging and significant question of humanitarian assistance is studied (5). I will conclude that most of the humanitarian problems except the issue of humanitarian assistance and sieges are adequately regulated by IHL and that the problem is mainly that those rules are not respected. The controversy about the classification of the conflict, whether it is an international armed conflict (IAC) or a non-international armed conflict (NIAC), does not fundamentally affect those rules.

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Introduction

For more than a decade, the Republic of Yemen has been torn apart by multiple armed conflicts involving domestic extremist groups and foreign countries which have eroded Yemen's centralized rule and split the country into various local centers of power. Geostrategic concerns aside, the collapse of Yemen's institutions during the war exacerbated poor living conditions in what was long the poorest Arab country and is now considered the world's worst humanitarian crisis. connected to things. In 2014, the Ansar Allah/Houthi movement (the Houthis) based in northern Yemen captured the capital Sanaa/Sana'a and in early 2015 moved south from the capital to Aden. In March 2015, Saudi Arabia formed a coalition of several Arab partners (the Saudi-Led Coalition (SLC)) by which a military offensive was launched in order to restore the Yemeni President Abdu Rabbu Mansour Hadi's rule and expel the Huthis from Sanaa and other regions. The conflict has led to killing of thousands of Yemeni people, grave humanitarian suffering and serious damage of Yemen's infrastructure.[1]

The armed conflict in Yemen conflict is one of the most devastating and catastrophic crises the international community is facing. It is entering its seventh year. According to International Committee of the Red Cross (ICRC), thousands of civilian people have been killed and have lost their property. Around 4 million people across the country have been forced to flee to safer places. Basic services have all but collapsed, leaving millions of Yemenis facing a humanitarian crisis. This country faces the world's biggest food crisis, with some 20 million people in need of humanitarian assistance.[2] This situation has raised numerous questions under International Humanitarian Law (IHL) as the set of rules the main aim of which is to limit the effects of armed conflicts for humanitarian reasons. Additionally, this raises the question of the pertinence and efficiency of IHL rules in the face of current armed conflicts.

Accordingly, the present article seeks to study certain important issues in IHL raised by Yemen armed conflict. Doing so, firstly, the type of armed conflict in Yemen has to be discussed

1. See Congressional Research Service, 'Yemen: Civil War and Regional Intervention', Summarized by: Jeremy M. Sharp (updated March 12, 2021) available at: https://sgp.fas.org/crs/mideast/R43960.pdf
2. See https://www.icrc.org/en/where-we-work/middle-east/yemen

(1). Next, the principles of distinction, proportionality and precaution have to be applied to the conduct of hostilities (2). Thereafter, the issues of blockade and siege are dealt with (3). After that, the situation of certain persons is examined (4). And finally, the very challenging and significant question of humanitarian assistance is studied (5).

1. IHL and the Classification of the Conflict in Yemen

While the customary rules applicable to international armed conflicts (IACs) and non-international armed conflicts (NIACs) are allegedly largely the same,[1] to identify the applicable treaty rules, the situation has to be classified as IAC, to which the four Geneva Conventions and Protocol Additional I applies, or as NIAC, to which only Article 3 common to the Geneva Conventions and Protocol Additional II applies.[2] Some experts suggest that IHL of IAC should apply to an outside intervention, even if it is consented by the government. Undoubtedly, this is a nice idea but does not correspond to state practice. Obviously, the law of IAC also applies if there is foreign support to the rebels. As to the situation in Yemen, in my assessment, Iran does not have overall control over the Huthis. Internationalization could only happen if a foreign state does not just support or help, but has overall control over the rebels.[3]

Sometimes the law of IAC was applicable in Yemen, for instance, when there were hostilities between forces controlled by Saudi Arabia and forces controlled by UAE. This was the case of the *Southern Transitional Council* in Aden. Anyway, the classification of the conflict is not so important because on most issues the law of IAC and NIAC is the same, but not on all obviously. When it comes to occupation of territory, the concept and the IHL regime of military occupation applies only in IACs. Equally, POWs and combatant status exist technically only in IACs.

So, let us apply the law of NIAC to the armed conflict in Yemen. Then question is when Additional Protocol II (AP II or Protocol II) to the Geneva Conventions to which Yemen is a state party applies? At least under the letter of Article 1 of Protocol II,[4] it is only Yemen which is bound by Protocol II but not foreign states which intervene to help Yemen. However, one may claim that if a state intervenes to help the government of another state, which is bound by Protocol II, it has to respect the Protocol too. Finally, the question arises whether the US and the UK are parties under the support-based approach? The ICRC has suggested that in an NIAC, if foreign states commit acts which would constitute a direct participation in hostilities in the

1. Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law – Volume 1: Rules, (ICRC and CUP 2005).
2. For more information about when does IHL apply, see Marco Sassòli, International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare, (Edward Elgar Publishing 2019), 168-203.
3. For more information regarding the internationalization of an NIAC see Djemila Carron, 'When is a Conflict International? Time for New Control Tests in IHL' (2016) 98 International Review of the Red Cross 1019, 1019-1041. Also, for more information on the ICRC position on the notion of armed conflicts involving foreign intervention see Tristan Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict' (2015) 97 International Review of the Red Cross 1227, 1227-1252.
4. Article 1 of AP II:
"1. This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 […] shall apply to all armed conflicts which are not covered by Article 1 of […] Protocol I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol (my emphasis)".

support of one of the parties, they become a party even if the intensity of their support would not be sufficient to trigger the applicability of the law of NIAC. [1]

The Saudi-led coalition entered the war in Yemen on March 26, 2015, launching Operation Decisive Storm. A day before the start of the operation, the United States announced its "logistical and intelligence support" to the military operation of the coalition. But US officials cautiously insisted that this assistance would not involve direct military action. Although this military assistance did not involve the "direct" use of force, it was significant and included the provision of intelligence and the establishment of joint planning cells with the Saudi military. Additionally, US officials met with Saudi intelligence and military officials to identify targets shortly before the operation began. As noted at the time, and as the conflict unfolded, the Saudi coalition relied heavily on U.S. surveillance and intelligence services to conduct military operations, particularly air strikes. The exchange of intelligence and targeted information quickly became controversial as the attacks became more frequent. Similarly, U.S. arms sales and aerial refueling have met with significant opposition from human rights and civil society groups, as well as some members of the U.S. Congress. This military support required significant U.S. assets and personnel. The aerial refueling operation involved U.S. tankers outside Yemeni airspace, and intelligence sharing included the deployment of U.S. personnel to Riyadh. Additionally, at least a small number of US troops are stationed in Yemen, working with coalition forces to provide advice and support on operational planning, reconnaissance, and logistics.[2]

Following President Trump's election in November 2016, US foreign policy changed significantly, and US military aid to the Saudi coalition increased following Trump's inauguration in 2017 and his decision to resume arms sales with the Saudi government. The following month, US senators took steps to block the sale of precision-guided weapons to Saudi Arabia, citing concerns over the high number of civilian deaths in Saudi airstrikes. To boost confidence and secure arms sales, the Saudi officials assured their U.S. counterparts that the Saudi military will take greater care for reducing civilian casualties. A pivotal aspect of achieving this goal was to provide more U.S. military support. Finally, and very importantly, U.S. military personnel will return to Riyadh to support targeted operations, but will have expanded access to Saudi operations and will be working in operations control centers. In summary, despite the conflict showing little signs of resolution and widespread allegations of violations of international humanitarian law, including war crimes related to the coalition's military operations in Yemen, the Saudi coalition forces' U.S. military support continues.[3]

Regarding the support provided by the United Kingdom to the Saudi Arabia and the Coalition, *inter alia*, the members of the House of Commons have declared that the United King-

1. This theory which is termed "support-based approach" is recently developed by the International Committee of the Red Cross (ICRC) that is concerned with interventions made by 'one or more States, a coalition of States or an international or regional organization' in a pre-existing non-international armed conflict (NIAC) for supporting one of its parties. See Tristan Ferraro, 'The Applicability and Application of International Humanitarian Law to Multinational Forces' (2013) 95 International Review of the Red Cross 561, 583–687. The support-based theory contributes to define the ratione personae scope of International Humanitarian Law (IHL) application. For more information as to support-based approach and its functions see R. van Steenberghe and P. Lesaffre, 'The ICRC's 'support-based approach': A suitable but incomplete theory' (2019) 59 Questions on International Law Journal 5, 5-23.
2. Quoted in: John Hursh, 'International Humanitarian Law Violations, Legal Responsibility, and US Military Support to the Saudi Coalition in Yemen: A Cautionary Tale' (2020) 7 Journal on the Use of Force and International Law 122, 124-125.
3. Ibid 125-126.

dom's assistance for military action of Saudi Arabia in Yemen has been considerable. However, this assistance does not suffice for making this state a party to the conflict. They have added that the UK support includes both providing aircraft and bombs for airstrikes and participation of UK personnel in the Joint Combined Planning Cell and Saudi Air Operations Center. According to them, such an engagement which does not meet the legal threshold for becoming a party to the conflict has no precedence and shows the good relationship which exists between the UK and Saudi Arabia and its military. Furthermore, they are not persuaded that the UK government has enough oversight of "coalition procedures and operations.[1] It should be noted that the US government has always announced that the limited support with which the coalition has been provided by the US is not legally sufficient to make the United States a party to the conflict.[2]

2. Principles of Distinction and Proportionality in the Armed Conflict in Yemen

One of the most important and challenging issues in Yemen, is the unfortunate bombardments, which should under IHL distinguish between civilians and combatants.[3] According to news and reports, residential areas, markets, funerals, detention facilities, medical facilities, religious sites, refugee camps etc. have been bombed. A *Group of Eminent International and Regional Experts on Yemen* analyzed some of the airstrikes launched by the due to their disproportionate impact on civilians. For example, in accordance with the report of the *Group of Experts on Yemen*, the first attack hit the house shortly after 8:00 am, followed 10 minutes later by a second attack about 150 meters from the house. The third attack, which occurred about four to five minutes later, hit a clearing far from the village and caused no damage to people or property. The expert group was unable to confirm the exact number of casualties, but the Yemeni Residents and Humanitarian Coordinator's Office reported the following day that 12 people, including six children, had been killed and 16 injured. Most of the victims belonged to the same IDP families who fled their birthplaces in the Haradh district of Hajjah Governorate in 2015. Another example is the series of airstrikes launched by coalition forces at around 11:45 pm on 31 August 2019 at a complex called Dhamar Community College, located about 10 kilometers north of Dhamar city, Dhamar governorate. One of the buildings was used by the Houthis as an informal detention center and housed mostly male civilians. The existence of this detention facility has been publicly known since at least 2018 after it was alerted by a UN Security Council panel of experts. This informal camp was known to human rights groups and the ICRC who had visited it before the airstrikes. At least 134 male prisoners died and 40 were injured as a result of the strike. An analysis of satellite imagery and other material reviewed by the group

1. House of Commons Foreign Affairs Committee, 'The Use of UK-Manufactured Arms in Yemen, Fourth Report of Session 2016–17' (15 September 2016) 40; Available at: https://www.justsecurity.org/wp-content/uploads/2016/09/UK-Parliament-Foreign-Affairs-Committee-Report-on-UK-arms-in-Yemen.pdf

2. Quoted in: Hursh (no 9) 141.

3. In this regard, inter alia, see Human Rights Council, 'Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014: Report of the Detailed Findings of the Group of Eminent International and Regional Experts on Yemen' (September 3, 2019) A/HRC/42/CRP.1, 28-220; Human Rights Council, 'Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014: Detailed Findings of the Group of Eminent International and Regional Experts on Yemen' (September 29, 2020) A/HRC/45/CRP.7, 20-31; Human Rights Council, 'Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014: Report of the Group of Eminent International and Regional Experts on Yemen' (September 10, 2021) A/HRC/48/20, 4-14.

confirms that four buildings, including the detention center, were severely damaged and one building was completely destroyed.[1] However, the fact that they were destroyed and people there were killed under IHL is not yet decisive for a violation, because the question is what was that target. There may be a legitimate target in a residential area if there is a rebel commander or a weapons factory, so the residential area may be affected. Even in a refugee camp there could be a legitimate target, but obviously then the proportionality principle becomes applicable and the attacker must even take all feasible actions to minimize civilian impacts if that principle is respected. Therefore, it is very difficult to judge whether IHL is violated.

Until recently, an international commission existed,[2] the UN Group of Eminent International and Regional Experts on Yemen,[3] which asked all kinds of question to the Saudi-Led Coalition (SLC) to understand why there were so often civilians killed in these acts. The problem is that belligerent does not have an obligation to give an answer to that. However, we would need to know not only what was hit but also what was targeted and, to apply the proportionality rule, how important that target was for the plans of the SLC compared to the expected incidental effects on civilians. For this we would need know the plans of the SLC. It appears that effective mechanisms should be resorted to aiming at making the parties to the conflict accountable. In this regard, the Group of Expert, in its 2020 report, recommended the United Nations and the international community to make concrete efforts to support accountability for gross violations and crimes; advocate mainstreaming human rights into peace process negotiations and avoid any measures that undermine respect for human rights and accountability; and support processes for effective transitional justice.[4] In particular, it recommended that the Security Council integrate the human rights dimension of the conflict in Yemen more fully into the agenda, refer the situation in Yemen to the International Criminal Court and extend the list of sanctions directed against persons involved in order to ensure that the most serious crimes do not go unpunished. [5]

At present, one of the interesting but also dangerous developments in Yemen is that there are no-strike lists and a Humanitarian Notification System. The mechanism of this system notifies the Saudi-led coalition of the locations of humanitarian static locations and humanitarian movements in Yemen aimed at ensuring the safety and security of humanitarian installations, personnel, equipment and activities in active military operations areas. This mechanism is coordinated by the UN Office for the Coordination of Humanitarian Affairs (OCHA). This gives the wrong impression that everything else may be hit. On the contrary, the basic idea of IHL is

1. Human Rights Council, Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014: Detailed Findings of the Group of Eminent International and Regional Experts on Yemen (29 September 2020) A/HRC/45/CRP.7, paras. 66-69.
2. Unfortunately, on October 7, 2021, the Human Rights Council rejected a resolution to renew the mandate of the Group.
3. A Group of Eminent Experts (GEE) on Yemen was established by the United Nations Human Rights Council (HRC) in September 2017 to investigate international law's violations and abuses committed by all parties to the conflict and make general recommendations to improve the situation of human rights in Yemen. The mission of the Group is to establish the facts and circumstances surrounding violations and abuses and, where possible, identify the individuals responsible for those violations and abuses.
4. Human Rights Council, 'Situation of Human Rights in Yemen, Including Violations and Abuses since September 2014: Detailed Findings of the Group of Eminent International and Regional Experts on Yemen' (29 September 2020) A/HRC/45/CRP.7, 111.
5. Ibid.

that you may only target something if you know that it is a military objective. The Humanitarian Notification System mechanism gives somehow the reverse impression. It gives the impression that everything which has not been notified as a humanitarian site is a legitimate target of attack. In addition, why should a hospital run by an NGO like Doctors Without Borders (MSF) be better protected than a local hospital? Why should offices of an NGO be better protected than a simple civilian house? Furthermore, can the humanitarian organizations which notify those positions control that there is no military use? Obviously, a humanitarian impartial organization would be very embarrassed if it had to notify loss of protection. If the organization discovers the military use of a humanitarian site which is for distribution of food for the civilian population, it would probably not inform the SLC that now protection is lost. Therefore, I think this is a very doubtful idea.

Regarding proportionality, again, there is a need of an *ex ante* evaluation which includes the reverberating effects, in particular in urban areas. Indeed, if a military objective is targeted in midst of a town and you destroy this military objective, you will also destroy the water pipes and the electricity lines under and near this military objective. This attack may not be disproportionate, but if you have several such attacks then the whole infrastructure for the civilian population will be affected and many civilians will die not from the bombs but from the lack of purified drinking water. Furthermore, for instance, hospitals can no longer operate because there is no more electricity and this is something which should be much more taken into account because proportionality is not only about the individuals who are standing or living near the targeted objective but it is also about second and third order effects of an attack. Civilians are affected in many ways when civilian housing and critical infrastructure are damaged or destroyed, especially if densely populated areas are under attack for a long period of time. In many cases, the lingering effects of an attack, especially one that disables a country's power system, can far outweigh the immediate civilian casualties caused by the attack. [1]

One thing which is particularly raising concern in Yemen is that many hospitals were destroyed.[2] It is often argued including by humanitarian organizations that they are deliberately targeted to weaken the resilience of the civilian population or of the fighters. I must say I can nearly not imagine that but unfortunately it may be the case. Nevertheless, we have to understand that even a hospital loses protection if it is used to commit outside its humanitarian functions and acts harmful to the enemy. But there must be at first a warning and an appropriate time limit before you may attack it. Therefore, it is not admissible that a party claims only after an attack that a hospital was used by the enemy for hostile purposes. It must first warn the hospital and the hospital must have time to rectify the situation. Furthermore, to increase visibility of such specifically protected objects, medical units, including hospitals are entitled to use one of

1. Quoted in: Isabel Robinson and Ellen Nohle, 'Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas' (2016) 98 International Review of the Red Cross 107, 108.

2. Since the conclusion of 1864 Geneva Convention, "[t]he wounded and sick shall be collected and cared for" has become a fundamental principle of international humanitarian law. Based on this principle, a general protection is given to all wounded and sick persons, including civilians and wounded combatants who are considered hors de combat. Additionally, the fourth Geneva Convention as well as customary international humanitarian law, extend the mentioned protection to civilian medical units such as hospitals where the wounded and sick are cared for. See Lara Hakki, Eric Stover and Rohini J. Haar, 'Breaking the Silence: Advocacy and Accountability for Attacks on Hospitals in Armed Conflict' (2021) 102 International Review of the Red Cross 1201, 1202.

the distinctive emblems of the Red Cross, the Red Crescent or the Red Crystal. When it comes to schools,[1] in existing IHL they do not have special protection like hospitals.[2] They are obviously civilian objects, but it is not unlawful to use schools for military purposes. Obviously, you have first to evacuate the children. But, if then the school is destroyed, children have no more education, and in my view, this has to be taken into account in the proportionality evaluation.[3]

3. Siege and Blockade and the Armed Conflict in Yemen

Two particular issues raising major humanitarian concern in Yemen are also sieges and blockades. Siege exists in land warfare when one party besieges a town and does not let anyone in or out, which means the civilians in the besieged town will starve. For the solution of this problem IHL does not fit to the reality. One solution under existing IHL is to let the civilians quit the besieged town, but obviously the fighters who are besieged do not want let the civilians out, because if they let the civilians out the enemy can simply attack the entire town and there are no more civilians, who have to be respected. The other solution is that humanitarian assistance for the civilian population must be let in. But here the problem is that besieging party may insist on a distribution in the besieged town which makes sure that only civilians will benefit from the humanitarian assistance. This obviously never works because no organization can guarantee that at the end assistance will not also benefit to fighters, while under IHL humanitarian assistance may only benefit to the civilian population. It is lawful to starve combatants, but obviously combatants may surrender and then they must be fed.

Another significant and challenging problem is related to the institution of the blockade in naval warfare. First and foremost, it should be said that it is a very old-fashioned institution. I am not sure that such an institution exists also in aerial warfare, although we often make analogies between aerial warfare and naval warfare. Astonishingly, under traditional customary law it is lawful to declare a blockade, but only in an IAC, over an enemy coast, which means you do not let anything in and you do not let anything out. The only exceptions are that the blockade is prohibited if the sole objective of the blockade is starvation of the civilian population and perhaps also when the effect in terms of starvation of the civilian population are disproportionate compared with the military aim of the blockade. One could in addition argue that humanitarian assistance for the civilian population must be let through a blockade but here again the problem arises how to control that the assistance only benefits to the civilian population.

The problem in Yemen is, first, that this is a NIAC and, in my view, there can be no blockade in an NIAC. Anyway, no blockade was declared by the Coalition and also the UN Security

1. The Yemen's conflict has devastating effects on civilians, particularly vulnerable groups such as women and children. According to the United Nations Children's Fund (UNICEF) and the ICRC, in addition to destruction of and damages to schools and using them for military purposes, children's education for children is among the main casualties of the conflict. See UNICEF, 'Conflict shuts a third of schools in Yemen's port city of Hudaydah', November 30, 2018. Available at https://www.unicef.org/mena/press-releases/conflict-shuts-third-schools-yemens-port-city-hudaydah; ICRC, 'War in Yemen', (May 31, 2019); available at https://www.icrc.org/en/where-we-work/middle-east/yemen/war-yemen; UNICEF, 'Geneva Palais briefing note on education under attack in Yemen', (September 14, 2018); available at https://www.unicef.org/press-releases/geneva-palais-briefing-note-education-under-attack-yemen.

2. See, however, the Safe Schools Declaration, An inter-governmental political commitment to protect students, teachers, schools, and universities from the worst effects of armed conflict, at https://ssd.protectingeducation.org/

3. See on all this also Office of the Special Representative of the Secretary-General for Children and Armed Conflict, Protect Schools and Hospitals: Guidance Note on Security Council Resolution 1998 (United Nations Publication 2014) 16.

Council did not authorize a blockade.[1] So, officially, the Coalition only controls Yemeni ports and the Security Council requested all member States to control their ports. In Yemen itself, the same measures could be taken without a UN Security Council resolution if we start from the idea that Hadi government is the government of Yemen. But the real problem are bureaucratic delays. This is something we see in many conflict areas, such as Syria, that there is a consent to let humanitarian assistance enter, but there are also so many controls, conditions and permissions necessary that finally the civilian population will starve. In Yemen, there is also a UN verification and inspection mechanism. Therefore, together with the Coalition, there are two controls by the UN and by the Coalition and they never found any weapons in controlling these ships. It is clear that weapons enter Yemen, but apparently not by the ships which are controlled. They must bring in the food necessary for the civilian population because Yemen is well-known to be a net importer of food.

4. Certain Persons and the Armed Conflict in Yemen

Another significant IHL issue raised by the armed conflict in Yemen is the protection of wounded, sick and hospitals and ambulances. Under IHL, the wounded and sick must be respected, collected and cared for without discrimination. Both enemy's and own fighters have to be treated in the same way. As previously mentioned, hospitals may only in very exceptional circumstances be targeted. But hospitals and ambulances may be searched. So, it is not unlawful for a party to take control over the place where the hospital is situated, to enter a hospital and to try to find enemies in that hospital and to arrest those enemies. But if they are patients, wounded and sick, they must be continued to be treated.

Detention and the status of detainees in NIAC[2] is considered to be one of the current challenges of IHL. When it comes to detainees, unfortunately we have reports about ill-treatment of detainees, about rape, about detention conditions which are not acceptable. From a legal point of view, obviously we have also to make sure whether persons may at all be detained. There must be a reason for detention. There must be a legal basis and procedure for internment. And, in my view, both the government and the rebels can and must establish courts and mechanisms which make sure that there is a control of the legality of the detention of persons.

Another problem is the association of children with government armed forces and armed groups. Under the Additional Protocols children under 15 years may not be used to participate in hostilities and may not be recruited. Unfortunately, sometimes this has been violated in Yemen.[3]

1. It is noteworthy that UN Security Council in paragraph 15 of its resolution 2216 (14 April 2015) "calls upon Member States, in particular States neighboring Yemen, to inspect, in accordance with their national authorities and legislation and consistent with international law, in particular the law of the sea and relevant international civil aviation agreements, all cargo to Yemen, *in their territory*, including seaports and airports, if the State concerned has information that provides reasonable grounds to believe the cargo contains items the supply, sale, or transfer of which is prohibited by paragraph 14 of this resolution for the purpose of ensuring strict implementation of those provisions" (my emphasis). See S/RES/2216 (2015). A blockade, however, would be enforces on the high seas. Although Security Council did not authorized blockade in this resolution, it appears that this resolution has been invoked by the Saudi-led coalition in order to conduct inspections in situations in which there is no legitimate concerns about weapons. This has led to delay in the delivery of humanitarian goods and has contributed to severe shortages of food and other critical needs.

2. For a detailed analysis of detention in NIAC under IHL and IHRL and its different aspects, see Lawrence Hill-Cawthorne, Detention in Non-International Armed Conflict (OUP 2016).

3. According to art. 77 of API:

"1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

5. Humanitarian Assistance and the Armed Conflict in Yemen

An important issue is obviously humanitarian access and humanitarian assistance.[1] According to *World Food Program*, Yemen is experiencing an unexampled level of hunger which poses serious hardships for many people around the country. About 16.2 million of people are faced with food insecurity in spite of humanitarian assistance which is currently provided. More than 5 million Yemenis are at risk of starvation. Due to the conflict and a declining economy, the families have many problems to find enough food to pass the day. Child malnutrition rates are among the highest in the world and nutritional status is going to be worsen. Nearly a third of families have incomplete diets, eating very few foods such as legumes, vegetables, fruits, dairy products and meat. Yemen still has the highest rates of malnutrition among women and children in the world, with 1.2 million pregnant or breastfeeding women and 2.3 million children under the age of five in need of acute malnutrition treatment caused by decrease in food consumption. The humanitarian situation in Yemen is so fragile that millions could face starvation and death if critical supplies such as food, fuel and medicine are cut off.[2]

Under IHL, the starting point is that the starvation of the civilian population is prohibited. The parties must accept relief actions if the civilian population is in need of humanitarian assistance. However, this is subject to several conditions. Article 18(2) of Additional Protocol II, which is relevant to the situation in Yemen reads (and I directly add my comments): "If the civilian population is suffering undue hardship [which is certainly the case in Yemen] owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies [I would say in Yemen fuel is also an object indispensable for the survival of the civilian population, because you need fuel to operate the water pumps and the lorries which transport the food into the region where the civilian population is in need], relief actions for the civilian population [this is again the problem that they are only for the civilian population and therefore a party letting them through may insist to have some control that it only benefits to the civilians] which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken [unfortunately the provision continues requiring the following] subject to the consent of the High Contracting Party concerned".[3]

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2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavor to give priority to those who are oldest.
3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.
4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5.
5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed".
See also Art. 4(3)(c) and (d) of AP II for NIACs and Arts. 3 and 4 of the 2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (25 May 2000) 2173 UNTS 222.

1. It should be mentioned that according to UN Secretary-General, enhancing humanitarian access is among the five main challenges facing the civilians' protection in armed conflict. The other four core challenges are: enhancing compliance with international law; enhancing compliance by non-State armed groups; enhancing protection through more effective and better resourced United Nations peacekeeping and other relevant missions; and enhancing accountability for violations. See UNSG, 'Report of the Secretary-General on the Protection of Civilians in Armed Conflict' (May 29, 2009) U.N. Doc. S/2009/277 para. 26.

2. See https://www.wfp.org/emergencies/yemen-emergency

3. Humanitarian access to vulnerable populations in conflict areas has often become more problematic and complicated in recent years, and many humanitarian organizations see it as the greatest challenge of the current humanitarian response to be addressed in the future. On the one hand, this is because many of today's armed conflicts are fragmented and complex, with

The UN Security Council has adopted many resolutions concerning humanitarian assistance to Yemen.[1] Generally, it has considered in recent resolutions that the arbitrary denial of consent is prohibited.[2] One could make the argument that for the regions controlled by the Huthis it is sufficient if the Huthis agree with the humanitarian assistance brought, for instance, from Oman. It is important to address that humanitarian assistance is not only and mainly the task of the humanitarian organizations but the government has the obligation to make sure that inhabitants of its territory benefit from humanitarian assistance. And all belligerents must let humanitarian assistance in, if the civilian population is in need.

The denial of consent is justified (and therefore not arbitrary) if either the civilian population does not actually need the humanitarian assistance or if the entity offering it is unable to carry out relief actions that are exclusively humanitarian and impartial in character without any adverse distinction. Beyond that, in my view, the focus should not be on defining what is arbitrary but on the respect of other international obligations that make it compulsory to accept an offer of assistance. Indeed, denying consent in violation of international obligations must be considered as "arbitrary", and the fact that IHL subjects relief actions to a State's consent does not absolve that State from complying with its other obligations. Such other obligations under IHL include the very limited obligation to allow passage of certain items under Article 23 of Convention IV; the obligation to facilitate medical assistance to the wounded and sick (even for the benefit of combatants); the obligation to allow relief societies, subject to certain conditions, to provide relief to POWs and protected civilians; and the prohibition against starving civilians as a method of warfare as outlined above. Beyond IHL, International Human Rights Law (IHRL) continues to apply in armed conflicts to persons under the jurisdiction of a state, which is obliged to respect, protect and fulfil the rights to life, food, shelter and health as well as the prohibition against inhuman and degrading treatment. A State that cannot comply with these

many different groups fighting each other. Complexities also emerge when a protracted crisis intersects with conflict and/or when a natural disaster strikes an already conflict-ridden country. Most of today's armed conflicts are not international and are seen as threats to national sovereignty, which can lead to denial of humanitarian action. Meanwhile, the number of humanitarian organizations has increased significantly. This means that further coordination and negotiations on humanitarian access are needed. Moreover, the boundaries between military, political and humanitarian activities are gradually blurring. If conflict parties or segments of the population begin to perceive humanitarian aid as an instrument of their political agenda, access to those in need may become more difficult or impossible. This blurring of boundaries increases the risk of even humanitarian workers themselves being targeted. This assessment is quoted from Felix Schwendimann, 'The Legal Framework of Humanitarian Access in Armed Conflict' (December 2011) 93 International Review of the Red Cross 993, 993-994.

1. UN Security Council's resolutions concerning Yemen conflict are: S/RES/2201 (15 February 2015); S/RES/2204 (24 February 2015); S/RES/2216 (14 April 2015); S/RES/2266 (24 February 2016); S/RES/2342 (23 February 2017); S/RES/2402 (26 February 2018); S/RES/2451 (21 December 2018); S/RES/2452 (16 January 2019); S/RES/2456 (26 February 2019); S/RES/2481 (15 July 2019); S/RES/2505 (13 January 2020); S/RES/2511 (25 February 2020); S/RES/2534 (14 July 2020); S/RES/2564 (25 February 2021); S/RES/2586 (14 July 2021).

2. See UN Security Council Resolution 2216 (2015), preambular para. 10. Arbitrary denial of humanitarian access in increasingly recognized by the international community as a violation of IHL. For example, in response to the conflict in Syria, the UN Security Council, in a presidential statement adopted in October 2013, condemned the denial of humanitarian access by parties to the conflict, and recalled "that arbitrarily depriving civilians of objects indispensable to their survival, including willfully impeding relief supply and access, can constitute a violation of international humanitarian law." A few months later, in its Resolution 2139 of February 21, 2014, the Council "recall[ed] that arbitrary denial of humanitarian access and depriving civilians of objects indispensable to their survival, including willfully impeding relief supply and access, can constitute a violation of international humanitarian law." Similar statements were made by the Council in 2015 in addressing the Yemen crisis. Similarly, the UN General Assembly, the UN Human Rights Council as well as the UN Human Rights Committee have all dealt with the legality of humanitarian access obstructions occurred in Syria, South Sudan and Sudan from the point of view of "arbitrary denial" of access. This correct assessment is quoted from Dapo Akande and Emanuela-Chiara Gillard, 'Arbitrary Withholding of Consent to Humanitarian Relief Operations in Armed Conflict' (2016) 92 International Law Studies 483, 485.

IHRL obligations by itself violates them if it withholds consent to outside assistance when it is offered. Finally, and perhaps most importantly, the prohibition of discrimination enshrined both in IHL (referred to as the "prohibition of adverse distinction") and IHRL also applies to humanitarian assistance. IHL is therefore violated if, which is often the case, including in Yemen, the denial of consent only concerns or affects beneficiaries of a certain race, color, religion, faith, sex, birth or economic class.

Conclusion

The armed conflict in Yemen is one of the most devastating and catastrophic crises which the international community is facing. It is entering its seventh year. According to the ICRC, a great number of civilians have been killed or have lost their property. Furthermore, approximately 4 million people nationwide need to evacuate to safer places. Basic services have virtually collapsed and millions of Yemenis face a humanitarian crisis. Yemen faces the world's biggest food security, leaving nearly 20 million people for which humanitarian assistance has become a pressing necessity. This situation has raised numerous questions under IHL as the set of rules the main aim of which is to limit the effects of armed conflicts for humanitarian reasons.

This article attempted to examine briefly certain important issues in IHL raised by Yemen armed conflict. Doing so, firstly, the type of armed conflict in Yemen was addressed. Then, the principles of distinction and proportionality were studied. Thereafter, the issues of blockade and siege were dealt with. After that, the situation of certain persons such as wounded and sick was examined. And finally, the very challenging and significant question of humanitarian assistance was assessed.

To conclude, generally speaking, it appears that most of the humanitarian problems except the issues of humanitarian assistance and sieges, are adequately regulated by IHL and the problem is mainly respect. Even the controversy about the classification of the conflict, whether it is an IAC or a NIAC, does not fundamentally impact the rules that have to be respected. Unfortunately, how do we get the respect of those rules by the belligerents is the problem of all conflict areas including Yemen. This is a problem of political will and it has to be tackled regardless of who is right and who is wrong in the conflict.

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Investigating the Theoretical Foundations of Human Rights in Islamic Thought

With a Brief Overview of International Law's Perspective

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ABSTRACT

The present article seeks to investigate the theoretical foundations of human rights in Islamic thought. It would briefly overview the foundations of human rights in international law as well. By reflecting on the epistemological, cosmological and anthropological foundations of human rights in Islamic thought we can reach a realistic view relating to human being and his/her identity thereby justify human rights. Divine rights include two collections of rights: statutory rights that are recognized for human beings in the Book and Sunnah and those rights that are originated from Fitrah and nature. From an Islamic point of view, there is no contrast between Divine rights and those originated from Fitrah. Using reason and the revelation, legal school of Islam is one of the most reliable and reasonable sources for clarifying Fitrah and natural rights. Basing human rights on dignity is logical when correlation between human being and dignity is referred to correlation between humanity and dignity. That being the case, potentiality of humanity leads to potentiality of dignity and the actuality of the former results in the actuality of the latter. All of the results of secular human rights are not necessarily in contradiction with Islamic views and there are cases in which, despite difference in foundations, similar results can be seen. Accordingly, most of the articles of UHRD can be confirmed by Muslims.

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Introduction

Human rights are considered to be the most significant development in international legal sphere in 20th century. Human rights were brought into international law by the UN in its Charter in 1945. In paragraph 3 of Article 1of this Charter, the promotion and encouragement of human rights and fundamental freedoms was included as one of the purposes of the Organization. Furthermore, promoting universal respect for, and observance of, human rights and fundamental freedoms is linked, inter alia, to stability and well-being in Articles 55 and 56. Therefore, it was after WWII that human rights became an international issue.[1] That being the case, it is safe to say that we are living in the age of rights in which all aspects of human beings' life are interpreted through and affected by the human rights discourse. It appears that this discourse is the prevalent one of the present time in such a way that the wrongfulness of something is often characterized as a human rights breach rather than an immoral act.[2]

Lacking consensus on the nature and justification of human rights is the only consensus regarding these rights.[3] Approaches toward human rights are based on specific understandings about the universe and human being. Accordingly, disagreements with respect to human rights and its boundaries can be attributed to disagreement as to legal foundations and principles. If we summarize the foundations into epistemological, cosmological and anthropological, then the different point of views in these three axes have caused disagreement in the foundations the reflection of which can be seen in the legal system. The positivistic and secular epistemology is grounded in empiricism, sensualism and rationalism and, as a consequence, rejects many of the religious teachings. While, in Islam the reason and Sunnah are the bases for knowledge at the same time and they together can help the human being in his/her true knowledge. These differences in the understanding of the universe and human being were existed and exist in different schools and, as a result, have their own consequences.

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2. See Romuald R. Haule, 'Some Reflections on the Foundation of Human Rights – Are Human Rights an Alternative to Moral Values?', (2006), 10 Max Plank Yearbook of United Nations Law, 368-369.
3. Vittorio Bufacchi, 'Theoretical Foundations of Human Rights', (2018), 66 Political Studies, 601.

As Freeman remarked in 1994, human rights concept has both practical and theoretical problems.[1] Undoubtedly, the debate about the relationship between Islam and human rights in the Islamic world is diverse and has been going on for some time. This debate is not only theoretically connected to the universalization of human rights in general, but is particularly related to the practical realization of human rights in the Islamic world. This is rooted in the obvious role played by Islam in the social, cultural, political and legal affairs of most of the Muslim-majority States and societies.[2] Among other things, the theoretical foundations of human rights in Islamic thought are of great significance for deep understanding of this relationship.[3] Accordingly, the objective of the present article is to study the theoretical foundations of human rights in Islamic thought. In doing so, first and foremost, we briefly overview the theoretical foundations of human rights in international law (1). Afterward, epistemological (2), cosmological (3) and anthropological (4) foundations of human rights under Islamic legal thought would be discussed respectively. It appears that all of the results of secular human rights are not necessarily in contradiction with Islamic views and there are cases in which, despite difference in foundations, similar results can be seen. It is due to this fact that, most of the articles of UHRD can be confirmed by Muslims.

1. Foundations of Human Rights in International Law: A Brief Overview

Human rights are difficult to define, notwithstanding that the term is used extensively and frequently. Generally human rights are considered to those fundamental and inalienable rights which are essential for a decent life as a human being.[4] Surely, this view that all individuals have rights because of being human predates 1948. For instance, it can be traced back to the American Declaration of Independence (1776) and the French Declaration of the Rights of Man and the Citizen (1789). Under the guise of "natural rights", this idea can be found in the influential works of the 17th and 18th centuries by Grotius, Pfendorf, Locke, and Kant.[5] In fact, recent research has argued that this idea of natural rights arose in early medieval thought or much earlier. However, it is worth mentioning that there is much debate about whether modern human rights are identical to, or at least modernized and secularized forms of natural rights.[6]

Putting emphasis on the significance of nature and foundations of human rights in their introduction to the book of which they are the editors, Ernst and Heilinger state that clarification of concept and justification of human rights are the two key challenges in human rights philosophy. According to them, in addition to politicians, NGO activists, international lawyers,

1. Michael Freeman, 'The Philosophical Foundations of Human Rights', (1994), 16 Human Rights Quarterly, 491.
2. Mashood A Baderin, 'Islam and the Realization of Human Rights in the Muslim World', in Joseph and McBeth (eds.) (no 1), 440-441.
3. It is worth mentioning that the majority of human rights theorists are skeptical about the strictly religious notions of human rights. It is due to the fact that they feel more like a lawyer or a philosopher than a theologian in theoretical issues. They also try to avoid references to religious texts and limit themselves to legal documents that even may not be of a secular basis. See Jordan Kiper, 'Do Human Rights Have Religious Foundations', (2012), 7 Religion and Human Rights, 109.
4. Rebecca M. M. Wallace, International Law, (fifth edition, Sweet and Maxwell 2005), 225.
5. Hugo Grotius, The Rights of War and Peace, (1625); Samuel Pufendorf, On the Law of Nature and of Nations, (1672); John Locke, Two Treatises of Government (1689); Immanuel Kant, The Metaphysics of Morals (1797).
6. Quoted from Rowan Cruft, S. Matthew Liao and Massimo Renzo, 'The Philosophical Foundations of Human Rights: An Overview', in Rowan Cruft, S. Matthew Liao and Massimo Renzo, Philosophical Foundations of Human Rights, (Oxford University Press 2015), 1-2.

political and moral philosophers etc., human rights are significant for individuals who defend their own rights and the others' and try to decrease the violation of human rights in the society. Therefore, whatever is the reason behind the interest in human rights, knowing their nature and normative force should be of fundamental importance for those concerned with human rights.[1]

According to Marks, there are various theoretical discussions on the origins, scope and significance of human rights in the related disciplines. Broadly speaking, using the term "human rights" is grounded on moral reasoning (ethical discourse), socially sanctioned norms (legal/political discourse) or social mobilization (advocacy discourse). These discourse are in no way different or sequential but are all used in diverse contexts. They are interconnected i.e. the public reasoning based on ethical arguments and social mobilization based on advocacy agendas effect legal norms, processes and institutions and, as a consequence, all of them play their role in making human rights part of social reality.[2]

Generally speaking, inherent human dignity is considered to be the most well-known and agreed upon founding value of contemporary human rights discourse. In Oxford Encyclopedic English Dictionary, "dignity" is defined as "the state of being worthy of honor or respect". Whenever the adjective human is added to this concept, the term means that all individuals are equal and have inherent worth as the consequence of which they should be given utmost respect and care without distinction on grounds such as race, ethnicity, religion etc. It should be borne in mind that inherent human dignity is not the same as moral dignity, which is a synonymous with "honor". It is the first notion that has occupied a prominent place in bioethics-related legal instruments. The inherent dignity is the same for all and cannot be gained or lost due to its inseparability from being human. Even the worst offenders have the right not to be deprived of their dignity and to be free from inhuman or degrading treatment and punishment.[3]

In the international law sphere, human dignity is a fundamental principle which entails equality of respect for all individuals and human rights are those concrete norms which are required to actualize that equal respect in social life. It is important to mention that human dignity should not be regarded as a super-right. It is the main source and basis of all rights. This notion deals with the reason behind the entitlement of humans to have rights which is their intrinsic worth. Currently, inherent dignity of all people is the assumption on which human rights law is grounded. Additionally, promoting and securing respect for dignity and rights are considered to be the reason of being of the state in the contemporary political thought. It is the obligation of both international community and individual states to recognize that people do have basic rights resulting from their inherent dignity. Hence, one can argue that human dignity means justice for every human beings.[4]

It is stated by Lokow that human dignity has a special status in UDHR because of its key features. As the result of previous ideological and philosophical discussions and the writings of

1. Ernst Gerhard and Jan-Christoph Heilinger (eds.), The Philosophy of Human Rights: Contemporary Controversies (Walter de Gruyter GmbH & Co. KG 2012) VII.
2. Stephen P. Marks, Human Rights: A Brief Introduction, Program on Human Rights in Development, Harvard University, (2016), 1-2.
3. Quoted from Roberto Andorno, 'Human Dignity and Human Rights', in Henk A.M.J. ten Have Bert Gordijn (eds.), Handbook of Global Bioethics, (Springer 2014), 45.
4 Ibid 49.

distinguished thinkers, the authors of the UDHR were conscious of the notion of human dignity and some of them considered it to be the basis for human rights. However, as its rationale was largely undisputed and gradually tied to human rights over the past few years, human dignity was incorporated into the Declaration and found no definitive opponents.[1] As a consequence, UDHR opens with the statement that recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the basis of freedom, justice and peace in the world. ICESCR and ICCPR, which together with UDHR comprise the International Bill of Rights, go even further and announce that the inalienable rights of all human beings derive from their inherent dignity. Furthermore, the concept of human dignity plays a pivotal role in discussion on the universality and relativity of human rights as well.[2]

However, there is no consensus as to the intrinsic relation between human dignity and human rights and this linkage is sometimes criticized.[3] It is argued that without a strong consensual justification these concepts are subjected to appropriation in many ways. Human dignity, which sometimes is regarded as an empty and ambiguous concept, is usually seen as the base on which human rights should rest. This concept's openness may lead to highlighting the role it can play in promoting and protecting human rights, however, its vagueness may leave it open to particularistic appropriations and manipulations. Human dignity has acquired the status of a legal principle that serves as the footing for establishing a complex structure of needs, interests, norms, institutions, governmental initiatives, and international human rights policy. However, due to lacking a firm foundation for this legal basis, one can criticize the current human rights system for its weak validation.[4]

2. Epistemological Foundations of Human Rights in Islamic Thought

The ways to knowledge and their validity are among the important issues of epistemology. Sensual, rational and intuitive knowledge are valid and valuable in their own place and are confirmed by Holy Qurān. Albeit, intuitive knowledge has a special position in revelational teachings.[5] In modern time, developments of epistemological foundations led revelation and Sunnah-based knowledge to be casted on doubt and caused its validity and justification be called in to question due to radical inclination toward sensualism and rationalism. This required rationalism against religious rationality that put reason and revelation beside each other. Qurān is always recommending reasoning and contemplating as to the Creation. On the contrary, radical rationalism that corresponds to rejecting revelation, takes position and negates it through different interpretations. According to Āyah 165 of An-Nissā' (the Women) Sūrah of Qurān, reason is necessary for knowledge but not sufficient: "Messengers were as bearers of glad tidings [for the believers] as well as warners [for the disbelievers] in order that mankind should

1. Pawel Lukow, 'A Difficult Legacy: Human Dignity as the Founding Value of Human Rights', (2018), 19 Human Rights Review, 319.
2. David Kretzmer and Eckart Klein (eds.), The Concept of Human Dignity in Human Rights Discourse (Kluwer Law International Law 2002) V.
3. See for example Stamatina Liosi, 'Why Dignity is not the Foundation of Human Rights', (2017), 8 Public Reason, 51-64.
4. Amos Nascimento and Matthias Lutz-Bachmann (eds.), Human Dignity: Perspectives from a Critical Theory of Human Rights (Routledge 2018) xi.
5. Mohammad Taqī Fa'ālī, Epistemology in Qurān (Institute of Seminary and University 2016), 415. [In Persian]

not have argument against Allāh [concerning their lack of knowledge] after sending the Messengers; and Allāh is the Source-Wisdom Superpower".[1]

This Āyah implies both the necessity of reason for the guidance of the mankind and its insufficiency and need to revelation simultaneously. In terms of reasoning and delimitation, the phrase "in order that mankind should not have argument against Allāh [concerning their lack of knowledge] after sending the Messengers" means that if the Revelation would not have existed the mankind could argue in the Dooms Day that: O my Lord! You impose duty on me without sending any Revelation and Messenger. The most delicate interpretation in this regard is incorporated in Āyahs 1 and 2 of Sūrah of Al-Bayyīnah (The Evident Proof): "Those who disbelieved among the people of the Book [i.e., the Jews, who called Ozair son of Allāh and the Christians who believed in the Trinity]; and also the pagans of Quraish could not depart from their deviated ideas until came to them the Evident Proof"; "A Messenger of Allāh who recites to them the Words of Revelation from the pure Pages". This means that the Revelation never leaves the mankind.[2]

Given that reason and the revelation are two significant ways of epistemology, they should be employed for law in general and human rights law in particular. In addition, being satisfied with reason, sense and experience in contemporary human rights law would not be compatible with Islamic epistemology. "Theism is not assumed in secular human rights (the Universal Declaration of Human Rights (UDHR) and 1966 Covenants) and rights of man are considered according to humanism".[3] From a human rights perspective, the most fundamental assumption is that human being can know him/herself and the Universe; as a consequence, he/she does not need the revelation and the creator of the revelation and the law should not be grounded on any metaphysical origin. Alongside such human rights perspectives that rely and put emphasis on the reason of man, some well-known modern philosophers and thinkers, reflecting on the ability of the reason, have revealed its shortcomings and vulnerabilities.

They have called humanism and rationalism into serious question. Among others, David Human was of the opinion that human beings, alike animals, are governed by instinct and feelings and Kant maintained that thought and reason are not able to understand the depth of things and the Universe. Furthermore, Freud believed that we are unaware of all layers of our existence and it is beyond and broader than our thought area and Nietzsche expressed that all of our demands, even that of our knowledge, are not to reveal any truth or reality but their ultimate goal is to provide us with power and authority.[4] Those who believe in Islam, through rethinking the strengths and weaknesses of the man according to Qurān, find out the anthropological

1. In addition, Āyah 134 of Tāha Sūrah reads: "if we had punished them before sending this [Holy Qurān and the Messenger] they would have said: O, our Creator! Why did You not send us a Messenger so that we would follow your Revelations before we were seized in disgrace and affliction".

2. Abdollāh Javādī Āmolī, Thematic Interpretation of Qurān, Vol. 13 (Epistemology in Qurān) (Isra' 2000), 198-199. [In Persian]

3. Seyed Sādeq Haqīqat, 'Islamic Human Rights: Possibility and Impossibility', in Collection of Papers of International Conference on Human Rights and Dialogue among Civilizations (Centre for Human Rights Studies of Mofīd University 2001), 99. [In Persian]

It should be mentioned that there is a philosophical tradition in the West that emphasizes the not fully rational nature of human beings (for example, giving importance to the role of emotions in cognition and evaluation). However, it is a minority perspective. In this regard, see: Adam Smith, The Theory of Moral Sentiments (CUP 2002).

4. See Hossein Kājī, 'The Philosophical-Anthropological Foundations of Human Rights', in Collection of Papers of International Conference on Human Rights and Dialogue among Civilizations (Centre for Human Rights Studies of Mofīd University 2001), 236-237. [In Persian]

baselessness of the contemporary human being in the field of human rights that claims his independence and originality more than before; a human being that is believed to be independent of any power and does not request assistance from any metaphysical and spiritual power. He/she is owed to no one even God and it is for this reason that in UDHR, despite its numerous privileges, there is no sign of God. It is exactly the perspective that the authors aim to criticize. UDHR does not states that "all human beings are created free", but provides that "all human beings are born free…". Reviewing the history of its codification makes it clear that although there were serious debates as to incorporation of God, the Nature etc. as the origin of rights, ultimately the divine origin of human being is not mentioned.[1]

3. Cosmological Foundations of Human Rights in Islamic Thought

3.1. The Universe is a Truth from Him and to Him

In accordance with a monotheistic ideology, God is the pure and absolute existence and the whole Universe is originated from Him. The Universe is dependent upon Him in its existence and the world including the human being is returned to God. Accordingly, the Universe in its direction is not ended in this world, but it is an introduction to another world. It is crystal clear that this attitude toward the Universe and human being has its impacts on the legal system concerned.[2] A legal system which is adhering to an ideology based on a beginning and resurrection differs the one based on a mere materialistic ideology. Considering a non-material end for the Universe leads to difference in goals in these two legal systems which affects both their direction and examples and quality of rights.

3.2. The Universe is Created Justly

If justice considered to be putting things in their own place, according to Islamic ideology it is believed that God has put everything in its own place and the Creation is done in best possible way. It is quoted from Prophet Muhammed that heavens and earth are established based on justice.[3] Legislative justice deals with fairness of laws and rules of Sharia (Islamic legal system), while creational justice addresses the fairness of creation system and the creation of the creatures from the heavens and the earth to inanimate objects, plants and human beings. Qurān considers the creation system as the best system[4] in such a way that a better and more beautiful creation has been impossible.

Believing in creational justice in the Universe causes special effects in the related legal system. For example, how we can justify and interpret the existence of certain gender differences between men and women that include different physical, mental, emotional and intellectual aspects and make the world of women distinct from that of men? If these creational differences are regarded as just, taking into account the principle on the necessity of compatibility between legislation and creation, there would be a specific legal system as to men and women. How-

1 .Behnāz Hājīzādeh, 'The History of Universal Declaration of Human Rights', in Behnāz Hājīzādeh, 10 Articles on the Universal Declaration of Human Rights, (Ayin-e-Ahmad Publication 2010), 27.

2. See Abdalhakīm Salīmī, 'Theoretical Principles of Human Rights in Islam', (2012), 1 Legal Knowledge, 166-176. [In Persian]

3. Mīrzā Habīb Allāh Hāshemī Khūyī, The Method of Ingenuity in Explaining Nahj-al- Balāghah, Vol. 18 (Maktab-al-Islāmiyah 1980), 342. [In Arabic and Persian]

4 .Sūrah As-Sajdah (The Prostration), Āyah 7: "Allāh is the One Who gives the best perfection to all that He created…".

ever, if it is believed that women are oppressed in the creation and the creational justice is not observed therein, at least in this case, the principle on the necessity of compatibility between legislation and creation should be discarded and another solution should be considered in the legal system. One of the existing challenges in the relationship between human rights system of Islam and international human rights law is the disagreement regarding the basis for creational and legislative justice.

3.3. The Universe is Purposeful

There is a close link between the purposefulness of the Universe and believing in the Resurrection and other world. God is the Knower of the Universe and all aspects of human being's life and his/her potentials, abilities and needs. Therefore, He is absolutely aware of the way to human being's happiness and perfection and can lead him/her in this path. The purposefulness of the Universe indicates that any creature has an end and perfection and should move toward its perfection; moving toward perfection is instinctive in creatures other than human being, while it is conducted voluntarily by human being and God Helps him/her through sending the Messengers. This justifies two principles of Prophethood and Imamate (leadership) in Islamic worldview which both provides the human being with Sharia and religion and determines the leader and guider. Religion is comprised of teachings that includes the rights and duties of human being at the same time. Furthermore, this is purposefulness of the Universe that can be a justifying factor for many of the human rights.[1]

As Motahharī states, there is a linkage between human being and bounties of the Universe in the overall map of the Creation in such a way that if human being was not existed it was a different one. Qurān repeatedly reaffirms that the bounties of the Universe are created for human being. Thus, according to Qurān there is a relationship between human being and the blessing of the Creation before the man can have an activity and do something and before the conveyance of the religious orders to the people by the Messenger and these bounties are property and right of human being.[2] His opinion is based on certain Āyahs of Qurān such as the Āyah 13 of Sūrah Al-Jāthiyah which reads: "And Allāh has subjected for you whatever is in the heavens and on the earth…". Looking from this perspective at the Universe, one can find out that the theatre of the Creation, per se, is the origin of a great collection of human rights. Believing in purposefulness of the Universe gives birth to the theory based on which human rights could not be justified unless being considered in a religious intellectual system that is purposeful and meaningful. In other words, as a principle, commitment to human rights that are based on the holiness and dignity of humankind, cannot be compatible with secular views.

According to some Islamic thinkers, without believing that human being is an end in him/herself and that the Universe is purposeful, the productions of the nature would be regarded as brought by the wind wealth that are fallen on the earth accidentally. Therefore, it is crystal clear that this standpoint cannot be the foundation of right to human being to the Universe because human being only is entitled to his/her own productions resulting from his/her activities. In the

1 . For a brief overview of the foundations of the theory of Wilayat al-Faqih, see Muhammad Taqī Misbāh Yazdī, A Cursory Glance at the Theory of Wilāyat al-Faqīh (second edition, CreateSpace Independent Publishing Platform 2014).
2. Mortezā Motahharī, Twenty Articles (thirty-fifth edition, Sadrā Publication 2011), 53. [In Persian]

Divine logic, anyone who comes to this world has a right to it potentially. All human beings are the children of the Universe and, as a natural consequence, the child has rights over his/her parents.[1] This meaningful relationship between the Universe and human being which considers human being as the central core of the Creation and everything is subjected for him/her is the justification for the naturality of certain rights.

If the whole Universe is subjected for human being and this right is provided for him by the Creation system, so human being is a right-holder and there is no need for any reason other than the law of nature and the system governing the Creation for proving that human being is a right-holder. For further clarification, as an example, it is worth mentioning that in accordance with Āyah 233 of Sūrah Al-Baqarah (The Cow), "And the mothers shall suckle their children two complete years". Consequently, the child has the right to be suckled that is built upon the Creation system which amazingly has made a linkage between the need of the newborn to food and his/her mother's ability to produce milk. The proportionality between the alimentary canal of the child and the type of the milk produced demonstrates the close and mutual link between these two phenomenon and their creation for one another. Once the milk is produced for fulfilling the needs of the child, he/she has a right to it and Qurān has confirmed this right by setting forth the duty for mothers. This can also be true for all cases in which the creation of something is aimed at fulfilling the needs of the other creatures. If the ultimate goal of creating A is to serve B, this purposefulness makes B the right-holder and A is the right-bearer.

If natural needs are taken to be the justifying factors for rights, one can list certain rights such as right to security and right to marriage as natural rights that are built upon and originated from human being's need to security and marriage. If it is the case, what is needed to be proved is the natural need principle by proving which, any actual need makes who needs it a right-holder. As Motahharī claims, it appears that without Divine logic and the logic behind the theory that human being is end in him/herself according to which there is a willful order and if there was not the needy creature the creature who fulfil the need of the needy would not be created, justifying Fitrah and natural rights is impossible.[2]

4. Anthropological Foundations of Human Rights in Islamic Thought

Anthropology seems to be a basic science the product of which can response to many of human science's issues including law. As is expressed by Goodale, "at mid-twentieth century anthropology had established itself as the preeminent source of scientific expertise on many empirical facets of culture and society, from law to kinship, from religion to morality".[3] Accordingly, any question related to human being's nature and character is relevant in and can be assessed based on anthropology and anthropological view. The inherent dignity of all human beings and their equal and non-alienable rights are emphasized in the first paragraph of the preamble of UDHR. Pursuant to art. 1 of UDHR, "all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience …". Among others, questions such as the dignity of human being, meaning of dignity and its nature (granted or acquired),

1. Mortezā Motahharī, A Brief Study of the Foundations of Islamic Economy (Hekmat Publication 1981), 165. [In Persian]
2. Ibid, 165.
3. Mark Goodale, Surrendering to Utopia: An Anthropology of Human Rights, (Stanford University Press 2009), 18.

potentiality or actuality of dignity etc. should be investigated carefully in anthropological discussions. In this section, we will present human being form an Islamic point of view and will have a brief look at opponent viewpoints.

4.1. Divine Fitrah

Human being essentially has an inclination toward God and monotheism. This can be found out from perfectionism that exists in the nature of human being. There is no human being who has no desire to be perfect. Thus, human being is God-oriented because the absolute perfection can only be found in God. This is what is called Divine Fitrah in religious texts and is the base to distinguish between human being and other creatures and has numerous cognitive effects. Since Fitrah-related affairs are fixed and permanent, they never fade away. As inclination toward God is natural, inclination toward religion that depicts the program of life designed by God and makes him/her perfect is natural too. This fact is clarified in Islamic anthropology as follows: "[O, mankind] Set the face of your heart towards the upright religion of the Divine Unity: Allāh has originally created the nature of man's soul with full tendency and love for the Divine Unity; and nothing can change the original creation of Allāh. This monotheism is the True and Lasting Religion…".[1] Without belief in the truth of the Universe and clarification of the essential status of human being, the concept of human rights would be ambiguous and in such a situation would become a mere living creature and, as a consequence, most of his/her rights would be disregarded.[2]

Now, Islamic anthropology can be compared with humanistic anthropology. In the latter school, not only there is no sign of Divine Fitrah, but also everything is defined according to human being's demands and basically he/she knows no creature higher than him/herself to consider him/herself responsible and bound to. Hence, rights of human being should be examined from two perspectives: one is his/her natural aspect which is corollary and the other is his/her Fitrah aspect that is original. Being limited in nature in this assessment, the significant part of human being's reality would be denied and if his/her reality is equally taken into account between nature and Fitrah, the corollary and original are placed in an equal footing. Because if the nature of the body is prioritized over the soul's Fitrah, the original would be replaced by the corollary. In this situation, the reality of human being would be wiped out.[3] To clarify, following a humanistic anthropology leads to priority of nature of human being over his/her Fitrah and, as a consequence, his/her reality and originality would be marginalized.

However, we should bear in mind that a materialistic and natural view toward human being is not equal to natural rights which somehow the same as Fitrah law. Thus, the compatibility between Divine statutory law and natural law should not be neglected because God has set forth the law of religion in harmony with laws of Fitrah and Creation. Owing to this fact, it has been rightly pointed out that no language as eloquent as that of natural rights and no argument as sound as that natural law school can help the public and universal understanding of Islamic law and demonstrate it as a fully reasonable and evident system. Even it could be said that reveal-

1. Qurān, Sūrah Ar-Rūm (The Romans), Āyah 30.
2. Nasr Allāh Hekmat, 'Rights of Which Human Being?', in Collection of Papers of International Conference on Human Rights and Dialogue among Civilizations (Centre for Human Rights Studies of Mofīd University 2001), 347. [In Persian]
3. See Abdollāh Javādī Āmolī, The Philosophy of Human Rights, (fourth edition, Isra' 2004), 8. [In Persian]

ing the inabilities and lacunas of other legal systems supporting fundamental rights is possible through this way of analysis.[1]

4.2. Human Dignity

As was mentioned previously, one of the most significant grounds invoked for proving the right-holderness of human being is called human dignity (Kirāmah). Meticulous examination and assessment of dignity that has been paid a special attention both in religious writings and contemporary human rights instruments is a necessity. According to Mazaffari, Muslim scholars are divided into two groups about the inherent dignity. Referring to Holy Qurān, the Majority consider it as one of the basic Islamic teachings. By contrast, the minority opposes this argument and is of the opinion that "the dignity is a transcendental status that can only be obtained through sincere belief, good deeds, and piety". This disagreement between the majority and minority groups of Muslim scholars has opened its way to Islamic human rights instruments.[2] Rejecting the categorization of dignity into inherent dignity and acquired dignity, in the following, we will discuss two types of dignity as the potential granted dignity and the actualized acquired dignity.

4.2.1. Potential Granted Dignity

From the perspective of Qurān, human being has two types of dignity: the granted dignity and the acquired dignity. Granted dignity which is termed inherent dignity in human rights literature, without any exception, belongs to all human beings regardless of their color, language, race, sex, social and political status, national origin etc. According to Qurān, human dignity is considered to a Divine blessing that is factual and existential not credential and contractual. For this reason, states cannot derogate human dignity by enacting laws. The most well-known reason for the recognition of such a dignity in Qurān and Islamic thought is the 70th Āyah of Sūrah Al-Isrā' (The Divine Excursion and Night): "Indeed We honored the Children of Adam; provided them with means of transportation on land and sea; and also provided them lawful and pure sustenance and bestowed them priority above many of Our creatures".

This Āyah clearly implies three points: 1) Dignity is God-given because the phrase "We honored the Children of Adam" is used in Qurān and, as a consequence, we should employ granted dignity instead of inherent dignity; 2) Use of "Children of Adam" makes it crystal clear that all human beings have been bestowed with granted dignity and it is not limited to monotheists or Muslims; and 3) Dignity granted by God to all human beings entails effects such as his/her potential priority over other creatures and restricting certain bounties and blessings to human beings. However, in Qurān we come across Āyahs according to which certain Children of Adam do not deserve dignity.[3] Reflecting on such Āyahs and certain narratives indicates that the God-granted dignity is merely a potential one that brings no special rights for human being unless become actual. If we consider the human being presented in UDHR as a creature that is

1. Mohammad Javād Jāvīd, A Critique on Human Rights Philosophical Foundations, Vol. 2: Islamic Philosophy of Human Rights, (Mokhātab Publications 2013), 2. [In Persian]
2. Mohammad Hossein Mozaffarī, 'Human Dignity: An Islamic Perspective', (2011), 4 Hekmat Quarterly Journal, 3.
3. An example in this regard is Āyah 179 of Sūrah Al-A'rāf (The Lofty Barrier between the Inhabitants of the Paradise and of the Hell): "Indeed We have created for the Hell, many of the Jinns and the men: They have hearts [but] they cannot understand [the Truth] with them; and they have eyes [but] they cannot see [the Truth] with them; and they have ears [but] they cannot hear [the Truth] with them. They are like cattle, no, they are more astray; they are those who are heedless of the Divine warnings".

created based on unconscious laws of the nature and passes away after a period of aimless life, the inherent value, respect and dignity would be an illusion.[1]

Unfortunately, the term "human dignity" has been subjected to false perceptions and undue misuses. It is argued that the correlation between human being and dignity is the correlation between humanity and dignity. Accordingly, potentiality of humanity leads to potentiality of dignity and the former's actuality generates the actuality of the latter. Actual rights cannot be extracted from potential humanity. Since God has given human beings the capacity of transcend from potentiality to actuality, their rights would become different. Those who seem to remain in the stage of potential human beings cannot be equal with actual ones and Divine wisdom necessitates this conclusion.[2] In other words, dignity is based on being human and those who commit treason and crimes and thereby lose their human identity, will lose their human dignity as well. Answering the question as to the relationship between being human and having right, some have argued that all human beings have rights due to their moral dignity. This answer has been criticized even by western thinkers and it has been said that this answer cannot resist against monsters such as Hitler and Stalin who one cannot claim to have moral dignity.[3]

In addition to criminals who in fact have no rights, invoking human dignity for proving the right-holderness of ordinary human beings is problematic because rights should be acquired to be justified ethically. These rights are not associated with human being automatically. This claim entails two meanings relating to characteristics of human rights. First, for having human rights, it is not enough to be merely be a human being; but, exactly vice versa, for having them they should be acquired. Second, rights do not prioritize over and justify duties but these are duties that prioritize over rights because you can have rights if you accomplish your duties. Accordingly, instead of correlation based on which one has a right and others have duties, rights and duties are symmetrical; that is to say one has both right and duty at the same time; but he/she has rights only because he/she has firstly accomplished a duty. Consequently, from this point of view, there exist no human rights i.e. those rights that the individual has only as a result of being human.[4]

It should be noted that rejection of basing rights on potential granted dignity does not mean to reject the rights of human being as a whole. The previous argument suggests that one cannot and should not base human rights on dignity in an absolute manner. This does not contradict with recognition of rights for human being by God according to other grounds. Thus, we should

1. Mohammad Taqī Ja'farī, A Comparative Study of the Universal Human Rights: From The Viewpoints of Islam and the West (Institute for Codification and Publication of Allāmeh Ja'farī 2006), 92-93. [In Persian]
2. Seyed Mohammadalī Ayāzī and others, 'Islam and Human Rights: Interaction or Confrontation' (Summer and Fall 2007), 8 Research and Seminary, 314-317. [In Persian]
3. Alan Gewirth, 'Do any Human Rights Exist?', in Collection of Papers of International Conference on Human Rights and Dialogue among Civilizations, (Centre for Human Rights Studies of Mofīd University 2001), 150. [In Persian]
It is noteworthy that Alan Gewirth's theory of human rights has made a major contribution to philosophy. Gewirth bases human rights on necessary truths instead of contingent values. This thesis is derived from the Gewirthian conception of morality. He is of the opinion that different and specific modes of action are required for different moral precepts and all moral precepts deal directly or indirectly with how people ought to act. It is the presupposition of morality that the addressees of its precepts have the ability to manage their actions following their own choices. Thus, moral people can follow these percepts or reject them. Accordingly, action has two fixed, interconnected generic characteristics namely voluntariness or freedom, and purposiveness or intentionality. As a consequence, the necessary content of all morality is provided by action and the content of action is given to it by its generic characteristics. See Alan Gewirth, Reason and Morality (The University of Chicago Press 1978) 25-27. For more information about his theory of human rights, see Per Bauhn (ed.), Gewirthian Perspectives on Human Rights (Routledge 2016).
4. Ibid, 154.

search for other grounds. This is true for other cases as well. For example, the statement "torture of human beings is forbidden" should not be linked to dignity of human being as human being because this statement can be true for animals too.

4.2.2. Actualized Acquired Dignity

Form an Islamic point of view, in addition to the God-given potential dignity, there is another dignity namely the acquired dignity. This type of dignity is associated with those who endeavor to proceed in the path of their human honor and identity and are striving to draw the near the God through piety and purification of the soul. Needless to say, this type of dignity can have different degrees according to endeavor, striving and capacity of a related individual. The clearest and most related argument as regards acquired dignity can be found in Āyah 13 of Sūrah Al-Hujarāt (The Chambers) in which Allāh states: "O, mankind! Verily, we created you all from male and female [Adam and Eve] and appointed for you tribes and nations to be known to each other [by specified characteristics]. Verily, in Allāh's Sight the most honorable of you is the most pious of you; and Allāh is the Informed Owner of Knowledge".

Differences between the granted potential dignity and actual acquired dignity can be listed as follows: 1) The granted dignity is non-voluntary (God-given without the interference of human being) but the acquired dignity is voluntary and volitional; 2) The granted dignity includes all human beings while acquired dignity belongs to certain persons; 3) The granted dignity is a potential one which becomes actual through acquirement and, as a consequence, becomes valuable; and 4) Consistency and permanence of the granted dignity depends on the consistency and permanence of human identity. What is called the inherent dignity of human being in the UDHR, is a dignity without a Divine origin the spirit governing which is that human beings, merely due to being human beings, have rights regardless of grounds such as sex, nationality, religion, ethnicity and any other external grounds and these ground should not impede their enjoyment of human rights and hinder their self-esteem and dignity. The Assumption on which this instrument is based is that the said rights are justified and recognized according to inherent human dignity and, therefore, they are universal and perpetual and binding for all states, cultures and nations. In such a human rights system, as Sharīfī Tarāzkūhī remarks, for the reason that being human cannot be denied, removed or revoked, human rights are inalienable as well and even the cruellest persons are yet human beings.[1]

Such understandings about human dignity has been harshly criticized by Muslim thinkers. What is that inherent human dignity which is the origin of rights for human being and distinguishes it from horses, cows, pigeons etc.? This is the point in which a manifest paradox between the basis of UDHR on one side and the assessment of human being in the western philosophy on the other side is revealed manifest. Motahharī is surprised why such rights proclaimed in UDHR are linked to inherent dignity of human being while the westerns have moved exactly against the dignity and honor of human beings. He writes that in the western philosophy, the inherent dignity of human being is hindered and his/her status is underestimated as far as possible… It was necessary for the West to first revise its interpretation of human being…. UDHR should had been issued by the one who understands human being to be higher than a

1. Hossein Sharīfī Tarāzkūhī, Human Rights, (Theories and Practices) (University of Tehran Publication 2011), 73-74. [In Persian]

mechanical materialistic composition and does not consider his/her incentives and instigators to be limited to personal and sexual affairs.[1] Here is the place in which one cannot make a link between anthropology in western philosophies and inherent human dignity.

4.3. The God-Given Talents

One should take into account the God-given talents and abilities when is discussing "the origin of rights". Looking at human being from this perspective, we understand that the existence of any talent in human being –regardless of any other fact- would be the origin of a related right. Enjoyment of human being from a power in his/her very being and nature would provide him/her with rights and the Creation system has bestowed him/her with rights at the same time the talents are granted to him/her. Thusly, natural and Fitrah-related rights are the result of the Creation system role in leading human beings toward the perfections in which their talents are laid. Any natural talent is the basis of a natural right and is considered to be a natural evidence for it.[2] For example, if human being has the talent to use other creatures, he/she has right over them and if he/she can learn, he/she has a right to education. Women, taking into account their special body, can become mothers and this talent and capability provides them with a right to become mothers and, as a consequence, no one can deprive them to become mothers. In the same vein, if a creature can fly, it should not be deprived of it. According to what was said, all creatures including human beings are equipped with potential capabilities that the Creation system has bestowed them. Since these abilities are in the very essence of human beings, they can be call "natural law" in this is according to this natural law that one can infer natural rights. As a general rule, it can be argued that the level of rights and advantages of human beings is as high as the level of their talents and abilities.

The answer to this question should be taken into account that whether the talents of human being create rights potentially or actually? In other words, whether the established talent automatically and without further measures makes the talented person a right-holder or the actuality of the right is dependent upon the actuality of the talent by the person concerned? It appears that the meaning of this part of Āyah 61 of Sūrah Hūd (Hūd, the Prophet) which states "…. Allāh is the One Who produced you from the earth and Who let you settle down on it…" is that God is asking human being to improve the earth. Strictly speaking, mere being produced from earth does not suffice to be the right-holder and you need to act and improve the earth to make the right-holderness practical and actual. It is noteworthy that one can infer an actual right from the potential talents of human being; that is the right to planning for flourishing of talents and eliminating and precluding the obstacles in this regard. This right is one of the fundamental human rights which, unfortunately, has often been neglected.

Extraordinary physical and spiritual talents which are restricted to human being require appropriate environment to be flourished and actualized. In the absence of such an environment and the related conditions, on most occasions, the endeavors and perseverance of human beings would be fruitless. Taking into consideration this fact, the 1979 Constitution of Islamic Republic of Iran (as amended of 28 July 1989) has obliged the government of Islamic Republic of Iran

1 . Motahharī (no 28), 139.
2. Mortezā Motahharī, Martyr Motahharī's Collection of Works, Vol. 19 (Women Rights System in Islam) (Sadrā 1990), 148 [in Persian]

to employ all resources to realize "the creation of a favorable environment for the growth of moral virtues based on faith and piety and the struggle against all forms of vice and corruption" (Art. 3, para. 1) and "the abolition of all forms of undesirable discrimination and the provision of equitable opportunities for all, in both the material and intellectual spheres" (Art. 3, para. 1). Sadly, such a right is not recognized in UDHR. In non-Islamic schools of thought, the nature is the origin of the rights in itself, while in Islamic one the origin of rights should be found in God-given natural talents. Accordingly, both in religious and secular approaches, human rights are originated from the nature of natural rights; rights that are stemmed from natural rules in the Universe that are unchangeable and universal.[1]

4.4. The Human Being: A Combination of Weakness and Strength

In Islamic anthropology, the human being is introduced as what he/she is. There is no place for going to extremes toward human being in this culture and his/her weaknesses and strengths are cautioned at the same time in order to prevent him/her to be arrogant. Qurān has regarded human being as deserving the highest degrees in some cases and the worst blames in others. It seems to be necessary to review these Āyahs briefly for a better understanding of human being.

4.4.1. Weaknesses of Human Being

Those Āyahs existing in Qurān relating to the position of human being have depicted the highest status for him/her and have considered him/her to be the symbol of God on the earth. From an Islamic point of view, the humanity of human being is not defined by his/her ability to speak, his/her physical healthy etc. the goal of God in creating human beings is that they reach perfection through their voluntary activities and they are equipped with necessary tools for achieving this goal. In this regard, it is remarked in Āyah 4, Sūrah At-Tīn of Qurān: "That indeed We created man in perfect balance [spiritual, mental and physical]. According to Qurān, human being is a combination of material nature and spiritual Fitrah. The seventh and eighth Āyahs of Sūrah As-Sajdah (The Prostration) state respectively: "Allāh is the One Who gives the best perfection to all that He created: He first created Adam from clay"; "[At the second stage] He declared the progeny of Adam be created from a small drop of a fluid of light value". Divine Fitrah and human dignity have provided human being with such an ability to become the Divine Governor (Khalīfah) (Āyah 30, Sūrah Al-Baqarah). Human beings have conscience in their natural state and, in accordance with Qurān, this advantage is of a Divine origin and is a gift from God thereby all human being can distinguish between right and wrong: "And by the Soul and the One Who created it and gave order and perfection to it"; "And inspired to it both its wrong and its right" (Sūrah Ash-Shams (The Sun), Āyahs 7-8). Human being is independent and autonomous and can choose good or bad: "…and in order to try him We granted him the faculties of hearing and sight"; "Then We showed him the Straight Path: Whether he chooses to be grateful or be ingratitude and disbeliver" (Sūrah Al-Insān (Human Being), Āyahs 2-3). God has subjected everything in the heavens and on the earth for human being: "And Allāh has subjected for you whatever is in the heavens and on the earth…" (Sūrah Al-Jāthiyah (Bowing the Knee), Āyah 13). This is for this reason that human being has the right to enjoy all of these in a legitimate way.

1 . Mohammad Javād Jāvīd, Mostafā Shafi'zādeh and Mojtabā Shafi'zādeh, 'The Essence of Human Rights in Natural Law and Islamic Law Theories', (2012), 1 Legal Thoughts Review, 108. [in Persian]

4.4.2. Weaknesses of Human Being

Human being is such an amazing creature that can reach the highest part of the paradise or fall in the lowest part of the hell. The advantage of Islamic anthropology is the consideration of weaknesses and strengths of human being simultaneously. Qurān introduces human being as higher that heavens and the earth and even the angels on some occasions and as lower than cattle on others. Here, some of the weak point of human being would be mentioned. According to Qurān, human being is created weak (Sūrah An-Nissā' (The Women), Āyah 28). All human beings confirm the existence weakness when they face difficulties and calamities in their lives. By a pathological approach, Qurān cautions all human beings that they have been given only a little of the knowledge (Sūrah Al-Isrā', Āyah 85). Scientists face more unknowns when they proceed in their scientific researches. Now, one of the foundations of western human rights namely the scientific rationalism can be assessed from an Islamic point of view. Based on the mentioned foundation, we should believe in human being's ability to understand the Universe and him/herself, while if he/she can get rid out of this double ignorance and find out that he/she is not such able to understand all unknowns by relying merely on his/her reason, would not put him/herself in the place of God. Considering individualism as the leading philosophy of many areas including human rights as the consequence of scientific rationalism, we can well understand our wrongs and lacks.

Among other weaknesses of human beings that are mentioned in Qurān, to name a few, are cruelty (Sūrah Al-Ahzāb (The Parties), Āyah 72), becoming arrogant as soon as he/she feels free from need (Sūrah Al-Alaq (The Blood-Clot), Āyahs 6-7), being greedy, impatient, fretful, miser etc. (Sūrah Al-Ma'ārīj (The Ways of Ascent), Āyahs 19-21), being hasty and ungrateful (Sūrah Al-Isrā', Āyahs 11 & 67). To sum, it can be said that human being is a combination of reason, conscience, wills and instincts. In many cases, instead of playing role by the reason, these are wills and instincts that lead human being. Autocracy, selfishness, hedonism and lust disable the reason and conscience of human being. The reason is affected by customs, education system, economic conditions, different life styles, time and place requirements. These are such conditions that shape our reason and conscience and, as a consequence, it is possible that worst thing be familiarized.

Conclusion

By reflecting on the epistemological, cosmological and anthropological foundations of human rights in Islamic thought we can reach a realistic view relating to human being and his/her identity thereby justify human rights. A fundamental difference between the religious viewpoint and the secular one is employing the key term Fitrah besides the nature. Using such a term implies putting emphasis on the metaphysical element in human being which, in addition to the natural element, plays a significant role in making human being as a right-holder. Being content with the materialistic nature of human being, non-religious cultures have paid attention to non-perfect part of human being in searching for the origin of rights. However, any attempt to bridging the gap between natural rights and those rights originated from Fitrah is worthy to appreciate.

Divine rights include two collections of rights: statutory rights that are recognized for human beings in the Book and Sunnah and those rights that are originated from Fitrah and nature. Contrary to what some say, in an Islamic point of view, there is no contrast between Divine rights and those originated from Fitrah. Using reason and the revelation, legal school of Islam is one of the most reliable and reasonable sources for clarifying Fitrah and natural rights. Basing human rights on dignity is logical when correlation between human being and dignity is referred to correlation between humanity and dignity. That being the case, potentiality of humanity leads to potentiality of dignity and the actuality of the former results in the actuality of the latter.

All of the results of secular human rights are not necessarily in contradiction with Islamic views and there are cases in which, despite difference in foundations, similar results can be seen. It is due to this fact that, most of the articles of UHRD can be confirmed by Muslims.

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Human Religiosity, Diplomacy, and the Use of Force

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ABSTRACT

In the classical system of international law, states have largely used religion as an instrument in their reciprocal relations. This "instrumental" interpretation of religion was often a reason of conflict rather the ground of religious freedom. Since its origins, yet, the international legal system has changed and it is reasonable to ask what role religion plays at present day in international relations. The present article aims at suggesting that religion – or more exactly "religiosity" – can be an element of diplomacy. Taking the transformation from International to "global law" into account, this article promotes a constructive, not-more instrumental, role of religion, useful to prevent the States from the use of force. In so doing, it offers some insights into the differences between "religion" and "religiosity" in the contemporary human rights' discourse; analyzes the recent involvement of religious leaders in global law; presents the emergence of a new methodology, called "Religious Diplomacy". This methodology is supported by the increased number of international provisions encouraging a major engagement of religious actors into diplomacy. As a result, international community could enhance human religiosity as a factor of diplomacy. International organizations such as United Nations, Organization for Security and Cooperation in Europe, and European Union should use their convening power to initiate new, multi-layered frameworks of engagement, inclusive of the representatives of global religions. This could make multilateralism more fit for purpose and have a major impact over time on the global peaceful relations among states and international actors.

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Introduction

In the "classical" system of international law[1] the engagement of religion into diplomacy was a controversial matter: on one side, the modern skepticism toward religion precluded the possibility to recur to religion as a factor of the diplomatic relations;[2] on the other side, for several decades states have used religions as an instrument in international relations in order to promote their foreign policy. Taking the attributes of global law into careful consideration, the present study aims at offering some insights into fundamental disparities between "religion" – typically, but perhaps, superficially or at least improperly understood at an institutional or state level – and the phenomenon of "the religious" – perceived in a more anthropologically informed and nuanced way, and which nevertheless impacts institutions and states.[3] As a result, "religiosity" is the universalizing force that guides individuals when they act as private players on the global arena so as to select the instruments and remedies which are more fulfilling towards their religious goals. At the same time, religiosity is an important element of "compliance", which is the behavioral conformity with existing norms and regulations. This obviously does not mean that institutional religions and official denominations are useless or inconsistent; rather, their regulatory power resides not only in their institutional shapes (e.g. codes, hierarchies, community organization, and laws) but also in their own symbolic appeal, unofficial saints, separate constitutive narratives, different jurisdictional concepts and conflict resolution norms, cross-border affiliations, transnational solidarity, and international mobilization capacity.

This article aims specifically at emphasizing the role that "religiosity" can play at present day as a factor of diplomacy. In order to support a constructive role of such a concept of religiosity into the diplomatic field the following points are discussed:

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1 . See Antonio Cassese, International Law, (OUP 2005), 3 and 22 ff.

2 . See generally Thomas F. Farr, 'Diplomacy in an Age of Faith, Religious Freedom and National Security' (March/April 2008) 87 Foreign Affairs 110, 110 ff.; see also, John Stempel, 'Faith and Diplomacy in the International System' (March 14-18 2000) International Studies Association, 41st Annual Convention, Los Angeles, CA; available at https://ciaotest.cc.columbia.edu/isa/stj01/

3 . A more comprehensive analysis of the relevance of religiosity at global level and in the global law is in Giancarlo Anello, 'Homo Religiosus in a Globalized World: How Religious Individuals are Actors of Global Law'; available at https://canopyforum.org/2020/04/04/homo-religiosus-in-a-globalized-world-how-religious-individuals-are-actors-of-global-law/; and Giancarlo Anello, 'Homo Religiosus in a Globalized World: Why Religious Individuals Are Actors of Global Law' (2021) 12 CALUMET 87, 87-99.

- the progressive transformation from international to "global" law;
- the characteristics of the recent involvement of religions (and religious leaders) in international and global law;
- the emergence of a legal methodology – labelled "Religious Diplomacy" – that aims at integrating religious engagement into diplomacy.
- After considering "Religious Diplomacy" as a global resource that can limit the use of force as a reaction to sectarianism and interreligious conflicts, the final section of the article outlines a new interpretation of freedom of religion and belief (FoRB), leaned more on collective social responsibility rather than on formal legal statements.[1]

In sum, international organizations such as United Nations, Organization for Security and Cooperation in Europe, and European Union should recruit their potentials to institute novel, multifaceted arenas of collaboration which incorporate religiosity. Endorsed by the countries, this could consolidate a universal multilateral diplomacy, and leave an auspicious legacy for the planetary future which could, in turn, mitigate the hatred, hostility, insecurity, sectarian, and interreligious violence[2].

1. The transition from international law to "global" law: The controversial role of religion in diplomacy

The Westphalian model of international law was a liberal-pluralist system of law made up of a hard core of sovereignty and freedom of States. This historical setting was characterized by the principle of neutrality with regard to the political and religious choices made by States in their domestic orders, in so doing dissociating internal and external sovereignty. In external relations, a theory of negative coexistence of free sovereign states was established and connected with rights and duties of States, which they could claim each other against violations. Consequently, in the classical international law the will of the State was the primary source of international relations and the main source of conflicts and wars. Eventually, classical International law was profoundly unfair, being a European system by culture, useful to legitimize the colonialism, by introducing a distinction between civilized states, which were subjects of international law, and uncivilized who were not subjects of international law. These states had to endure the domination of civilized state in order to gain access to the benefits of civilization. The rules were not based on formal equity among States, but, on the contrary, took account of ethnic and cultural differences to justify the intervention of certain States with regard to some peoples or inferior countries. So, it was because of that the "use of force", often between colonial powers and colonized people, was at the center of the system.

Classic international law authorized States to resort to war as a means of settling disputes: in this scenario, giving the absence of control over the States' exercise of their option to make

1 . This was the approach, for example, of the workshop "Religion and Religious Freedom in International Diplomacy", which has taken place on 22 September 2016 with participation of the United Nations Special Rapporteur on Freedom of Religion or Belief in collaboration with the World Council of Churches and Finnish Ecumenical Council; available at https://www.ohchr.org/Documents/Issues/Religion/WorkshopReligion.pdf

2 . See Philip Mc Donagh and others, On the Significance of Religion for Global Diplomacy, (Routledge 2021), 114; available at https://library.oapen.org/handle/20.500.12657/42730.

a subjective interpretation of the situation of a "just war" (and so the decision to resort to war), a new idea of "collective security" was enacted. The security of nations could no longer be ensured in a subjective framework but had to be upheld within an institutional, collective framework that could restrict states' capacity to make their own judgment on whether to resort to war.

As outlined before, in the classical system of international law the role of religions as a factor of peace and security was highly controversial. On one side, in the European history religions were a reason of conflicts rather than agents of peace and reconciliation. Furthermore, the persistent belief, due to modernity, that religion was inherently emotive and irrational precluded clear thinking about the possibility to recur to religion as an element of the diplomatic relations. On the other side, for several decades, states have used religions as an instrument in international relations in order to promote their foreign policy, especially following the 1917 Revolution of Russia and the formation of Eastern Bloc. Just to mention some examples, in 1948 Athenagoras was elected ecumenical patriarch and he was honored to be flown in the personal airplane of the American president Harry Truman to Istanbul, Turkey to assume his position. Since, the US intended to use him as an instrument to impact on the minds of orthodox Christians in the East Socialist Bloc. Also, the appointment of John Paul II, the first non-Italian pope since Adrian VI in the 16th century finally resulted in the political changes in Poland and the East socialist countries. In the Muslim World, the US used religious leaders and Islamic movements as an instrument to confront the Soviet occupation of Afghanistan. The above list is not exhaustive.

The classical international law, yet, has been slowly transformed by means of two major factors.[1] On one side, the transformation of the State itself and the changing political groupings which have developed within that system. For example, originally the use of force was the most important and codified domain of the international law and the military power was an essential branch of the State organization. Furthermore, the presence of a permanent diplomacy regulated the international relations, emphasizing bilateral negotiations. Later, States developed policies focused on economic cooperation, needed specialized international organizations, so that countries became part of a wider international community in which multilateral relations were a stable characteristic of the system. On the other side, the contemporary international legal system raised from the ashes of the World Wars and from the creation of two international organizations: the League of Nations after the first World War that was the forerunner of the United Nations Organization after the second World War.

In the transformed framework, the role of the use of force has changed. The UN Charter of 1946 made the right to use of force unlawful. On the contrary, peace was enshrined as the first goal of the United Nations,[2] setting an obligation for the peaceful settlement of disputes (*jus contra bellum*). Surely, this was a turning point in respect to the past, but this principle suffered exceptions of various kind (right to defend if attacked, armed collective security under the aegis of the Security Council, in the event of threat of infringement of international peace and security).

Accordingly, other areas of international law have been transformed. Being traditional ar-

1 . See Emmanuelle Tourme Jouannet, A Short Introduction to International Law (CUP 2013) 23 ff.

2 . Ibid 78 ff. The Author makes mention of a UN Charter-based "international legal regime against force" (jus contra bellum), construed through the connection of art. 2(4), plus 2(3), 51 and 42.

eas only diplomatic privileges and immunities, the use of force and peacekeeping, the international responsibility of international subjects, the rules governing international organizations, new areas of International law today include (among others) human rights, international criminal law, international security, and international cooperation.

The transformation of the international scenario has also modified – by the relevance of the freedom of religion and belief (FoRB) as a human right – the role that religion and religious individuals could play in order to prevent conflicts and support diplomacy. It should be underscored that religions are similar to two-edged swords: they can be terribly divisive forces as well as unifying and constructive features. Religions and religious individuals may also have a great potential for conflict resolutions, offering diplomats not only help in negotiations, but mainly educational and cultural categories for dialogue. For this reason, diplomacy should approach religion as something that drives the behavior of people in important ways. Religious motives can act as a multiplier of both destructive and constructive behaviors often with more intense results.[1] Thus, after the Second World the skeptical position of many western governments in terms of the relevance of religion in peace and diplomacy was slowly mitigated by the potential of collaboration with religious actors.[2] International relations, which were not interested in the constructive role of religion first, turned to religion to achieve some of the goals of preventive diplomacy.[3] Religion has been progressively absorbed as a subject of the discipline of International relations[4] and, surprisingly enough, this shift adopted often a phenomenological approach focusing mainly on the "insider's perspective" and her/his emotional and cultural identification rather than on institutional status. It should be noted that this perspective was not alien to the international law. On the contrary:

> *it is important to bear in mind that freedom of religion or belief follows the logic of the human rights approach in general, which has been summed up in Article 1 of the UDHR: "All human beings are born free and equal in dignity and rights." Instead of providing protection to religions in themselves (i.e. to religious truth claims, identities, reputations etc.), freedom of religion or belief protects human beings in their dignity, freedom and equality. To put it succinctly, it protects believers rather than beliefs.*[5]

This principle could clarify the tremendous potential of religions to help peoples not only to solve conflicts but also to lead humanity out of the contradictions that modernity has brought

1 . Farr (no 2), 119.
2 . For a definition of "religious actors", see Ioana Cismas and Ezequiel Heffes, 'Not the Usual Suspects: Religious Leaders as Influencers of International Humanitarian Law Compliance' (2019) 22 YIHL 131: "The analytical category of religious actors can be empirically delineated to include those States and non-State entities that grant religion a central place in their functioning by means of adopting a religious organizational structure, religious doctrine, religious motivations, or by espousing a predominantly religious discourse. Whereas their religions, goals, and indeed the forms they take differ—and therefore we can distinguish between individual religious leaders, non-State religious associations, non-State armed groups, religious States of various denominations and even an inter-governmental organization—what unites religious actors is a common claim that they are legitimate interpreters of religion".
3 . Ibid, 115.
4 . See generally, Vendulka Kubálková, 'A 'Turn to Religion' in International Relations?', (2009), 17 Perspectives, 13.
5 . See https://www.ohchr.org/Documents/Issues/Religion/WorkshopReligion.pdf

with it. For example, Vendulka Kubálková, while explaining the increased importance of religion in international relations, writes:

> *"As my overview will show, many writers are reducing religions to religious institutions and categorizing them as elements of transnational civil society or even as distinguishing attributes of civilizations. If the religions engage in violence, so goes the argument, they do so because they believe the ends justify the means or suffer from 'anti-social' socialization. These simplifications result in a profound misunderstanding of the strength of the passion that many religious people feel, a fervor which infuses religious practices and compensates for their lack of material capabilities. This, in turn, produces surprise when, on occasion, religiously motivated organizations, including governments, act 'irrationally' or 'non-rationally' and with a force at odds with their material strength, thus confounding positivist expectations."*[1]

As a result, in recent decades, the opportunity for constructive religious involvement abroad have multiplied significantly, individually and independently, as well as collectively through non-governmental organizations.[2]

At present day, globalization is under way and ineluctable. The process is mainly dependent on, though not limited to, economic cornerstones. It boasts significant implications for law and religions, as well. Meanwhile, international law has gradually superseded many of the legal mainstays of the pre-globalized world, and grew to highlight international rather than local economic governance. New international norms have facilitated the grounds for individuals, firms, corporations, and non-governmental organizations to bring claims before international jurisdictions. In effect, global legal rules are not rules of particular legal systems; instead, they are rules that emanate from the convergent behavior of institutional and economic players of various legal systems. The "global" law is primarily intent on identifying a uniform set of legal rules, principles, and procedures to orchestrate global human rights, interests, goods, groups, and cultures. Identifying these approaches involves drawing from a variety of international practices in political and jurisprudential contexts. In this scenario, which is neither religiously neutral nor concerned with legal formalism — and which is polycentric and complex — "religiosity" is the global factor that guides individuals when they act as private players of global law in order to choose what global legal instruments and remedies are best to achieve their religious goals. More specifically, the nature of global processes implies the augmented relevance of religiosity in the sphere of global normativity and human rights in a number of ways. As previously mentioned, religiosity is the main element of "compliance", which is the behavioral conformity with existing norms and regulations. The legitimacy of the law or the authority enforcing the law are central aspects of compliance.[3]

1 . Kubálková (no 11), 27.

2 . See Karsten Lehmann (ed.), Talking Dialogue. Eleven Episodes in the History of the Modern Interreligious Dialogue Movee ment, (De Gruyter 2021), 21 and 151.

3 . The relevance of "religiosity" in global law challenges the traditional distinction between the private and public sphere: the role of religion or belief cannot be relegated into a mere private sphere. For many believers it also has a public dimension and may include some public initiatives like running kindergartens, schools and charity organizations or the establishment of community-based social media, healthcare facilities and other public activities: "This may help overcome too narrow understandings of freedom of religion or belief, which indeed covers the whole range of convictions and conviction-based practices attached to religion or belief". See https://www.ohchr.org/Documents/Issues/Religion/WorkshopReligion.pdf

When it comes to the relation between religiosity and compliance to law, it is strongly connected to the deontological position of the faithful, their beliefs, religious values, and religious duties. It is undeniable that in shaping the normative dimensions of law, individuals need the intervention of religious institutions, however, their agency matters also as a singular stance in transforming the global scenario of legal claims because the living person is the link between faith and religious order before the secular law. From this perspective, religious obligations and duties represent rules for action and give substantial meaning to different behaviors in the legal sphere. Understanding this concrete interplay between religious individuals and the state-law/international law "in context" is indispensable to any attempt to drive a global transformation of law. In such cases, "religiosity" manifests itself within the legal limits provided by norms that regard religion as a fundamental human freedom to be duly enshrined in different forms in pluralistic and democratic societies. In many cases, religious individuals express their primary interest not only in applying the norms of religious law or their own state, but just as significantly when translating their religious/cultural habits into legal claims that render the concrete effects of religious demands and obligations into the legal systems where they actually live (for instance, the *Riba* prohibition).

These processes influence the role that religion can play as a factor of diplomacy: at institutional level, denominations and leaders contribute to negotiate and adapt international and diplomatic norms to specific cultural settings and therefore act towards the symbolic validation of the rule,[1] but simple individuals are actors of global law as well. For example, the scholar Ioana Cismas, in a book dedicated to this specific issue,[2] openly contends that:

> *"In shifting the focus of the legal analysis from debates over (in)compatibility of religion and law, the book introduces religious actors as an analytical category. This analytical category presents religious actors as state and non-state entities, which assume the role of interpreters of religion, and draw on a special' legitimacy in demanding obedience from their adherents, members, or citizens."*[3]

Accordingly, Cismas suggests to shift the focus of legal analysis concentrating on actors rather than religion, and on the rights and obligations of religious actors under international law rather than the compatibility or incompatibility of religion with international law. The role of religious actors as interpreters of religion(s) becomes central, because through interpretation they generate the dynamism and diversity of religions.[4] For these reasons, religious leaders and individuals as well can be considered as actors of the international scenario and some of them put their activities under the paramount framework of peacekeeping and preventing the governments from the use of force.

The extention of religious engagement is appreciated by lawyers, practitioners, and scholars who are active in the field of diplomacy:

> *The perspective of religious engagement points to ways in which governments*

1 . See Cismas and Heffes (no 9) 19, adapting Sally Merry's hypothesis.
2 . Ioana Cismas, Religious Actors and International Law (OUP 2014).
3 . Ibid 9.
4 . Ibid 2 and 4.

and international organizations can better engage religious actors, including religious leaders, communities and a variety of religion-based organizations, to promote common global ambitions like sustainable development, human rights, and peace. By "interreligious engagement", we refer to the interreligious, policy-oriented interactions between states and international organizations on the one hand, and religious and interreligious actors, groups, coalitions, platforms and activities on the other.[1]

2. The relevance of "Human" Religiosity in global law

The new leading role of "human" religiosity – which results from the combination of this anthropological characteristic and its global relevance through the doctrine of human rights (FoRB) – in the prevention of conflicts and violence at the international level is demonstrated by the enactment of new international agreements or declarations concerning such issues. Even though a global movement of involvement of religions in global issues is under way,[2] this article focuses only on the process of Muslim and Christian engagement into diplomacy.[3] From the European point of view, the involvement of Muslim religious leaders in the international dialogue can be considered a sort of foundational stone of the diplomacy of the Greater Mediterranean region.[4] It should be noted that this new address involves a certain amount of criticisms toward the category of "Religious Minorities", which was the traditionally adopted by international lawyers to limit sectarianism and interreligious clashes. This category has been for years the regulatory element in case of international conflicts[5] but at present day is considered an obstacle to a more comprehensive idea of contractual citizenship.[6] For example, the *Marrakesh Declaration on the Rights of Religious Minorities in Predominantly Muslim Majority Communities*, January 25 to 27, 2016 clearly states:

"This Declaration condemns the prevalent use of violence to "impose viewpoints" and settle disputes in various parts of the Muslim world and recognizes the

1 . See Fabio Petito, Fadi Daou, and Michael D. Driessen (eds.), Human Fraternity & Inclusive Citizenship. Interreligious Engagement in the Mediterranean, (Ledizioni Ledi Publishing, 2021), 11-12.

2 . The new leading role of religions in the prevention of conflicts and violence at the international level is demonstrated by the the modernist approach of religions to global issues and the call for a global ethic as a premise of a global law. Institutional religions and religious leaders as well were actors of this process. Since the World's Parliament of religions (1893) the movement of interreligious dialogue has increased its activities, seats of dialogue, and efforts to create a global religious/moral framework. The reason why it is believed that, in spite of their differences, religions can cooperate to establish a common global ethical framework, is the idea that the multitude of different religious faiths are founded on several primary moral rules. This idea has been promoted, for example, by Hans Küng, a Catholic theologian that has been selected by the Parliament of the World's Religions of 1993 – after 100 years from the first session – for proposing a formalization of its fundamental tenets, the Global Ethic Declaration. Focusing on the idea of a global economic ethic, Küng argued that such an ethic must be founded on a set of fundamental tenets arising from the confrontation between world religions and their moral values. More precisely, it has to be based specifically on the two primary principles of the Global Ethic Declaration, namely the "principle of humanity" and the "principle of reciprocity" or "Golden Rule".

3 . See Petito, Daou, and Driessen (no 20) 11.

4 . See Astrid B. Boening, The Arab Spring: Re-Balancing the Greater Euro-Mediterranean? (Springer 2014) 1 ff. who investigates the Euro-Mediterranean region security after the Arab springs contending that since 2010, there has been a consolidating cooperation among existing powers in the Euro-Mediterranean in face of the rapid de-stabilization of the Arab region.

5 . See, traditionally, Francesco Capotorti, Study on the Right of Persons Belonging to Ethnic, Religious and Linguistic Minorities (ONU 1991); and more recently Daniele Ferrari, Il concetto di minoranza religiosa dal diritto internazionale al diritto europeo. Genesi, sviluppo, circolazione (Il Mulino 2020) 25 and 61.

6 . See Giancarlo Anello, 'The Concept of "Contractual Citizenship" in the Charter of Medina (622 C.E.): A Contemporary Interpretation' (2020) 46 Islamochristiana - Journal of Pontificio Istituto di Studi Arabi e Islamistica, 47-75.

> *suffering of minority communities that have existed in these regions for centuries. For this reason, it declares that the need to protect religious minorities in countries with a Muslim majority is pressing."*

The *Document on Human Fraternity for World Peace and Living Together*, February 4, 2019, explicitly rejects the use of the term "minorities" in its human rights discourse, arguing that:

> *the Declaration wishes that all men of culture and intellectuals be cautious regarding the risks implied in the use of the term "minorities". In fact, while it claims to affirm certain rights, it veils a sense of discrimination and separation.*

Finally, the *Encyclical Letter, Fratelli Tutti* of the Holy Father Pope Francis on Fraternity and Social Friendship, October 3, 2020 rejects the category of "minorities" and contends that religions can work together globally against terrorists and violence, without any regard of the status of a recognized minority. For example, chapter 131 reads that:

> *it is important to apply the concept of "citizenship", which "is based on the equality of rights and duties, under which all enjoy justice. It is therefore crucial to establish in our societies the concept of full citizenship and to reject the discriminatory use of the term minorities, which engenders feelings of isolation and inferiority. Its misuse paves the way for hostility and discord; it undoes any successes and takes away the religious and civil rights of some citizens who are thus discriminated against.*

Chapter 267 mentions specifically the problem of "use of force" during interreligious and international conflicts:

> *Here I would stress that "it is impossible to imagine that states today have no other means than capital punishment to protect the lives of other people from the unjust aggressor". Particularly serious in this regard are so-called extrajudicial or extralegal executions, which are "homicides deliberately committed by certain states and by their agents, often passed off as clashes with criminals or presented as the unintended consequences of the reasonable, necessary and proportionate use of force in applying the law".*[1]

Even though from a strictly legalistic point of view, these documents are not sources of international law, a perspective that does not recognize the role of religions in the global relations fails to understand the radical (or "prophetic", using the religious language) international

1 . Pope Francis, 'Address to Delegates of the International Association of Penal Law (23 October 2014)' 106 Acta Apostolicae Sedis 842. His Holiness has remarked the same point in his message to the participants at the G20 Interfaith Forum which took place in Bologna, 12-14 September 2021: "We will not kill each other, we will help each other, we will forgive each other." These are commitments that require conditions that are not easy - there is no disarmament without courage, no aid without giving freely, no forgiveness without truth - but which constitute the only possible path to peace. Yes, because the path to peace is found not in weapons, but in justice. And we religious leaders must be the first to support these processes, bearing witness that the capacity to fight evil does not lie in proclamations, but in prayer; not in revenge, but in concord; not in shortcuts dictated by the use of force, but in the patient and constructive force of solidarity. Because only this is truly worthy of man. And because God is not the God of war, but of peace», see the complete text of the message online: https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2021/09/11/210911f.html

normative dimension of religions. Many of the world's most influential religions, such as Christianity, Judaism, Islam, and Hinduism, contain their own legal systems that interact with secular state law. In addition to these larger systems that drive religious legal change, individuals inspired by religious principles and norms routinely appear before national and international legislative and judicial bodies to advocate for the recognition of their religiously-inspired versions of human and civil rights as alternatives to the more secular conceptualizations often enshrined in national and international law. The continuous interplay between the secular institutions and the religious individual, leaders, and communities, even in the diplomatic field, can contribute to protect freedom of religion and move away the use of force in situation of sectarian violence.

The normative dimension of religions and religious individuals is emphasized in the encyclical letter of Pope Francis. This letter describes a system in which religions are "sisters" to one another and work mutually to protect internationally shared religious communities. In doing this, the letter addresses the way in which nations and communities view the "other", which is a key issue of international relations. Horrors have been perpetrated by all faiths when they have tilted toward the dark side of otherness. This approach could transform the present system of bilateral and institutional relations into a networked arrangement in which individual brothers and sisters – even of different religions – could cooperate proactively and be co-responsible for the implementation of collective religious freedom. As citizens operating within the framework of state or international law, brothers and sisters of different religions could strive, in solidarity, for the concrete realization of their respective freedoms (FT, Chapter 279), reminding each other of the wrongs suffered in the past (FT, Chapter 247), activating globally to oppose persecution and discrimination, where they may be co-responsible, or represent the victims, in all those places in the world (FT, Chapter 281 ff.) where religious freedom is not statutorily guaranteed.

It is no coincidence that United Nations recently adopted similar principles and applied them in their practical interventions. Religiosity plays a crucial role in building trust, fostering dialogue, stressing unity, solidarity, and mutual understanding, and in offering positive and moderate narratives in response to hatred and division. The active and sustained engagement of religious leaders to build and effectively communicate through all available channels a counter-narrative to hatred and violent extremism as and when conducive to terrorism is crucial. For these reasons, on September 12, 2019, UN published the *Plan of Action to Safeguard Religious Sites: In Unity and Solidarity for Safe and Peaceful Worship*.[1] The sacred places represent the history and traditions of people. They must be respected and protected as place of peace and harmony where the faithful can practice their worship activities. This UN's Plan of Action addresses not only governmental authorities and civil society but also religious leaders. According to this Plan, religious leaders must work to promote respect and protection for religious pluralism.

3. Toward a "Religious Diplomacy": Integrating religious engagement into diplomacy

Contemporary international law is the law in force today, which began in the wake of the Second World War, most notably with the adoption of the UN Charter as the outcome of the S. Francisco Conference on June 26, 1945. In the Charter, religion is mentioned as a ground for

1. See https://www.un.org/sg/sites/www.un.org.sg/files/atoms/files/12-09-2019-UNAOC-PoA-Religious-Sites.pdf

possible discrimination – along with some other matters like race, sex, language – given that international community is called to assist the realization of human rights and fundamental freedoms (Articles 13, 55, and 76). International law has ever since been changing in light of events like the spread and collapse of communism, the development of international organizations, decolonization and the rise of the rights of peoples to self-determination, the international recognition of human rights, and the recent globalization. Accordingly, religion (or better – "religiosity") became the ground of a specific position within the human rights' discourse. The grounding value of religion has been changing from time to time until the latest interpretation that considers religious freedom as a "special" right.

The universally-acclaimed Italian scholar, Silvio Ferrari has rightly delineated the "triadic" nature of religious freedom. He maintains that while freedom of conscience or expression is grounded on a bilateral relationship, the relationship between the individual and the State, the right to freedom of religion or belief has a more complex structure as it lies at the triangulation point where the individual, the faith community and the State converge. The relationships between individual, faith community and political power have been different depending on the historical periods. Sometimes the faith community has prevailed and the political power has regulated freedom of religion or belief according to the tenets of a religion, normally the majority religion in the country. Sometimes the political authority has prevailed and has dictated its own discipline of freedom of religion or belief to which the faith communities have had to adapt. Rarely, however, have individuals been able to assert freedom of religion or belief as their own right, with an autonomous foundation independent from the law of the State or faith community.[1] For this reason, it is possible to count more and more provisions of recent international legislations promoting the idea of a major engagement of religious actors into international relations and diplomacy. The action of religious leaders can integrate the area of diplomacy as a traditional area of international law.

Recent documents produced by international organizations indicate the direction for integrating religious engagement into diplomacy. For example, the *Report of United Nations Special Rapporteur on Freedom of Religion or Belief* of December 29, 2014 contains specific recommendations to religious communities declaring that "religious communities should feel encouraged to start initiatives of interreligious communication and cooperation, including the establishment of interreligious councils."[2] Another global-related international document, the UN Development Programme of 2014, draws clearly the increasing legal relevance of religious leaders, but also faith based organizations, that "[i]n addition to providing spiritual and traditional guidance, […] are part of the social fabric of communities and some may have greater access, scale and legitimacy than local governments".

An even deeper approach comes from European institutions that, specifically, integrate religious engagement into diplomatic action.[3] The EU Guidelines on the Promotion and Protec-

1 . Silvio Ferrari, 'Freedom of Religion or Belied in International Law', in Andrea Benzo (ed.), From Freedom of Worship to Freedom of Religion or Belief. Fostering the Partnership between States, the International Community and Religious Institutions, Proceedings of the Conference Italian Cultural Institute – Cairo, 18 February 2020, Embassy of Italy, Garden City-Cairo, 109-110.
2 . A model is UNGA, 'Report of United Nations Special Rapporteur on Freedom of Religion or Belief' (29 December 2014) UN Doc A/HRC/28/66, 22.
3 . See Benzo (no 28) 17.

tion of Freedom of Religion or Belief were adopted by the European Council on June 24, 2013. Even though this document takes the form of an essentially non-binding declaratory measure, it contains some effective principles to integrate religious engagement into diplomacy. At Point 22 the document affirms that:

> *States have a primary duty to protect all individuals living in their territory and subject to their jurisdiction, including persons holding non-theistic or atheistic beliefs, persons belonging to minorities, and indigenous peoples and to safeguard their rights. States must treat all individuals equally without discrimination on the basis of their religion or belief.*

Among the recommended actions, Guidelines include that kind of religious violence that often requires an international reaction and the use of force. Thus, Point 29 declares that:

> *States have an obligation to guarantee human rights protection, and to exercise due diligence to prevent, investigate and punish acts of violence against persons based on their religion or belief. Violence or the threat thereof – such as killing, execution, disappearance, torture, sexual violence, abductions and inhuman or degrading treatment – are widespread phenomena that have to be addressed. Such violence may be committed by state or non-state actors, based on the actual or assumed religion or belief of the targeted person or based on the religious or convictional/ ideological tenets of the perpetrator.*

Furthermore, under the title "Tool", detailed instructions concerning the role and the duties of diplomatic delegations are contained. Points 47 and 48 read:

> *47. EU missions (EU Delegations and Member States Embassies and Consulates) form a key-component in early warning. EU missions, in co-ordination with any relevant CSDP missions, will monitor respect for freedom of religion or belief in third countries and will identify and report on situations of concern (including individual cases and systemic issues), drawing on available sources in and outside the country, including civil society, so that the EU can take prompt and appropriate action. […]*
>
> *48. Through its local presence and HQ capacities, the EU will: a. Monitor and assess the situation of freedom of religion or belief at country level, to identify progress or concerns, along the priorities and themes covered by these guidelines. b. Maintain contact with parties concerned by violations or conflicts, local and regional authorities, local and international civil society organizations, including women organizations, human rights defenders as well as with religious and belief groups in order to be fully informed and updated on specific situations, including on individual cases, systemic issues and conflict related aspects. In these contacts, the EU will pay attention to groups within any one religion or belief system, to women and young people. […]*

Specifically, point 67 promotes a training including a sort of religious literacy.

> *67. The European External Action Service (EEAS), in coordination with Member States and in co-operation with civil society including churches and religious associations, philosophical and non-confessional organizations, will develop training materials for staff in the field and in headquarters. Materials will be made available to Member States and EU institutions. Training will be practical in its orientation, focused on enabling EU missions to use EU tools for analysis and reporting effectively so as to highlight EU thematic priorities and respond to violations.*

In the same vein, it is also worth mentioning the Organization for Security and Cooperation in Europe (OSCE) Freedom of Religion or Belief and Security Policy Guidance[1] of December 29, 2014. In this document, the religiously-neutral interpretation of international security is overturned. Traditionally, international security was considered as a matter of international law and its ordinary interpretation included that, in case of contrast with freedom of religion, at least some aspects of this freedom must be sacrificed. Moreover, the complementary dimensions of international security were the political-military, the economic and environmental, and the human and did not include freedom of religion and belief.

On these topics, the new OSCE's approach to security seems to be different. The Guidance presents issues and recommendations describing the intersection of Freedom of Religion and security.[2] As a result, the Guidance outlines a comprehensive approach to international security in which a dependence on religion is particularly emphasized. This view does not frame freedom of religion or belief and international security as competing rights, but recognizes them as complementary, interdependent and mutually reinforcing objectives that can and must be advanced together. As with other human rights, a comprehensive security regime is needed for freedom of religion or belief to be fully respected, protected, and fulfilled. At the same time, sustainable security is not possible without full respect for human rights, as they are essential pre-requisites for the trust that must underpin the relationship between the state and the population it serves. Without such a trust, it is difficult for the State to effectively uphold its responsibility to ensure security and to protect and maintain a democratic society.[3]

Finding long-term solutions in this area requires a collaborative approach involving the State and all other relevant stakeholders. The Guidance is therefore aimed at civil society organizations, especially those working on human rights and tolerance and non-discrimination agendas, religious or belief communities, national human rights institutions, academia, educational professionals and the media. Moreover, from a practitioner's point of view, this guide is interesting because not only it contains the references to international jurisprudence, but also some practical recommendations directed to Member States, religious organizations, civil society, and media. Eventually, the Guidance takes into consideration the need to promote "religious literacy", the knowledge or religious texts but preventing violence committed in the name of religion. This point is supported by the following statement:

1 . Published by the OSCE, Office for Democratic Institutions and Human Rights (ODIHR), ul. Miodowa 10, 00–251 Warsaw, Poland OSCE/ODIHR 2019,
see online the text at https://www.osce.org/odihr/429389
2 . Benzo (no 28), 28.
3 . Ibid, 9.

> *It is human beings – individuals, groups, community leaders, State representatives, non-state actors and others – who invoke religion or specific religious tenets for the purposes of legitimizing, stoking, spreading or escalating violence. In other words, the relationship between religion and violence can never be an immediate one; it always presupposes human agency, that is, individuals or groups who actively bring about that connection — or who challenge that connection.*[1]

It should be noted that to enter into interfaith dialogue, people need to know not only the religions of the others but also their own faith deeply, and be able to apply it appropriately when it comes to conflict and peace. In other words, religions are not conflicting *per se*, but on the contrary can be factors of the process of peace. Necessary premise is that dialogue and reciprocal knowledge are assured between the parties and the Member States involved in the clashes. Yet, providing "religious literacy" as a fundamental competence of diplomacy is a complex undertaking.[2] A very basic religious literacy[3] training program would have three core components:

1. world religions and global religious demography;
2. religion and the advancement of foreign policy interests; and
3. religious engagement in diplomacy.

However, a more comprehensive methodology is required in terms of consolidating multilateral diplomacy. Some academics are conducting specific researches in this direction. Mention should be made to Mandaville and Silvestri[4] who, after surveying a number of the challenges to integrating religious engagement into statecraft – from a bias of secularism in diplomacy,[5] to religious freedom protections, to institutional constraints – describes a new approach that includes:

- moving away from a model whereby religion is viewed as being relevant only to certain specialized functions such as the advancement of international religious freedom;
- departing from approaches to engagement with religious leaders and faith-based organizations that view those entities as having a limited role around a very limited set of policy issues (e.g. peacemaking, development, humanitarian disasters);

1 . Ibid 41; See also UNGA (no 29), para 15.

2 . Religious Literacy Project, Harvard University: https://rpl.hds.harvard.edu/ "Religious literacy" entails the ability to discern and analyze the fundamental intersections of religion and social/political/ cultural life through multiple lenses. Specifically, a religiously literate person will possess 1) a basic understanding of the history, central texts (where applicable), beliefs, practices and contemporary manifestations of several of the world's religious traditions as they arose out of and continue to be shaped by particular social, historical and cultural contexts; and 2) the ability to discern and explore the religious dimensions of political, social and cultural expressions across time and place.

3 . According to the mentioned workshop "Religion and Religious Freedom in International Diplomacy" of 22 September 2016, religious literacy can contribute to religious freedom literacy. This mutual support lies in many international practices, for example, developing principles for promoting religious and religious freedom literacy; organizing exchanges on cultural/ religious literacy among diplomats; organizing open dialogues and learning space that promotes sensitivity to religions and religious freedom; doing a mapping of available documentations on religious and religious freedom literacy; developing a pool of trainers on religious or religious freedom literacy; developing analysis tools that would cover both political and religious contexts; starting promoting religious freedom literacy through small personal human actions. See more online, https://www.ohchr.org/Documents/Issues/Religion/WorkshopReligion.pdf

4 . Peter Mandaville and Sara Silvestri, 'Integrating Religious Engagement into Diplomacy: challenges and opportunities' (2015) 67 Issues in Governance Studies 1, 1-13.

5 . See Douglas Johnston and Cynthia Sampson (eds.), Religion: The Missing Dimension of Statecraft (OUP 1994) 20 ff.

- getting beyond the all-too common practice of using "religion" as a shorthand or euphemism for Islam;
- recognizing the central importance of religion as a societal force around the world;
- making the case that awareness of and engagement with religious actors can play a constructive role in advancing even policy issues that, on the face of it, seemingly have little to do with religion, faith, or spiritual matters; and, lastly,
- while advocating for the importance of religion as a force in world affairs, also avoiding over-stating the importance of religion.[1]

The last point raises more specific questions: what are the types of religious actors to engage? Isn't it too risky to open the door of diplomacy to radical groups and fundamentalists? Pope Francis addresses them in a section of the mentioned encyclical letter "Fratelli tutti". The section is dedicated to "social dialogue for a new culture" (FT, Chapters 199 ff.). The Pope explains that such a dialogue must have specific characteristics and methodology, be enriched and illumined by "clear thinking, rational arguments, a variety of perspectives and the contribution of different fields of knowledge and points of view". But it must also make space for the conviction that "it is possible to arrive at certain fundamental truths always to be upheld". "Acknowledging the existence of certain enduring values, however demanding it may be to discern them", he adds, "makes for a robust and solid social ethics" (FT, Chapter 213).

Thus, it is obvious that irreconcilably violent extremists cannot be involved in inter-religious or intra-religious diplomacy but the approach that distinguish only between good and bad religious leaders overlooks the importance of the actors that are in the middle.[2] Many communities and leaders can be interested in entering the dialogue voluntarily, out of sectarian interests or a theological position, but just for improving the conditions of the daily lives of their communities. Such players are exactly the actors to engage in the diplomatic processes.

More specialized scholars and papers deal with the methodology of entering the dialogue, stressing the role of religion in the peacebuilding process, shifting the focus on the constructive potential rather than the destructive character of interreligious relations. Religious values and norms can motivate people to reconcile their differences. The spiritual dimension in religious peacebuilding can foster a sense of engagement and a commitment both to peace and conflict resolution. Under this light, religious peacebuilders are perceived as agents for social change committed to achieving justice and peace, combating injustice and creating awareness through consciousness raising.[3] To summarize, a practical methodology that gives relevance to religion as a factor of resolution of conflicts implies working stages such as:

1. exploring the diverse roles performed by religious actors and the underlying values and assumptions that shape peacebuilding methodologies;
2. developing an awareness of both the constructive and destructive aspects of religion and conflict and how it limits interreligious interaction;

1 . See a summary, https://www.brookings.edu/research/integrating-religious-engagement-into-diplomacy-challenges-opportunities/
2 . R. Scott Appleby, 'Comprehending Religion in Global Affairs', in Petito, Daou, and Driessen (no 20) 74.
3 . Mohammed Abu-Nimer, 'Conflict Resolution, Culture, and Religion: Toward a Training Model of Interreligious Peacebuilding', (2001), 38 Journal of Peace Research, 685.

3. examining how interreligious cooperation can resolve conflicts;
4. encouraging participants to examine how religion has helped to construct their world-view and how it shapes their value system[1].

Designing professional and educational programs that focus on religious diplomacy is a goal that international organizations and academic institutions have to pursue together. In their paper, Mandaville and Silvestri argue that training and professional development efforts around religion would need to be part of the mandatory preparation that all diplomats receive before heading into the field. Moreover, the authors argue that policymakers will have the greatest chance of reaping benefits from closer awareness of and engagement with religion if they are able to institutionalize this approach as part and parcel of mainstream diplomacy. Thus, developing the basic model, such a curriculum should have, at least, three core components:

1. World religions and global religious demography – A basic overview of major world religions including history, core beliefs, and key contemporary institutions/leaders. Introduction to major trends in religious demography;
2. Religion and the advancement of foreign policy interests – A module to introduce diplomats to the varying roles that religions play in different societies and to develop analytic capacity to better understand where religion is (and, conversely, is not) relevant to various issues and topics in diplomatic practice. This should also include coverage of policy areas not previously or conventionally associated with religion;
3. Religious engagement in diplomacy – An introduction to the practical aspects of engaging with religious leaders, faith-based organizations, and other religious actors. In addition to protocol issues and questions of cultural sensitivity to faith requirements for example, this module would also help diplomats develop a capacity to engage the subject matter of their work in terms that relate to values, culture, and philosophy.[2]

1 . Ibid, 689.
2 . Mandaville and Silvestri (no 37), 10.

Conclusions

The role of religion has thrived greatly since the establishment of the contemporary system of international law in 1945. It has expanded in light of the transformation of international law, the emergence of global law, the involvement of religious leaders, communities, and individuals in the dialogue to prevent states from waging wars for religious purposes, and the development of academic programs and methodologies. At present day, religion- more precisely human religiosity- is a decisive factor in the global arena and can play a constructive role in international relations. More specifically, religious actors, leaders of communities or individuals, can support diplomacy and prevent States from the use of force. Academia and scholars can support this interplay by the methodology of "religious diplomacy", through programs and teachings for international actors.

Furthermore, it should be noted that the new combination of legal principles and practical conditions could have consequences on the interpretation of international freedom of religion: from the Westphalian peace onward, the model of religious freedom has been elaborated as an exclusive relationship between the State and individuals or between the State and organized religions. On the contrary, the religious freedom that emerges from the UN Charter lies at the triangulation point where the individual, the faith community and the State converge.

The globalization and the emergence of "global" law introduced a further step: the global scenario is grounded on the "religiosity" of human beings, rather than on their denominational affiliation. As citizens – even though of different religions – operating within the framework of state or international law, religious individuals and leaders as well should cooperate for the concrete realization of their respective freedoms,[1] guaranteeing the security and protection of religious sites, reminding each other of the wrongs suffered in the past, opposing persecution and discrimination, where they may be co-responsible, or representing the victims, in all those places in the world where religious freedom is not statutorily guaranteed.

1 The cultural framework of this hypothesis is offered by two great representatives of the German legal culture, R. von Jhering, *Lo scopo del diritto* (1877) (Einaudi 1972) 75-76; and more recently A. Honneth, *Il diritto della libertà. Lineamenti per un'eticità democratica* (Codice 2015) XL.

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Protecting Animals Rights in Armed Conflicts from the Perspective of International Humanitarian Law and Islamic Law

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ABSTRACT

Nowadays, the effects and consequences of armed conflicts are not limited to human beings and they adversely affect the environment and many species of animals as well. Animals are considered to be the unknown and forgotten victims of armed conflicts. In international humanitarian law (IHL) this issue is largely ignored and there are only few rules that indirectly and ambiguously deal with the protection of animals during armed conflict. However, in the sources of Islamic law there are explicit rules and regulations that directly protect the rights of animals during the war. These rules fall into two different categories. First, those concerned with those animals which are used during the conflict as tools and methods of warfare and are regarded as part of military property and equipment. Second, those relating to animals that are not used in the conflict but are affected by the effects and consequences of the war similar to civilians and individuals who do not have a direct participation in hostilities. This study attempts to comparatively examine the relevant rules and principles in IHL and Islam. Based on the findings of the paper, it could be concluded that due to inadequacy and insufficiency of IHL concerning the protection of animal rights during armed conflicts, it appears to be necessary to develop new rules in this regard and employing the existing sources such as religious ones, including Islamic teachings, that are closely linked with ethical treatment of animals.

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Introduction

Animals are considered to be a crucial part of ecosystem and, as a consequence, their preservation and protection against threats and dangers they face is necessary for the arrangement and development of ecosystem and the environment. From time immemorial, animals including horses, camels, elephants, dogs, bees, scorpions and bats, have been present on the battlefield alongside humans in all wars. Sometimes they were used as weapons, sometimes they facilitated the combat process, and sometimes they were the target of the enemies' attack and implacability. Relying on some works of art, Pipia tactfully brings some examples to show how wars have also non-human victims, such as animals in his paper: "In his 1964 painting entitled 'War,' the Franco-Russian artist, Marc Chagall, depicts images of victims of war and the misery they experience. The painting shows a white horse alongside the last remaining helpless people in a city at the mercy of an 'all-consuming inferno' ravaging houses. Chagall sensitively portrays the suffering of all victims, including animals, who experienced war. This painting later became a source of inspiration for another artist, the Balkan film director Emir Kusturica, who animated the scene from Chagall's image in his acclaimed 1995 war drama, 'Underground.' One of the scenes in the movie shows people escaping burning buildings and a white horse running through the flames and disappearing. The movie also re-enacts 'Operation Retribution,' the air raid of Belgrade in 1941 led by the German Axis Powers, which, among other military objectives, also targeted the city's zoo, killing several animals, and forcing countless others to flee, leaving them unaccounted for.[1]

Although animals have always been the victims of war throughout history, they have not yet gained a special attention in International Law of Armed Conflict (ILAC) in general and International Humanitarian Law (IHL) in particular the aim of which is to protect the victims of armed conflicts. Nowadays, however, animals and their protection are addressed in different legal systems. In addition, religions have paid a special regard to ethical treatment of animals both in times of peace and war. For example, in Islam there are several rules and principles concerned with animal protection.[2] Indeed, animals and their treatment are of a great signifi-

1. Saba Pipia, 'Forgotten Victims of War: Animals and the International Law of Armed Conflict', (2022), 28 Animal Law, 176-177.
2. Javaid Aziz Awan and Syed Fazal ur Rahim, 'Animal Rights and Welfare in Islam', (2018), 3 International Journal of Avian & Wildlife Biology, 427.

cance in Islamic teachings. As Gulzar and Tasgheer put it, "Islam provides universal rights to terrestrial, aquatic, and aerial animals. It offers extensive orders and principles to animals' protection and welfare. Although Allah has made animals subjected to human service, at the same time human is accountable for the utilization of the resources he[/she] has been provided with. Animal manipulation is allowed for lawful acts but exploitation is prohibited".[1] It is worth to mention here that according to a Hadīth by Prophet Muhammad (PBUH): "A good deed done to an animal is as meritorious as a good deed done to a human being, while an act of cruelty to an animal is as bad as an act of cruelty to a human being".[2]

Due to the significance of animals for their intrinsic value as well as their instrumental role in the development and arrangement of ecosystem and preservation of biological diversity of the world and, as a result, the necessity to protect them both in times of peace and during armed conflicts, in this study an attempt has been made to examine the question of animal protection during armed conflicts from the perspective of IHL and the Islamic law. In doing so, the present paper first briefly discusses the role of animals in armed conflicts (Section 1). Then it turns to the debate on the protection of animals during armed conflicts under IHL (Section 2). Finally, the paper addresses the protection afforded to animals in times of armed conflicts in Islamic teachings.

1. The Role of Animals in Armed Conflicts

Human history is made of war/peace dichotomy. In fact, as Kistler remarks, "human civilizations wax and wane, like the Moon in its periodic phases, through ceaseless phases of peace and war".[3] It can be claimed that war almost leaves no creature non-affected. Different species of animals have been and are affected by armed conflicts. Throughout history, human beings have taken for granted the right to conscript animals for purposes of battle and defense.[4] The most famous and useful animal used during conflicts is the horse. Even today, in some developed countries, such as Britain and France, horses are symbolically used in military parades. Historically, military organizations relied on armored cavalry to win battles because they moved faster than infantry and inflicted heavier on the enemy. As Mooney puts it, "before 1500 BCE the Mesopotamians hitched horses to their chariots during battles. Ancient Egyptian and Chinese soldiers also fought from horse-drawn chariots. Other early armies rode horses into battle. Foot soldiers were driven back by troops charging on horseback. Some troops fired arrows on horseback… During the Revolutionary War (1775–1783) in the US, General George Washington created cavalry units called the Continental Dragoons. In addition, in the Civil War (1861–1865) the North and South used cavalry units. Horses were also used in World War I.[5]

Furthermore, the mention can be made to elephants in this regard. In the past, especially in India and Africa, elephants were used in wars because of their strength and armed forces were easily relying on these animals to achieve their military goals. During the Sultans of Delhi's era, the elephants were the mainstay of the corps on the battlefield. It is said that an elephant chain

1. Samreena Gulzar and Aqsa Tasgheer, 'Animal's Protection for Environmental Sustainability: An Islamic Perspective', (2020), 3 Al-Qamar, 138.
2. Quoted in Sira Abdul Rahman, 'Religion and Animal Welfare—An Islamic Perspective', (2017), 7 Animals, 2.
3. John M Kistler, Animals in the Military: From Hannibal's Elephants to the Dolphins of the U.S. Navy (Greenwood Publishing Group 2011) xi.
4. Elizabeth A Lawrence, 'Animals in War: History and Implications for the Future', (1991), 4 Anthrozoös, 145.
5. Carla Mooney, Ready for Military Action: Remarkable Military Animals, (Abdo Publishing 2015), 13-16.

in a corps alone has been as effective as five hundred cavalries.[1] The screams, the smell and the terrifying horror of the elephants on the battlefield caused the horses to stampede and, as a result, disrupted the order of the enemy corps. In addition, they were suitable for transporting equipment in battle scenes. Elephants are the best and safest means of transporting troops and equipment across rivers.[2] Camels are often used in deserts and barren areas. Camels are suitable for fighting in dry areas due to their ability and durability. It is said that the Parthians and Sassanids sometimes cleverly covered their camels with old armor and that Arab warriors when attacking other tribes or Muslims during the conquests of the Middle East and North Africa rode on camels. In the 1700s and 1800s, with the development of firearms, the role of camels in campaigns diminished.[3]

The most important benefits of animals during armed conflicts are: 1) Using animals as weapons, such as scorpion bombs and snake bombs[4]; 2) Using animals to defuse mines and trap; 3) Using animals or their carcasses as explosive traps; 4) Using animals such as dogs to track the enemy; 5) Using animals such as pigeons to spy; 6) Using animals to camouflage military targets and positions; 7) Using animals for deception operations; 8) Using animals to move light weapons, especially in impassable areas such as mountains and deserts. Contrary to the motives, motives, and grudges that led to war among humans, innocent animals were harmed and killed for no particular motive, and sometimes they themselves led to the killing of humans or other animals. Although the use of animals as tools and weapons of war is limited today and is less common on the battlefield, it should be noted that the effects and consequences of armed conflict can lead to harm to animals similar to humans.[5]

In addition to the role animals play in warfare as tools and weapons of war, they are the victims of armed conflicts as well and, as a consequence, deserve legal protections among other things. For this reason, in the next sections animal protection from the perspectives of IHL and Islam are addressed respectively.

2. Animal Protection from the Perspective of IHL

The rules and principles governing animal protection in armed conflicts can be divided into two distinct categories. First, those concerned with those animals which are used during the conflict as tools and methods of warfare and are regarded as part of military property and equipment. Second, those relating to animals that are not used in the conflict, but are affected

1. Fardin Mehrabi Kali and Mohsen Masoumi, 'The Elephant in The Delhi Sultans Era: Its Significance and Functions', (2014), 18 Quarterly Journal of Islamic History and Civilization, 111. [In Persian]
2. Ibid, 119.
3. See Mehr News Agency, 'Introducing Military Animals Throughout the History of Human Wars' (Mehr News Agency, September 12, 2010) < http://ceesty.com/edKlQv> accessed May 15 2022. [In Persian]
4. Hannibal had one of the largest armies and used many animals in wars. In one of the naval battles, he ordered large jars to be filled with venomous snakes. Then, as they approached the enemy ships, they threw jars at them and the snakes were released. This weapon was one of the deadliest weapons in history that took the lives of many people. It has also been used after Hannibal. See Tabnak Professional News Site, 'Animals That Became Weapons' (Tabnak Professional News Site, February 16, 2012) <http://ceesty.com/edKlmn> accessed May 15, 2022. [In Persian]
5. In Islamic law, as a general principle, it is not permissible to kill or harm animals belonging to another person. Even in the case of an animal owner, there are rules regarding the behavior for animals. For more information in this regard see Alirezā Nāīnī and Muhammad Rabbānī, 'Animal Rights from the Perspective of the Qur'an and Hadīths', (2000), 7 Daneshvar Medicine, 43-50 [In Persian]; Abu al-Qāsem Moqīmī Hājī, 'Animal Rights in Islamic Jurisprudence', (2007), 48 Fiqh Ahl al-Bayt Journal, 138-195. [In Persian]; Pūr Muhammadī, Shīmā, 'Scope of Animal Rights in Islam and the West', (2006), 40 Jurisprudence and Family Law, 136-151. [In Persian]

by the effects and consequences of the war similar to civilians and individuals who do not have a direct participation in hostilities. It is clear that each of these categories can be discussed in a different and distinct way from the perspective of IHL.[1]

There is no principle in IHL that directly protects animals during hostilities. Enforcement of IHL has only indirectly benefited animals.[2] Both animals that are involved in the conflict process and those animals that are not involved in the conflict but are the subjects of war damage and injuries benefit from the benefits of limiting tools and methods of warfare and as well as support for civilians involved in armed conflict. Of course, as much as IHL can limit the extent of war damage, or limit war to humans, it also means protecting the life and health of animals and causing less harm and pain to these creatures.[3]

These are animals that are not used as tools or methods of warfare in conflict, but are harmed by the harmful effects of war[4]. The rules of IHL are clearer for such animals. In addition, the rules of peacetime also apply to this group of animals. Legally, such animals should be considered in two different categories. Some of these animals are owned by individuals and others are not owned by any particular person. The rules of ownership apply to the first category and in the event of damage, the offender is liable to pay compensation to the owner of the animal. The second category, which is considered permissible, such as mountain and desert wildlife, is governed by a public law regime of environmental protection, and governments have a duty to protect, pursue and compensate for wildlife damage during armed conflict.

3. Animal Protection from the Perspective of Islamic Humanitarian law

In Islamic humanitarian law, there are numerous Āyahs (verses), Hadīths, rulings and recommendations on respecting animal rights. Of course, some of these rules become less important during the war, and Islamic jurists have expressed various issues and views in this situation. This study first tries to discuss the importance of paying attention to the animal protection from the perspective of Islam, and then refers to a set of animal rights that must be observed in both peace and war, and finally, the rules that protect animals in times of conflict are discussed in terms of Islamic jurisprudence and law.

3.1. The Importance of Paying Attention to the Animal and Its Rights

Among the great divine religions (Abrahamic religions), Islam has always considered the animals' rights, both at the level of moral and mystical advices and at the level of rules related to the treatment of animals and those have been considered alongside humans as living beings. There are many narrative and hadith sources in this regard. In some important juridical books, a special chapter has been opened for the virtue of watering and feeding animals which can be mentioned from Shiite juridical books, al-Hadaiq al-Nadharah[5], and from popular juridical

1. Anne Peters, Jérôme de Hemptinne and Robert Kolb (eds), Animals in the International Law of Armed Conflict (CUP 2022), 5.
2. For example, the technical annex to the Mine Ban Convention, which was adopted in accordance with Article 3 of the Mine Prohibition Protocol, sets out a rule on trapping that indirectly protects animals. According to part of this annex, animals or their carcasses cannot be used as traps. Although the purpose of this document is not to protect animals at all, this rule can prevent the use of animals and their carcasses in war.
3. Anne Peters, Jérôme de Hemptinne and Robert Kolb (eds), Animals in the International Law of Armed Conflict, (CUP 2022), 54.
4. Anne Peters, de Hemptinne J and Kolb R (eds), Animals in the International Law of Armed Conflict (CUP 2022), 264.
5. Yusuf al-Bahrani, al-Hadaiq al-Nadharah, Vol. 25, 129.

books, Sahih Muslim[1]. Alimony for livestock is considered as one of the duties and obligations of Muslims.[2] The Prophet (pbuh) said, "When traveling, if you stop at a residence, you should first give water and grass your pack animal."[3]

In another hadith, the Prophet said, "I saw the owner of the cat in the middle of the fire, who was holding him back and forth and eating him. He was the one who imprisoned the cat and did not feed it or release it so that it could eat the insects on the ground."[4] In support of the birds, it is said that Abu Dharr al-Ghifari in the season of hatching was walking in the streets and wherever he saw a baby sparrow in the hands of a child, he would buy it and release it.[5]

It is also narrated that the Prophet (PBUH) entered a garden and a camel came towards Him and made a noise. The Prophet stroked the camel and it calmed down. Then the owner summoned and said that this camel complains to me about hunger, do you not fear God that you keep it hungry. The animal rights have been emphasized to the extent that if the owner does not pay the alimony of the animal, the ruler of Sharia will force the owner, and if the coercion does not work, the ruler will do whatever is expedient. It is narrated from Imam al Sadiq (PBUH) that an animal has six rights over its owner, which are:

1. Do not put more weight on the back of an animal;
2. Do not talk to another person while sitting on the back of your animal;
3. When you get off the back of your animal, first give it grass;
4. Do not mark with a branding iron your animal;
5. Do not touch the face of your animal, which also glorifies God;
6. Water your animal as it crosses the stream.

Other animal rights include:

It is not permissible to milk the animal so that it is damaged due to lack of grass. It is not permissible to create an early estrous cycle (for reproduction) so that the baby of the animal is harmed. It is not permissible to kill honey bee and ant. There are also three types of travel to catch:

1. Hunting is permissible for the livelihood of himself and his family and guests.
2. Hunting is permissible for commercial gain.
3. Hunting is not permissible for fun and play, and enjoy.

The third hypothesis can be very helpful, so we can talk a little more about it.

Imam al-Sadeq (pbuh) was asked if a man who goes out to hunt should pray brokenly or fully. He said that he should pray fully, because his journey and path were not right. According to this hadith, it is clear that the broken prayer is for a person whose journey is not sinful, but since hunting is fun, the journey is sinful, such a hunter must pray fully.

1. Noori, Sahih Muslim, Vol. 14, 241.
2. Abolghasem Yazdi, Persian translation of Sharāʾiʿ al-Islām, Vol. 3, 1214.
3 . من سافر منكم بدابته فليبدأ حين ينزل بعلفها و سقيها. Bihar al-Anwar, Vol. 61, 213.""
4 . «رأيت فی النار صاحب الهرة تنهشها مقبلة مدبرة كانت او ثقها ولم تكن تطعمها ولا ترسلها تاكل من خشاشة الارض»:
Bihar al- Anwar, Vol. 11, 268.
5. Bihar al-Anwar, Vol. 61, 271.

3.2. The animal protection exclusively During Wartime

Part of the rules that cover animal protection is related to the circumstances of the wartime. For example, amputation of animals in wartime is forbidden in Islamic sources. In the following, some of these rules are reviewed.

3.2.1. Prohibition of harming civilian animals

As a principle, only military property and persons should be affected by a war, and damage to those animals that are considered civilian property is prohibited. God has beautifully stated this assumption in the Noble Quran in the story of Solomon's army and ants. Solomon's forces of jinn, humans, and birds were rallied for him, perfectly organized (An-Naml, 17).

And when they came across a valley of ants, an ant warned, "O ants! Go quickly into your homes so Solomon and his armies do not crush you, unknowingly."2 (An-Naml, 18). So Solomon smiled in amusement at her words, and prayed, "My Lord! Inspire me to ˹always˺ be thankful for Your favors which You have blessed me and my parents with, and to do good deeds that please you. Admit me, by Your mercy, into ˹the company of˺ Your righteous servants."3 (An-Naml, 19). Therefore, during any conflict, in addition to humans, a large group of animals and living beings are also affected by the unfortunate consequences of war.

This principle, previously referred to in IHL as the The Martens Clause, is referred to in Islamic sources as kind and human behavior for animals (whether military or civilian animals). In fact, animals, even military animals, have no grudges against humans and are used only as military tools. Therefore, human behavior for animals is a necessity of Islamic behavior. This has always been considered both in the behavior and speech of the infallibles. For example, as mentioned in the discussion of water, in the event of Karbala, when the al-Hurr Army approached the of Imam al-Husayn's caravan (pbuh) at noon (because the weather was very hot and there were signs of thirst in the army and horses), Imam (pbuh) said that Water the thirsty and their horses[1].

3.2.2. Prohibition of animal amputation (Sterility)

One of the most important issues in Islamic humanitarian law among jurists is the animal amputation of during conflict. The Arabs and sometimes the Muslims used this during the war, both before and after Islam, as a tactic of war. They usually cut off the limbs of the enemy animal with a sword or other

device in order to capture the enemy or reduce the enemy's military efficiency. This action was called sterility. A fundamental issue here is whether sterility is permissible in war under any circumstances. Are soldiers allowed to amputate limbs of their own animal or another in any situation? Can sterility be used as a last military solution? Is it permissible to use this method in any situation, even without military necessity? Is not sterility in war a violation of the principles of segregation, proportionality, necessity, etc. of IHL? In response to such questions, especially from the perspective of Islamic humanitarian law, there are very scattered issues among juridical sources. However, some principles and rulings can be achieved in this regard.

In some sources, the Prophet of Islam forbade soldiers to amputate limbs of their own animal

1. Soleimani Saifuddin Reza, Animal Rights in Islam, (Parto Velayat Publications, Qom, 1st edition 2010), 157.

or another; even if the animal disrupts military performance. For example, the Prophet (pbuh) commanded his soldiers to stop moving whenever their livestock rebelled in the land of the enemy, and they were allowed to kill him, but they were not allowed to cut off it hands and feet[1].

Another question that may be raised here is whether this command of the Prophet (pbuh) in war only refers to the assumption that the possibility and conditions of killing the animal are provided. Or if such conditions are not provided, can the animal's limbs be amputated to increase military efficiency?

In this regard, some great jurists believe that the words of the Prophet (pbuh) only refer to the time when such a thing is possible and the soldier has sufficient opportunities and conditions to kill the animal. Otherwise, if the conditions of the war are such that it is not possible to kill the animal in a sharia manner, the animal's limbs can be amputated in such circumstances[2].

In an opposing view, it can be said that the Prophet (pbuh) gave this command to the soldiers, considering the state of war and the importance of animal protection and the need for this protection. Therefore, the soldiers were not allowed to amputate the animal's limbs under any circumstances. As some jurists have commented[3]. In fact, it is not permissible to harass animals (torture) under any circumstances. However, some reject this view, arguing that it is permissible under certain military conditions. Some have even said that Ja'far b. Abi Talib did so in the battle of Mu'tah.[4]

In this regard, other views have been raised. Some jurists have considered it disgusting to cut off the limbs of animals. Others have allowed the amputation of animal limbs if the animal falls into the hands of the enemy and strengthens the enemy forces. However, it is recommended to kill the animal instead of amputating its limbs.

Some have argued in this regard and in justifying this approach, others elaborate and believe that this ruling is true for the animals (horses and camels) of the Muslim army, but it is not abhorrent for the animals of the infidel army and may be permissible, otherwise it will strengthen the enemy forces.[5] But it seems that the jurists did not forbid the sterility in the case of enemy animals[6]. others believe that it makes no difference and that the animal is the property of man, and that sterility is permissible in any case because of the proprietary domination that humans have over animals[7]. This is based on a purely proprietary view of animals and is certainly not compatible with some Islamic moral advice and some principles of animal rights rulings. Criticizing this view, al-Karaki argued with the same argument that harassment of animals is forbidden in Islam, that it is necessary to water and feed them, and that it is forbidden to put an extra burden on the back of them, how can sterility be allowed[8]. Therefore, it is obvious that this view (considering the animal as property) is not acceptable, and according to the first view, it should be said that since there are many sanctities in behavior for animals, the sanctity will be more severe in the case of the sterility.

1. Nazari Tavakoli Saeed, animal rights; Protection Laws and Productivity Limits in Islam, (Samt Publications, first ed 2009), 108.
2. Ibid, 109.
3. Hilli Allameh, Hasan bin Youssef bin Motahar Asadi, Qaa'eem al-Ahkam fi Marafah halal va haram, (1992) 3 volumes, Islamic Publications office affiliated with the Qom Theological Seminary Society, Qom, 486.
4 al-Karaki, 1987, Vol. 3, 387; al-Najafi, 1988, Vol. 21, 82-85, Quoted from Nazari Tavakoli, the former, 108
5 Jawahir al-kalam, op. cit 82
6. Shahid Thani Zain al-Din Ibn Ali, Masalak al-Afham, (Al-Maarif al-Islamiya Institute, Qom 1992), 27.
7. Karki A, Jami al-Maqasid fi Sharh al-Qasas, Qom, (Al-Al-Bayt Institute 1987), 386.
8. Ibid.

3.2.3. Prohibition of Aiming At Animals

Aiming at animals, especially in combat exercises such as hunting and sharpening, was one of the tasks used in the past by the military to prepare for battle and increase their combat capability. Even today, this method may exist more or less among the military and civilians. This action is prohibited in Islamic law because it causes harassment of animals. Although there is a lot of emphasis and recommendation on the sport of shooting in Islamic teachings, according to some analysts, if the sport causes harm to an animal, it is not only undesirable, but also forbidden[1]. Also, from the Islamic point of view, " صبر البهائم " is forbidden and several texts indicate it. That is, to tie the animal's limbs and provide the ground for its gradual but painful death by targeting and shooting at it.[2] It is a hadith that the Prophet (PBUH) cursed a group that targeted a live chicken. Therefore, such an act by the military is forbidden even to increase combat readiness, because from the perspective of Islamic law, it leads to the harassment of animals.

Because animals have souls, this action is generally forbidden in Islamic law. In this regard, there is no difference between Shia and Sunni jurists. The reason for this sanctity is considered to be the unnecessary waste of the animal and the loss of property2, which is not rationally permissible.

3.2.4. Capturing animals

During or after the war, animals may be captured as spoils of war or any other title by the warring parties. In this regard, general rules and principles governing the animal protection apply. Therefore, Muslim military personnel are not allowed to harass animals because they belong to the enemy or deprive them of the basic rights provided in religious texts for the animal protection.

According to Islamic jurists, water and food for animals must be provided, and imprisoning and keeping them in an inappropriate place is not permissible and is forbidden[3]. Therefore, it can be said that the animals of the enemy, which are captured by the Muslims as spoils of war, are subject to the prescribed protections. These animals should be given enough water and food, and if they are injured or sick, they should be treated by their new owners. If it is necessary for them to be killed, all the rights stipulated in the religious texts regarding them must also be observed.

3.2.5. Prohibition of killing animals in vain

This prohibition is not limited to wartime, but it is very important in times of conflict. During the war, soldiers are only allowed to inflict damage as needed and in proportion to the specified attack and targets. This principle also applies to animals. In IHL, this protection is mentioned in the framework of some principles such as segregation, proportionality and protection of civilian property. In Islamic law, killing animals in vain is also irrational and forbidden. It is stated in the hadith that even a sparrow should not be killed for no reason.

1. Nazari Tavakoli Saeed, animal rights; Protection Laws and Productivity Limits in Islam, (Samt Publications, first ed 2009), 109.
2. Nazari Tavakoli, Ibid; Maqrebi, 2006, Vol. 2, 175.
3. Sistani Seyyed Ali, Menhaj al-Salehin, (Ayatollah Sistani School, Qom 1995) 136;
Nazari Tavakoli Saeed, animal rights; Protection Laws and Productivity Limits in Islam, (Samt Publications, first ed 2009), 110.

Conclusion

The use of animals in wars is an issue that should be considered by existing and future humanitarian law rules. The probability of using new laboratory animals in the future wars is very high. This article, as discussed, only deals with a small part of the existing rules. Part of these rules was related to humanitarian law relating to protection of civilian persons and property in war. Another part of the rules should be found in the Hague Laws related to the limitation of the means and methods of war. In addition, there were several rules in this field that mentioned in some Islamic sources. As a general conclusion, it should be said that the existing laws of war are very inadequate. Therefore, it is necessary to develop the rules of this area by using some existing resources (such as religious rules) and predicting some future events.

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Formulating a Protocol for Decommissioning of Offshore Oil and Gas Installations in the Gulf of Guinea Region: A Comparative Study

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ABSTRACT

Oil and Gas exploration and exploitations have been ongoing for more than half a century in the Gulf of Guinea (GoG). However, recent discoveries of oil and gas deposits deep offshore along the coast of the GoG has increased exploration activities. Removal of offshore installation is a rigorous and complicated process which needs stringent regulations to ensure environmental protection of marine life and ensure safety of navigation at sea among other issues. Therefore, as these oil and gas installations approach the end of their productive life, removal of these installations from the marine environment becomes inevitable. Consequently, the need for the existence of a regional legal framework or policy to govern the removal process within the GoG becomes imperative. Using the doctrinal approach, the paper examines treaty provisions which are binding on individual member States, as well as their obligations under the GoG Commission in relation to the 1958 Geneva Convention on the Continental Shelf (GCS), the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1972 London Dumping Convention, and the 1981 Abidjan Convention. The paper finds that the absence of a regional protocol or legal framework on removal of offshore installations creates chaos for the marine environment when removal issues arise in the future along the coast of the GoG. It concludes by making recommendations for a regional legal framework to ensure the smooth removal of installations in the future.

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Introduction

Decommissioning or *removal* refer to the winding phase of oil and gas operations on the site where extraction equipment and installation are located. The present study aims at exploring the idea of formulating a regional legal framework or marine policy for the decommissioning of offshore oil and gas installations on the Gulf of Guinea (GoG) with a view to proffering solutions to its relevant issues. Obligations of member States under the 2001 Gulf of Guinea Treaty are examined, as well.. Ultimately, the problem of the absence of a codified legal or policy framework in the form of Protocol among member States of the GoG Commission on the subject is discussed. Employing qualitative design, the study investigates available cases, statutes, conventions and protocols. It concludes by making recommendations on the content of the preliminaries of a legal framework prior to its enactment. The present paper discusses some existing literature on the subject of decommissioning to elucidate the importance of different components of the complicated process of decommissioning such as legal, technical, financial and environmental parts.

Cameron,[1] in his work addressed the problem of decommissioning as it affects legal regulation and policy, technical and financial involvements. The issue of decommissioning over the years has raised concerns due to the increase in number of oil and gas installations constructed offshore. The economic, legal, technical and financial challenges have made decommissioning a complex process. According to Cameron, "uncertainty is a defining feature of decommissioning".[2] The work examined the 1982 United Nations Convention on Law of the Sea (UNCLOS) on the basic rules for the removal of disused installations in accordance with standards set up by the International Maritime Organization (IMO) and others. The importance of the author's work to this paper is to the extent that the work deals with the adoption of international legal instruments on decommissioning which is a fundamental obligation imposed on coastal States by UNCLOS. However, the author did not examine the provision of the Convention based on which States have an obligation to enact national laws and policies to the effect.

1. Peter Cameron, 'Tackling the Decommissioning Problem', (1999), 14 Journal of Natural Resources and Environment 121, 121.
2. Ibid.

Claisse and others,[1] in their work, examined the impact of partial removal option for decommissioning oil and gas installations on fish biomass production. The impacts of partial removal of platforms to fish biomass production could be determined by multiplying the standing stock biomass and total production density matrices by the surface area of the structure. This approach option to decommission an installation intends to conservatively refrain from underestimating the impact of partial removal of such installations. The core of their work is that partial removal option for decommissioning impacts on the production of fish biomass, although there is little scientific data to support. The authors are of the position that the primary impact of partial removal will be a reduced Standing Stock Biomass (SSB). The relevance of this work to the paper is to the extent that it supports the argument that disposal options of decommissioning of installations in oil producing areas must gear towards the protection of marine life and species from extinction caused by decommissioning programs and activities. However, the work did not examine other aspects of decommissioning such as cost of financing, regulating framework among others.

Hamza,[2] discussed international rules regulating decommissioning of offshore installations. The author acknowledges in his work that one major problem in dealing with decommissioning of oil and gas installations especially offshore is the lack of a definite legal regime and a legal definition of the term "decommissioning". The author discussed the meaning of decommissioning from an international law perspective using various global legal instruments.[3] The process of decommissioning varies between countries according to their national laws. The author is of the position that in Malaysia, the decommissioning guidelines identifies four phases: pre-decommissioning, implementation, post decommissioning and field review.

Hamza argues that the process could be divided into three phases for environmental assessment. These phases are; the cold phase, removal and disposal. He states that not a single oil producing developing country has put in place a comprehensive legislation on decommissioning. This goes to support the position of this thesis that international legal instruments need to be adopted for the regulation of the decommissioning of oil and gas installations in Nigeria. This problem draws up other issues such as cost of financing the decommissioning project and the management of environmental influence of the removal of structures. The author examined some international legal instruments such as the 1958 Geneva Convention on the Continental Shelf, the 1982 United Nations Convention on Law of the Sea and the 1989 IMO guidelines, highlighting the position of international law on decommissioning of oil and gas installations. He concludes by recommending that most developing countries that produce oil should as a matter of concern enact their national legislation on decommissioning of oil and gas installation.

Henrion, Bernstein and Swamy[4] discussed decision analysis for decommissioning of platforms using various options. According to them, the criteria for selection as examined in their

1. See Jeremy T Claisse and others, 'Impact from Partial Removal of Decommissioned Oil and Gas Platforms on Fish Biomass and Production on the Remaining Platform Structure and Surrounding Shell Mounds', (2015), 10 PLoS ONE 1, 1-19.
2. See BA Hamza, 'International Rules on Decommissioning of Offshore Installations: Some Observations', (2003), 27 Marine Policy 339, 339-348.
3. These instruments are International Maritime Organization (IMO) Guidelines 1989, 1958 Geneva Convention on the Continental Shelf, Oslo and Paris (OSPAR) 1998 and 1982 United Nations Convention on Law of the Seas (UNCLOS).
4. Max Henrion, Brock B Bernstein and Suray Swamy 'A Multi-Attribute Decision Analysis for Decommissioning of oil and Gas Platforms', (2015), 11 Integrated Environmental Assessment and Management 594, 594-609.

work include the existing legal framework, technical feasibility and economic feasibility, among others. The authors addressed issues affecting the options for decommissioning to ensure a smooth program. The work maintains its focus on some options for decommissioning such as complete removal option, partial removal option, the presence of a Heavy Lift Vessel (HLV) etc. The issue of leave in place or re-use of decommissioned structure was also addressed. Any of these options are adopted after evaluation to ensure that the option best suited for the particular structure to be decommissioned is adopted.

1. Removal of Offshore Installations along the Gulf of Guinea (GoG)

Decommissioning is a frequent term in the international law arena. [1] The term is lauded yet elusive. A common definition of the term is provided by the UK Offshore Operators Association (UKOOA) as "the process which the operator of an offshore oil and gas installation goes through to plan, gain government approval and implement the removal, disposal or reuse of the structure when it is no longer needed for its current purpose".[2] It is also used commonly to denote to “the process of commencing the final removal of oil and gas installations used during operations whether onshore or offshore with the intention of restoring the environment to its previous state through a rehabilitation program contained in a decommissioning plan.”[3] Host communities and human settlements located around the area of operations are usually touched by the impacts of decommissioning.[4] It was brought to the forefront of global environmental issue pursuant to the celebrated case of the *Brent Spar Case*.[5]

In its broadest meaning, the term denotes generally to the process of bringing the life cycle of a facility to an end. It is done when a facility is depleted of resources and, hence, economically unproductive. The act and process of removal or abandonment of a facility- whether it is onshore or offshore- in the wake of reduced productivity is referred to as decommissioning. The conceptual scope of decommissioning is more expansive than abandonment. Decommissioning of oil and gas installations are the final stage in petroleum exploration. It is done mostly offshore, though there are onshore decommissions, as well. All in all, where extraction of oil and gas is no more economically productive, the decommissioning of the installations becomes mandatory, as the unneeded infrastructure could endanger the safety of navigation at sea, contaminate the marine environment and degenerate aquatic life above all.

The removal process commences with preliminary discussions with relevant regulatory

1. Hamza (no 4), 339.
2. See <http://www.ukooa.co.uk/issues/decommissioning/background.htm#whatis> accessed May 12, 2022.
3. Ifeoma Palema Enemo and others, 'Proposing a Legal Framework for Decommissioning of Oil and Gas Installation in Nigeria', (2019), 45 Commonwealth Law Bulletin 211, 211-230.
4. Ondotimi Songi, 'Regime of Decommissioning Ghana's Offshore Hydrocarbon Facilities', (2014), 12 Oil, Gas & Energy Law 8, 8.
5. Brent Spar was a North Sea oil storage and tanker loading buoy in the Brent Oilfield. It was operated by the UK Shell Company with the completion of a pipeline connection to Shetlands. in 1991, it was decided that the storage facility was of no more value. Therefore, disposal options were considered and evaluated. Shell UK and Esso had jointly owned the Brent Spar Installation, however, Shell UK agreed to the decommissioning. The installation infrastructure was 147m high and 29m wide and displaced a total amount of 66,000 tons of oil. Having evaluated the costs of disposal, the Shell UK decided to get rid of the installation by sinking it into the sea. Shell UK negotiated the case with the representatives of fishing and environmental organizations in the UK and claiming that the sinking will leave insignificant contamination damage, managed to acquire a licence from the UK government to dispose of the installation in North Feni Ridge within UK waters. As the news leaked out, Greenpeace, an environmental rights group, organized a worldwide campaign against Shell UK, claiming that the installation actually contained about 5,500 tonnes of oil instead of the 50 tons which Shell UK claimed. Greenpeace maintained that the disposal of the installation into the sea would be catastrophic the marine environment. Eventually, the agitated campaign by the Greenpeace thwarted the Shell UK plan for decommissioning by sinking the installation.

agencies to the submission of a proposed plan for decommissioning. This process further entails meetings with members of the public such as community leaders, environmental activists and so on. There are about ten steps to decommissioning an installation: i) Project Management; ii) Engineering Analysis; iii) Regulatory Compliance; iv) Preparation; v) Well Abandonment; vi) Conductor Removal; vii) Structure Removal; viii) Pipeline and Cable Removal; ix) Material Disposal; x) Site Clearance. [1]

Project Management involves a detailed plan for the process of decommissioning beginning from the approval stage to site clearance. It contains the best option available for decommissioning of such installation. Engineering analysis deals with appraisal of the risks involved in decommissioning process, with further recourse to the protection of humans and the environment.[2]As regards the regulatory compliance, the approval to decommission an installation is obtained ahead of the commencement of the decommissioning process. The application for approval to commence the decommissioning of installations must be in line with the laid down laws and regulations.[3] Preparation entails mobilization of machineries and other ancillary equipment necessary for the commencement of decommissioning. Some preparatory activities include the clearing of sites, flushing and cleaning of pipes and tanks and so on.[4]

These steps are meant to be in accordance with enacted legislation or a formulated Protocol regulating the process of decommissioning of oil and gas installations. However, the absence of such a protocol among the GoG States would expose the marine environment of the coast of GoG to the inherent dangers of lack of decommissioning. Therefore, GoG States must as a matter of urgency formulate and adopt a protocol at the regional level for the removal of offshore installations from the available international legal instruments on decommissioning. It is fundamentally important for GoG States to formulate a regional protocol and adopt it because offshore installations would be approaching the end of their productive life span in no distant time on the coast of the GoG.

While abandonment is a partial cessation of operations on the extraction site, decommissioning denotes to the total cessation of productions whereby the operator removes the installation completely. Onshore removal of installation poses a more challenging burden in comparison with the offshore removal as it requires more technicality and expertise both in terms of the cessation of oil and gas operations and in the removal process of the installations, structures, plugging of well heads. The decommissioning is indeed incomplete or more technically unfulfilled if the operation is ceased but the installations are not removed. It is advised that States which are Parties to the international legal instruments on decommissioning of installations such as the Economic Community of West African States (ECOWAS) and GoG Commission learn from the success scenario of the States that had already established frameworks in this respect.

the United Kingdom has developed workable legal frameworks on decommissioning which

1. A Saeed, 'Identify and Handle Safety Challenges during Decommissioning of Offshore Installations', (Msc Thesis, University of Stavanger 2016), 8.
2. Ibid 8.
3. Ibid 8.
4. Ibid 9.

could prove helpful to the member States of GoG Commission, in Particular Nigeria.[1] It is worth mentioning that the enactment of UK legislation on decommissioning was on grounds of guidelines of some international and regional legal instruments such as the Oslo and Paris (OSPAR) Convention. The UK legal system anticipates a Regulator with responsibilities on guidelines for decommissioning. The Offshore Petroleum Regulator for Environment and Decommissioning (OPRED) stands as the Regulator on matters of decommissioning in the United Kingdom. It is upon OPRED to warrant that the requirements of the 1998 Petroleum Act and international obligations are observed. Indeed, the Regulator is the sine quo non to the completion of the decommissioning process. It addresses the complicated issues of UK offshore installation decommissioning. OPRED makes sures that the beneficiaries of the exploitation and production processes now stand liable to the decommissioning of installations.[2] The fact that the polluter hast to compensate for damages he incurred is, of course, endorsed in many global environmental protection treaties.

The GoG Commission lacks a binding legal body- a committee or agency- which could regulate the total process of decommissioning with in GoG region. The establishment of a Regional Regulatory Authority (RRA)- a representative of the Host State- which supervises the decommissioning process is highly recommended. The RRA should be entrusted with the authority to secure the compliance of member States with the regulations and legal provisions on environmental health and safety throughout the process of decommissioning. In the same way the OPRED acts in the United Kingdom (UK) to secure the the proper implementation of the provisions of the UK Petroleum Act (1998) and international obligations; the RRA under the regional legal or policy framework on decommissioning would perform the same responsibility. It should be pointed out that the treaty establishing the GoG Commission must be amended either through an additional Protocol or a constitutive Act of the Heads of Governments to ensure its legality.

Most of the developing countries which happen to be major oil producers especially within the Members of ECOWAS and GoG Commission lack a workable legislation or policy on removal of offshore installation at the national level. Indeed, these Host countries and the Operators are merely acting consistent with a number of existing contractual obligations such as Production Sharing Contracts (PSC), Risk Sharing Contract (RSC) etc.[3] The peril posed by the absence of a regional protocol or framework for the removal or decommissioning regime for offshore installation in the GoG is that Oil producing countries like Nigeria, Ghana, Angola and others may encounter a similar devastating situation as did Malaysia when she spent a large sum of money to finance the decommissioning of some offshore installations because she lacked clear-cut legislation or legal framework in this respect. Consequently, Malaysia alone bore the entire cost to finance the removal of those installations. Therefore, an implementable regional protocol or framework pieced together from other international and regional legal instruments such as the 1988 IMO Guidelines, OSPAR Convention and others would help the

1. See Efe Uzezi Azaino, 'International Decommissioning Obligations: Are there Lessons Nigeria Can Acquire from the UK's Legal and Regulatory Framework?', (2013), 16 CEPMLP Annual Review 1, 1-19.
2. United Kingdom (UK) Petroleum Act 1998, s29.
3. Hamza (no 4), 339.

process of removal of offshore oil installations along the GoG. This would help Member States in the coast of the GoG to reduce financial cost of removing the offshore installations using a collective pool of resources.

Some African countries which are members of the GoG Commission use Production Sharing Contract (PSC), Joint Venture Agreements (JVAs) and other forms of commercial partnerships as methods of financing projects as source of decommissioning security.[1] A decommissioning security is primarily intent on ensuring that the funds for the implementation of the process are available. In so doing, it is of high importance that the Parties use the Decommissioning Security Agreement (DSA).[2] In the United Kingdom, DSA is the recourse in the UK as the activator in providing funds for decommissioning. There are several methods to earn the funds, including thorough Cash, Letters of Credit and Decommissioning Trust Fund (DTF) among others. The need to establish a global decommissioning fund has recently been vehemently argued..[3] In their paper on providing a legal framework on decommissioning fund, Komusiga and Ole (2018) suggested using the Ugandan Petroleum Act as an example.[4]

Consequently, this paper argues in support for the establishment of a Regional Decommissioning Fund (RDF) among the GoG Commission members which would have its roots in the proposed regional legal framework. It is sorely needed because of the huge oil and gas infrastructure contaminating the GoG region. As of 2022, it is estimated that an amount of USD $340 billion is needed for the removal of offshore installations around the world.[5] Furthermore, the number is estimated to jump to £15 billion for the UK industry over the next decade.[6] As a result of this knowledge, the GoG member States could pull financial resources together in addition to the use of a regional Protocol framework to ensure the safety of the marine environment during the process of removal of offshore installations. The Member States would have quota contributions or counterpart funding to ensure availability of funds in the decommissioning fund which would be kept in an escrow account.[7]After all, the essence of the regional Protocol for decommissioning of oil and gas installation is the protection of marine life, the environment and safety of navigation at sea.

1.1. Treaty Ratification and Obligations under the Gulf of Guinea Commission Treaty

The obligations which the coastal States such as GoG member States are bound to comply with have been properly addressed in the Geneva Convention on the Continental Shelf (GCS) of 1958.[8] Under the Convention, it is the exclusive right of a coastal State over the continental shelf to explore and exploit natural resources as well as to offshore installation to which no

1. Ngozi Chinwa Ole, 'The Financial Securities for Decommissioning of Offshore Installations in Nigeria: A Review of the Legal and Contractual Regime', (2017), 15 Oil, Gas and Energy Law 1, 5.
2. Damilola O Salawu, 'Bringing Down the House: Decommissioning Issues in Nigeria's Upstream Oil and Gas Sector', (2014), 12 Oil, Gas & Energy Law 13, 13.
3. See Natalia Meza Lomonco, 'How to Finance Decommissioning in the Offshore Petroleum Industry': The Role and Importance of Decommissioning Fund', (2013), 16 CEPMLP Annual Review 6.
4. Juliet Komusiga and Ngozi Chinwa Ole, 'Ugandan Legal Framework on Decommissioning Fund: Is There an Achilles Heel, and Can Lessons from the UK Help?', (2018), 16 Oil, Gas and Energy Law 1, 8.
5. Jia Li and others, 'Decommissioning in Petroleum Industry: Current Status, Future Trends and Policy Advices', (2019), 237 IOP Conference Series: Earth and Environmental Sciences 1.
6. Oil and Gas UK, Decommissioning Insights 2018 (The UK Oil and Gas Industry Association Limited 2018) 4.
7. An Escrow is an account or fund held by a Third Party on behalf of contracting parties to a transaction.
8. Nigeria signed and ratified the Geneva Convention on the Continental Shelf on April 28, 1971.

other state is allowed except through the consent of such member coastal State. Additionally, the GCS stipulates the method of removal that the coastal States must implement in the decommissioning process under Article 5 (5). The Article reads as follows:

> *"Due notice must be given of the construction of any such installations, and permanent means for giving warning of their presence must be maintained. Thus, such installations which are abandoned or disused must be entirely removed."*

A total removal of any abandoned installation is required by this which is a giant leap in the protection of the marine environment. On the other hand, the UNCLOS is more tolerant and resilient in this respect by allowing partial removal where total removal is too costly or impossible.[1] Article 60 (3) of the Convention stipulates that:

> *"Due notice must be given of the construction of such artificial islands, installations or structures, and permanent means for giving warning of their presence must be maintained. Any installations or structures which are abandoned or disused shall be removed to ensure the safety of navigation, taking into account any generally accepted international standards established in this regard by the competent international organization. Such removal shall also have due regard to fishing, the protection of the marine environment and the rights and duties of other States. Appropriate publicity shall be given to the depth, position and dimensions of any installations or structures not entirely removed."*

The 1982 Convention modified the previous Convention on removal process greatly. However, there is a complication that some of the member States of the GoG Commission are Parties to both Conventions and there are differences in how the two conventions address a same issue. To overcome this apparent contradiction, the GoG Commission through its treaty provision when amended or by the Acts of its legislative body can decide that the Commission would adopt any removal method. This position would automatically bind members of the GoG Commission. This should be done under the auspices of the Regional Regulatory Authority (RRA) using the drive for regional economic integration and above all protection of the ocean's environment as a motivation.

The strategy appears practical because under the legal framework of UNCLOS, it is the obligation of a coastal State to enact domistic laws and regulations to secure marine environmental safety.[2] Being under the GoG Commission as a block, the GoG States can pass a resolution making member States committed to be bound by the legal policy framework on decommissioning. When this resolution is passed, member States become bound by it. The resolution to adopt any removal method by the Commission is to the extent that it will bind both Parties to the Convention and Non-Parties to the Convention who are also members of the GoG Commission. The purpose is to ensure that the strategic approach to removal is mutually

1. Nigeria ratified the 1982 United Nations Convention on the Law of the Sea on August 14, 1986.
2. UNCLOS, Article 208.

concordant among members of the Commission within the region. The Commission is bound by the collective decision of members through its decision-making organ.

Moreover, removal of offshore installations lies within the jurisdiction of the States.[1] Furthermore, insofar as the removal of offshore installations falls within the territorial waters or contiguous zones of littoral States, the existing legal regimes of such States has to be meticulously examined to devise plans that avoid conflicts of purpose.[2] However, the obligation could be passed on to the operator(s) or managers of the installations effectively where they are located through the GoG Commission regulated legal framework. International Oil Corporations (IOCs) mainly constitute the operators. It is in the process of applying the provisions of the treaties that the transfer, modification or removal of certain responsibilities by the member States to the operator of these installations may follow, deriving such powers from the available international legal instruments and the regional legal policy framework on removal of offshore oil installations.

Another legal achievement instrumental in the regulation and control of waste disposal at sea by national administrations in the London Dumping Convention of 1972. It stipulates and specifies the liability of the coastal States.. Nigeria is a member state of the London Dumping Convention and the GoG Commission. According to these conventions, any member state is obliged to withhold deliberate waste disposal at sea waters.[3] The word 'dumping' denotes to any deliberate disposal or materials, especially of contaminants into the sea from or of vessels, aircrafts, platforms or other structures and infrastructures at sea[4] A coastal member State of the convention is bound to ban dumping of wastes or other forms of materials unless it is permitted by the relevant authorities after meticulous examinations.[5] In addition, it is provided in the London Dumping Convention that member States should implement the anticipated measures of the convention.[6]Furthermore, violations of the provisions of the Convention should be anticipated and necessary preemptive and punitive measures should be taken by the Contracting Parties in advance.[7] The Convention recognizes the interest of the Contracting Parties to enter into regional agreements consistent with the convention to prevent dumping of wastes.[8] Consequently, the above provisions could form part of the regional legal policy for the removal of oil and gas installation.

The 1981 Abidjan Convention,[9] being a regional convention exists to protect and develop the marine and coastal environment of both west and central African regions. Pollution from ships, aircrafts, land-based sources are the various forms of harmful pollutions the convention

1. See Mark Osa Igiehon and Patricia Park, 'Evolution of International Law on Decommissioning of Oil and Gas Installations' (SPE/EPA/DOE Exploration and Production Environmental Conference, San Antonio, Texas, February 2001) <https://onepetro.org/SPEHSSE/proceedings-abstract/01EPEC/All-01EPEC/SPE-66555-MS/134671> May 15, 2022.
2. Ibid.
3. Nigeria acceded to the 1972 London Convention on October 30, 2010.
4. London Dumping Convention 1972, Article III (1)(a)(i) and (ii).
5. Ibid, Article IV(1)(a)(b)(c) and (2).
6. Ibid, Article VII(1)(a-c).
7. Ibid, Article VII(2) and(3).
8. Ibid, Article VIII.
9. 1981 Convention for the Co-operation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region (Abidjan Convention)

exists to address.[1]The Convention further imposes the obligation on parties to the Convention to take appropriate measures to prevent, reduce, combat and control pollution resulting from activities relating to the exploration and exploitation of the seabed resources within their jurisdiction. This includes artificial islands, installations and structures. It is important to state that the Convention did not mention decommissioning directly, however, the convention obligates Parties to ensure the prevention of marine contamination by dumping from artificial islands, installations and structures.[2] Offshore oil and gas installations can qualify as artificial islands, installations and structures. Activities that take place on installations during the course of exploration and exploitation of seabed minerals could result in dumping and consequently cause marine pollution. Oil and gas installations at sea when due for decommissioning can be classified as installation or structures on the sea which must be properly controlled to avoid marine pollution. The implication is that Parties now have the obligation to make national laws regulating the process of addressing the prevention of dumping at sea of harmful wastes in accordance with the provisions of the Convention.

However, the right to make these laws would be transferred to the regional level where a legal framework on removal of offshore oil and gas installations on the GoG would be agreed and implemented by Parties. The Abidjan Convention would have been the perfect piece of international legal instrument for the regional body. However, this treaty only addresses issues such as prevention, combating and reduction of pollution from dumping of toxic substances arising from exploration and exploitation of seabed resources. The removal of offshore oil and gas installation being a complex process involving legal, technical, environmental and financial obligations requires an implementable legal policy of framework within the GoG. This falls withing the scope of international law because offshore installation operation cuts across international maritime boundaries.

International Law concerns the relationships between States, individuals, multinational corporations through binding rules which strive for peaceful coexistence of the different countries in world. There are many treaties and laws- including the International Environmental Law- which emanate from it. These law do not impinge on the internal jurisdiction of the countries, but are binding for all nations in the international arena. The Permanent Court of International Justice (PCIJ), in the case of *Exchange of Greek and Turkish Populations*, maintained that:

> *"[a] state [which] has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations taken."*[3]

Traces of international law in the domestic laws of countries are detected in cases where international obligations are incorporated in the enactment and enforcement of national legislations. However, in addressing the issue of regional legal policy on decommissioning, States must surrender some of their national legislative sovereignty to a regional legislature such as

1. Ibid, Article 5-7.
2. Ayoade Morakinyo Adedayo, 'Environmental Risks and Decommissioning of Offshore Oil Platforms in Nigeria', (2011), 1 NIALS Journal of Environmental Law 1, 9.
3. Exchange of Greek and Turkish Populations (Advisory Opinion), (1925), P.C.I.J. (ser. B) No. 10 [20]-[21].

the ECOWAS Parliament where laws made for the region become binding and the Assembly of Heads of State and Government of the GoG Commission.[1] The Commission was originally intent on creating bilateral trust, peace and security, and harmony between the States in the exploration and exploitation of the natural resources of the Gulf region. The Commission's stabilizing measures were considered indispensable for the economical development of member States and in effect the general welfare of the residents of the Gulf region. Areas of shared interests and cooperation specifically on matters of peace and security of the maritime, exploration and exploitation of hydrocarbon, fishery and mineral resources for economic flourishing and integration of the Gulf region are rightly addressed in the treaty.

2. Formulating a Regional Legal Framework for the Removal of Offshore Installations in the Gulf of Guinea (GoG)

Formulating or proposing a regional legal or policy framework to regulate the removal of oil and gas installations in the GoG should be consistent with international legal instruments such as conventions, protocols and other guidelines which involves the legislative organ of the GOG Commission i.e. the Assembly of Heads of States and Government which meet once a year in regular sessions and at any time in extra-ordinary sessions. Their decisions are usually subject to approval by two-thirds majority of Member States of the Commission. The regional legal framework must emanate from the existing conventions, protocols and provisions. These multilateral environmental agreements are the raw materials for the introduction of a regional policy framework which would address and regulate the total removal process of oil and gas installation in GoG. This article argues in support for a regional legal policy for the removal of oil and gas installations on the GoG similar to the Oslo and Paris Agreement (OSPAR Convention) which gave birth to the regional legal instrument for European nations involved in the protection of the maritime environment with binding effect on member States.

The regional policy should incorporate precautionary and the polluter pays principles for effective implementation during removal of offshore oil and gas installation. To strongly postulate a position for this policy, the global conventions which member States have signed must

1. The Gulf of Guinea Commission was established in accordance with Article 2 of the 2001 Gulf of Guinea Treaty. In effect, several organs were formed under the Gulf of Guinea Commission in attaining its high goals. The organs include the Assembly of Heads of States and Government, Council of Ministers, the Secretariat and Ad-hoc Arbitration mechanism under Article 6 (a-d). The Assembly of Heads of States and Government is the supreme organ of the Commission which is held once a year in regular sessions. Extra-curricular sessions are usually held by approval of two-thirds majority of Member States of the Commission in accordance with Article 7. Since its formation in 2001, the Commission has adopted many workable strategies in response to multidimensional threats to maritime security in the region through integrated maritime security efforts according to International Peace Institute Expert round table Meeting 2013 Report 1. Reports of the incessant attacks happening along the GoG were the original trigger for the introduction of these strategies. Having been an arena of criminal actions such as piracy and armed robberies, drug trafficking, etc. and subsequently a zone of high insecurity and instability, the GoG was dubbed 'the New Danger Zone' by the International Crisis Group (ICG). See Katja Lindskov Jacobsen and Johannes Reber Nordby, Maritime Security in the Gulf of Guinea Report (Royal Danish Defence College Publishing House 2015) 7. According to Gilpin, the maritime security issues in the GoG caused a reported estimate of revenue loss of $2 billion to the region. See Raymond Gilpin, 'Enhancing Maritime Security in the Gulf of Guinea' (2007) 6 Strategic Insights 1, 1. As the tensions in the region escalated, the GoG Commission was formed aiming at combating these security challenges. The regional organization also aimed at achieving an acceptable level of maritime security through collaboration of the member States. These strategies are coordinated by the GoG Commission which is comprised of countries in both west and central Africa. Ultimately, these collaborative strategies could also prove helpful in designing new regional legal framework and policies for the decommissioning of offshore oil and gas installation to ameliorate the maritime safety, peace and overall security in GoG region.

be examined to devise adequate provisions to enhance the proposed regional policy framework and implementation. It is important to note that in bringing to life this policy through the use of international legal instruments would ensure for sustainable use of the oceans resources, ensure the peace of the marine ecosystem, preventing environmental degradation and pollution and safeguarding navigation and life at sea. By reason of regional integration efforts of the Commission and other bodies, this proposed legal policy or framework would be automatically binding on member States upon signature and ratification without recourse to domestic constitutional process of implementation found in the laws of member States. This is because the domestic legal processes clog the wheels of implementation of regional legal policies and framework. In proposing a regional policy on decommissioning of oil and gas installations in the GoG, some provisions from these international legal instruments are mingled together and arranged to form a unified body of policy document and ratified by member States of the Commission for the region.

For the region to have a policy on decommissioning, the Commission should incorporate some parts of the existing Conventions on the removal of offshore installations. Arguably, the proposed legal framework does not need adopt copiously from the above-cited international legal instruments. Rather, a workable legal policy document for the GoG's Decommissioning regime should include intrinsically the following indispensable ingredients:

1. A removal policy must be in place;[1]
2. Regional legal procedures must be established to acquire the member States' approval in the removal of an installation;
3. Environmental restoration and remediation strategies to compensate for the contamination and other devastating results of an offshore installation decommissioning must be anticipated at the regional level;
4. A regional decommissioning funding cycle must be devised;
5. Technical provisions stipulating the prevention of hazardous material release as well as the safety of maritime life during the entire process of decommissioning must be incorporated;
6. The regional Protocol should Establishing technical agency to meticulously supervise the decommissioning process in the regional Protocol;
7. And finally designing a decommissioning database where all information on the installation removal (including the method, time and cost) are stored.

1. See United Nations Development Program, Annual Report 2011 (United Nations Development Program 2012).

Conclusion

Handling the decommissioning process effectively and at the minimum damages requires the designation of policies and legal frameworks in the region as well as sanctions for non-compliance. The purpose of the regional protocol or legal framework is to protect the marine environment as well as to bind operators to comply with global standards in the arena of international oil and gas industry. The responsibility lies primarily within the jurisdiction of the legislative organ of the Commission or an amendment of the treaty through an additional protocol to ensure its legal basis. The author maintains that the recommended contents of what the regional Protocol or legal framework should contain must be treated urgently as many offshore installations need to be assessed in preparation for removal in the near future. Notably, more discoveries of offshore petroleum deposits are legitimate proofs for the introduction of a regional Protocol legal framework on removal of offshore installations to avoid prospective environmental catastrophes at offshore installations which could in effect imperil the overall human and marine life cycles. In light of the above, it is highly recommended that a regional Protocol framework be developed for the region which incorporates the provisions of existing global conventions, protocols and articles.. Finally, this paper is of the view that African countries who are both old and new entrants into oil and gas production in the necessities of the modern era adopt a proposed legal policy framework on decommissioning at the national and regional level to avoid the 'Malaysian' experience through the auspices of the GoG Commission regional policy.

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A Comparative Overview On The European Microstates Constitutionalism

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ABSTRACT

The European microstates offer a notable lesson for both constitutional law and, generally speaking, the theory of state. The article analyzes this typology of state with a comparative method about constitutionalism of them. Indeed, in the 19th century, the concept of state was related, according to these disciplines and Hegel's thought, not only to power, i.e. state power itself but also to "outward power", that is authority at the international level. It is well known that our understanding of state power has changed since then. But, if a key factor in guaranteeing independence at the international level occurred to be might rather than power, something microstates are not familiar with. The result of the contribution is that European microstates teach us a precious lesson: the state is not only a question of power but also of might, the last one understood as the power to perform at the international level.

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1. 1. Introduction: The Case of European Microstates

Microstates exist at both European and worldwide level. Particularly, the European continent counts five microstates (Andorra, Liechtenstein, Monaco, San Marino, and Vatican City)[1], without considering the bigger microstates of Luxembourg and Malta, which belong to the European Union (EU)[2].

First, the microstate phenomenon should be contextualized within the broader process of federalization, typical of German-speaking countries: Austria, Germany, and Switzerland.

The political communities of these countries stand out for their keen sensitivity to federalism. The German Federation consists of subordinate governmental entities, some of which are relatively small, such as the city of Bremen. Switzerland counts some small states making part of the Swiss Confederation. Likewise, Austria has its micro-Länder.

Under these premises, it is clear that the concept of microstate is particularly familiar to the German federalist thought, as well as to all these legislations inspired by the German model[3].

Nowadays, the concept of the microstate takes on particular significance at the European level. Regardless of the size- small, medium, large, all European countries, indeed, seem so small compared to countries such as the US, Russia, China, Brazil, or India. Therefore, European countries ought to act as microstates, following the pattern of those already existing on the European continent[4].

In view of the above-mentioned premises, I intend to comment on three different problems:

1. on the statehood of microstates;
2. on the comparative-constitutional issue arising from the existence of microstates;
3. on the peculiarity of some microstates, as they attract the interest of larger states and their legal systems.

1. See Fiorenzo Toso, Frammenti d'Europa, (Milan: Giuffré, 1996) 145.
2. See Guido Guidi (ed), Piccolo Stato, Costituzione e connessioni internazionali, (Turin: Giappichelli, 2003).
3. See Guarino, La nozione di microstato nel diritto internazionale e nell'ordinamento internazionale, (1 Diritto e giurisprudenza, 1971), 19–20.
4. See Zbigniew Dumienski, 'Microstates as modern protected states: towards a new definition of micro-statehood', (2014), Centre for Small State Studies, Institute of International Affairs.

Analysis of European microstates shows a peculiarity they all have in common, i.e. their Catholicism. This has piqued the interest of ecclesiastic law's scholars to closely study microstates in respect of their common Catholic trait. However, legally speaking, the Catholic character of all these microstates does not produce any significant impact. At this point, the theory could be put forward that microstates historically arose in the attempt to extend a balance of decayed foreign policies governed at a distance: a sort of platform for the exercise of powers elsewhere already banned. This might be the case of Liechtenstein, somehow of Vatican City, and, for some time, of Malta as well[1].

Nowadays, however, it seems that this no longer is the case when it comes to microstate governmental strategies. All European microstates, indeed, are not "governed at a distance" anymore, they are no more, so to speak, hetero-governed: on the contrary, governmental power is firmly rooted in the relevant territory of each microstate[2].

A specific problem regards Vatican City, in so far as there is this knot to untangle concerning the question whether it can be considered a state or rather a sovereignty platform for the Catholic Church. In other words, the question revolves around whether the Holy See, as a subject of public international law, and the State of Vatican City, as a subject of international law as well, can be seen separately from one another.

Without a doubt, recent events rather emphasize the dissociative option, so to say. However, in my opinion, this leads to two sets of problems. On the one hand, it has always been assumed that the Holy See, that is the Catholic Church, is the one to be the actual subject of international law, as properly pointed out in the so-called Law of Guarantees, after the annexation of St. Peter's estate. On the other hand, the assumption has also always been that the territory of the Vatican City serves as a mere ecclesiastic sovereignty platform. Exactly with this in mind, the popes claimed the sovereignty of Vatican City during the Risorgimento.

International public law's scholars have always endorsed this view. I see, therefore, no reason to quit this approach to the Vatican's particular case. Vatican City remains a both significant and ancient subject of international law that deserves a *sui generis* treatment.

That being said, the attempts to separate the Holy See from the State of Vatican City, carried out also by the Holy See, represent a source of risk for the Holy See itself, the Papacy, and the Catholic Church. In the event of the imposition of European regulatory requirements, problems could arise concerning Vatican City's state organization in terms of democratic principles, separation of powers and protection of human rights. All these aspects could prove problematic for the Catholic Church. Hence, I exclude the possibility of legal recognition of two different subjectivities at international level – the Holy See and the State of Vatican City.

Microstate experts have often expressed their positive opinion on research opportunities offered by constitutional comparative law, suggesting that results obtained in this field can be certainly applied to the study of microstates as well.

However, the method of constitutional comparison, whenever applied to the microstate

1. See Wouter Veenendaal (ed), 'Politics and Democracy in Microstates: a Comparative Analysis of the Effects of Size on Contestation and Inclusiveness', (2013), Vol. 8, No. 2, Island Studies Journal, 321;
Soamiely Andriamananjara & Maurice Schiff, 'Regional Groupings among Microstates', (1998), Washington: World Bank.
2. See Jorri Duursma, Self-determination, Statehood and International Relations of Micro-states: the Cases of Liechtenstein, San Marino, Monaco, Andorra and the Vatican City, (Leiden: University of Leiden 1994).

case study, has turned out to be a winding road for scholars who took the risk to go it down, similar to the case of the well-known method of comparative private law. This is due to all the challenges the study of microstates entails.

Some of them can be briefly summed up as follows:

Constitutional comparison applies to major legal entities characterized by a high degree of cohesion, excluding micro-comparison phenomena due to their high specialization level. Indeed, constitutional comparison explores entire legal systems, since constitutions include the whole vastness of state legal systems they refer to, either in the case of major states or minor ones. It has been proved that the study of the constitutions of European microstates was the result of a long historical path, full of specific features that cannot be easily compared with each other.

By way of example, the history of Malta is so different from San Marino's or Andorra's that it can be stated that to compare such different state patterns, poses serious difficulties. As a result, this suggests that the path of constitutional comparison should be set aside.

Lastly, it is fundamental to remind that constitutional comparative law focuses on political systems, not on human nor economic affairs occurring within those systems. For example, commercial transactions always take place following the same procedure that is covered by a specific set of rules, whether we are talking about China or San Marino. Issues arising from the study of trading mechanisms can be easily pinpointed, then treated separately not only from the legal order they function in, but also from civil law. Constitution, instead, is the direct result of political will, hence it has nothing to do with socio-economic influence factors.

The study of microstates, though being apparently so similar to each other, at least in terms of size, allowed to shed light on the importance of all the above-mentioned peculiarities. It follows that comparative scholars are required to pay particular caution[1].

2. 2. The European Microstates Constitutionalism: A Comparative Perspective

Notwithstanding that, the question arises, what European major states can learn from microstates.

Firstly, scholars have asked themselves if microstates can be considered as a sort of constitutional laboratory for the analysis of impacts produced by the model of major European countries on minor ones, but also for the experimentation of innovative solutions in a politically quiet and, therefore, favorable atmosphere.

Nevertheless, major countries holding the rank of reference model do not always offer innovative insights. Reception phenomena are, as a matter of fact, often observed in the study of microstates. It is undoubtedly the case of Malta with respect to England, Andorra with respect to Spain, Monaco with respect to France and, eventually, San Marino with respect to Italy, but there is more to it. Another common phenomenon regards the tendency of major member states to put forward requests and pleas claiming that microstates shall comply with the same solutions they had previously adopted as a prerequisite for EU accession or for the drafting of association agreements.

1. See Elisa Bertolini, 'The Constitutional Identity of European Micro States and the Continental Integration Mechanisms. The Influence of the Diminutive Size', (2020), ICL Journal, vol. 14, no. 2, 133.

The proof of this receptive phenomenon is the frequent recourse to constitutional review in almost all microstates. It results at European level, therefore, that major member states drag minor ones.

Microstates are often prone to acknowledge the European Convention on Human Rights (ECHR), this, in turn, put them in the position to account for instances of democracy, separation of powers, guarantee schemes for the safeguard of the rule of law, also by means of constitutional supervision.

Monarchy based countries, such as Liechtenstein and Monaco, are particularly struggling with the ever-increasing parliamentarization ambition of their national institutions.

There is no way not to praise these achievements of modern constitutionalism. Though, the question must be asked whether we are all experiencing, including us constitutionalists, a sort of euphoria, the euphoria of success. In the wake of emperor's Wilhelm II early 20th century enthusiasm, we are now similarly tricked by the belief that "we have achieved democracy, separation of powers" etc., but we should rather question this false certainty. This is a valuable lesson also for microstates; all too often, they have uncritically and passively embraced foreign constitutional achievements.

As to separation of powers, it can be easily proved that all three of them are going through a serious crisis. As regards legislative power, the crisis of this branch has almost become a constitutional triviality. Administrative power, the second state power, is no more than a bunch of heterogeneous absolutism remainings, whose traces are difficult to spot in the wake of nowadays' reconstructive-oriented dogmatism. As a matter of fact, no one can say exactly what administration is nowadays. Even less successful is the search for criteria that could help defining it.

As to judiciary power, we are surely proud of the independency of todays' judiciaries, yet almost every country suffers from, in some cases severe, obstruction to the independence of their judges.

It is thus appropriate to make an appeal for prudence to all European microstates, in the hope that they will not fall victim to highly praised constitutional triumphs.

Lastly, I would like to emphasize a positive aspect that European microstate constitutionalists consider as a real accomplishment. This especially concerns the courage of microstates in terms of remaining faithful to their own traditions, on the one hand, while on the other they keep assimilating foreign constitutional insights, turning them later into own sources of law.

This is particularly true of San Marino, where the so-called "traditional Constitution" and the written one successfully coexist next to each other[1].

Andorra[2] and Liechtenstein[3], in turn, preserve their own juridical tradition, likewise Malta keeps some elements of English origin, though adjusted to the Maltese tradition.

Therefore, it would be desirable for European microstates if they held to their own tradi-

1. See Guido Guidi (ed), Un collegio garante della costituzionalità delle norme in San Marino, (Rimini: Maggioli 2000).
2. See Viñas Farré, 'La ley sobre la nacionalid andorrana. Repercusión de la sentencia del Tribunal constitucional del 15 de marzo de 1994', (1994) Revista jurídica de Catalunya, 1057–67; Valls, 'La nova constituciò d'Andorra', (1993), Andorra La Vella: Premsa Andorrana; Vilar, 1984-1985. Vers un nouveau statut juridique des vallées d'Andorre: la réforme constitutionnelle du 15 janvier 1981, Aix-en-Provence: Mémoire I.E.P. Aix-en-Provence.
3. See Rita Mazza, 'Microstati e principio di eguaglianza nella riflessione sulla membership del Liechtenstein all'ONU', (2011). In: Vassalli di Dachenhausen (ed), Atti del Convegno in memoria di Luigi Sico: il contributo di Luigi Sico agli studi di diritto internazionale e di diritto dell'Unione europea, Naples: Editoriale Scientifica, 387–406.

tions, to which, incidentally, the European juridical thought is also closed. By doing so, they would avoid being eventually absorbed by bureaucratic jurisprudence.

In a desirable scenario, microstates should also turn away from the model of European major countries in which common law has been gradually replaced with both application and interpretation of written law. Another phenomenon typical of microstates and directly related to their traditionalism, as previously discussed, is their marked tendency towards federalism.

A quick look at the inner organization of microstates seems to confirm a famous ancient Greek saying, according to which there is no limit to the smallest.

Though microstates are tiny countries on their own, they are additionally characterized by the trend of splitting up themselves into increasingly smaller entities: cantons, parishes, castles, districts etc.

From this viewpoint, microstates represent a full-fledged federalism laboratory[1]; on the one hand, it seems there are no limits to juridical subdivision, on the other exactly thanks to this fragmentation tendency it was possible for microstates to preserve ancient traditions[2].

In this regard, microstates can provide valuable lessons to constitutionalists that focus on major countries, to whom I would like to address a piece of advice: one should be aware that federalism has always been at the center of a thwarted love. Federalism, indeed, is praised precisely in these countries that luck it most. In Germany, for instance, antifederal, i.e. centralizing trends are frequently the subject of collective discourse. Yet, precisely Germany could be considered as a model for European federalism[3].

Microstate federalism is a real treasure that should be safeguarded with determination.

Lastly, microstates offer a notable lesson for both constitutional law and, generally speaking, for the theory of state. In the 19th century, the concept of state was related, according to these disciplines and Hegel's thought, not only to power, i.e. state power itself, but also to "outward power", that is authority at international level.

It is well known that our understanding of state power has changed since then. Indeed, a key factor in guaranteeing independence at international level occurred to be might rather than power, something microstates are not familiar with. Once again, microstates teach us a precious lesson: state is not only a question of power, but also of might, the last one understood as power to perform at international level[4].

The questions that spontaneously arise regard the progress that has been made up to now by microstates and the direction in which they are moving with consideration of the historical development of our constitutionalism[5]. An important benchmark in this process is offered by the new constitutional framework that has established not only at supranational level, but also at a federal one – based, anyway, on pluralism. Such a framework has replaced the cohesive role played once

1. See Peter Häberle, 'Federalismo, regionalismo e piccoli Stati in Europa', (1994). In: Zagrebelsky (ed), Il federalismo e la democrazia europea, Rome: NIS, 78 ff.
2. See Jurri Duursma, 'Fragmentation and the International Relations of Micro-states: Self-determination and Statehood', (1996), Cambridge: Cambridge University Press, 976.
3. See Morganti (ed.), Europa: il ritorno dei piccoli stati: autonomie, piccole patrie, processi di sussidiarietà, (Rimini: Il cerchio 2012).
4. See Marcin Łukaszewski, 'Research on European Microstates in Social Science. Selected Methodological and Definitional Problems', (2011), (1) Ad Alta Journal of Interdisciplinary Research, 74–77.
5. See De Vendeuil, 'L'industrialisation des micro-états européens: Liechtenstein, Monaco, Andorre', (1983), Problemes economiques, 29–32.

by the concept of nation. It seems that, at the present stage in the history of European constitutionalism, the concept of microstate could be restored and reactivated, at least partially.

The focus of future studies on this topic could help to examine, by means of constant and comparative monitoring, the solidarity of microstates in order to better understand both their historical identity and their current situation. Additionally, targeted studies could also offer unexpected insights or solutions to serious limitations of EU approach to this new constitutional framework of which not only Europe itself, but also the whole world is in need[1].

1. See Marcin Łukaszewski, 'Research on European Microstates in Social Science. Selected Methodological and Definitional Problems', (2011), (1) Ad Alta Journal of Interdisciplinary Research 74–77.

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Studying the Conditions for Acquisition of Iranian Citizenship by the Children from the Marriage of Iranian Women to Foreign Men

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ABSTRACT

The conception of nationality is about the place someone is born— in reality the place of his/her birth land. Hence Nationality is relating to the place of birth and can often be regarded as ethnic or racial matter. The right of nationality is the most important and cardinal title of human right. Therefore, International law assigns that States provisions to the persons nationalities is not arbitrary and they have to observe their human rights obligations relating the grant and loss of people nationality. Hence, lack of nationality for someone, make him/her have no chance for school, doctor appointment, job, bank account, or even marriage right_ all the most necessary rights_. Nevertheless, Millions of people all over the world are out of nationality and are regarded stateless ! The conception of stateless is about one who is considered as a nationless, without any legal and political support and protection by a Sovereignty. For more explication of nationality importance, there is a number of regional and international human rights concerning the right to a nationality. Article 15 of the Universal Declaration of Human Rights indicate “[e]veryone has the right to a nationality” and that “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

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Nationality is the legal bond between a person and a state. It denotes membership and gives rise to both rights and duties on the part of the individual and the state concerned at the same time. Each state's municipal law dictates on whom nationality shall be conferred. The two principal doctrines for the attribution of nationality (at birth) are *jus soli* (nationality based on birth on state soil) and *jus sanguinis* (nationality based on descent from a national). International law recognizes, in principle, the freedom of states to regulate access to nationality as an exercise of sovereignty. However, some limits to this freedom may be imposed under international customary and treaty law.

It should be noted that there is another term as regards the legal bond between a person and a state namely "citizenship" which differs from nationality in some respects. Citizenship is a narrower concept than nationality. It can be said that citizenship is about giving a person a legal status in relation to the sovereignty, while nationality is about the natural identity of individuals. To put it another way, nationality is linked to one's family roots, religion, language, tradition, culture etc. Therefore, nationality is concerned with the individual's birthplace, whereas citizenship is granted to a person through special legal requirements. However, generally speaking, nowadays they are used interchangeably and issues such as the residence of individuals falls within the scope of both nationality and citizenship simultaneously. Accordingly, both of them are employed in the same meaning in this piece.

Closely linked to the legal identity of the individual and his/her enjoyment of other human rights, right to a nationality is recognized in a series of international legal instruments. According to art. 15 of the *Universal Declaration of Human Rights* (1948), "everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality". Art 24(3) of *International Covenant on Civil and Political Rights* (1966) states that "every child has the right to acquire a nationality". In addition, art. 9 of *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) states that "1. States Parties shall grant women equal right s with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless

or force upon her the nationality of the husband. 2. States Parties shall grant women equal rights with men with respect to the nationality of their children". Furthermore, in art. 7(1) of the *Convention on the Rights of the Child* (1989) the right of the child to acquire a nationality is recognized. Also, in accordance with art. 29 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990), each child of a migrant worker shall have the right to a name, to registration of birth and to a nationality. Under art. 18(2)) of the *Convention on the Rights of Persons with Disabilities* (2006), children have the right to acquire a nationality.

Owing to the significance of having nationality for members of a society in the contemporary era, the 1979 Iranian Constitution (as amended on 28 July 1989) has recognized the right to nationality and has declared that foreign nationals may acquire Iranian citizenship. In this regard, Article 41 of the Constitution states that: "Iranian citizenship is the indisputable right of every Iranian, and the government cannot withdraw citizenship from any Iranian unless he himself requests it or acquires the citizenship of another country". Also, article 42 declares that: "Foreign nationals may acquire Iranian citizenship within the framework of the laws. Citizenship may be withdrawn from such persons if another State accepts them as its citizens or if they request it".

Citizenship in Iran is classified into two original and acquired types. The original citizenship can be granted only through lineage while the acquired citizenship can be result of marriage or volunteer measures of someone to acquire Iranian citizenship. The citizenship of newborns is merely the original not the acquired citizenship, except for newborns of Iranian women married to foreign men. In this case, it is essential to acquire Iranian citizenship according to the law which will be addressed bellow.

In the Iranian legal system, the original citizenship is assigned to newborns through blood and soil system. That is to say, by the blood system, newborns citizenship depends on the birth of newborn to an Iranian father or mother. This means that the child acquires the parents' citizenship once being born. However, in the soil system, the citizenship of the newborn is determined in accordance with his/her birth place. In other words, according to the soil system, each person acquires the citizenship of his/her country and place of birth. For every person born within the territorial boundaries of a state, a spiritual political relationship is established between that nation-state and that person is known as a citizen of the related state. Therefore, paragraph 3 of Article 976 of Iranian Civil Code recognizes the granting of citizenship to newborns who are born in Iran with unknown parents. Moreover, according to paragraph 4 of mentioned article, only those persons are considered as Iranians that are born of foreign parents who one of them is born in Iran's territory. In this regard, the Constitution of the Islamic Republic of Iran recognizes the citizenship of Iran as an absolute right of every Iranian through Articles 41 and 42. In addition, the government cannot revoke the citizenship of any Iranian, unless by the person's request, or when the individual becomes a citizen of another country.

As was previously mentioned, Article 41 of the Constitution of the Islamic Republic of Iran considers Iranian citizenship as the inalienable right of every Iranian. Consequently, being Iranian should be assessed and examined in accordance with this Article. In this regard, people, in any case, are either Iranians or non-Iranians who can acquire Iranian citizenship if they tend

and Iranian authorities also accept to confer them the Iranian citizenship. After this process, the child/children of whom that can acquire Iran citizenship, acquire Iran nationality and citizenship automatically without any measure taken by parents or children. While, the foreigners who do not have Iranian nationality or citizenship, neither themselves nor their children are regarded as Iranians automatically and becoming an Iranian requires their request through a predetermined legal and administrative process. In this respect, Article 42 of the Constitution specifies that foreign nationals may become citizens of Iran within the existing laws, and their citizenship is withdrawn when another government accepts their citizenship or they themselves apply to relinquish their Iranian citizenship.

Articles 976 to 991 of the Civil Code of the Islamic Republic of Iran stipulate more detailed provisions in this regard. These provisions confer nationality through both principles of jus soli and jus sanguinis. Children born to Iranian fathers always are granted Iranian nationality regardless of being born inside or outside the country; but for decades, the Iranian nationality law prevented women form passing on their nationality to their children. Iranian law grants nationality jure sanguinis but only by paternal line which means that Iranian mothers do not possess the same rights as Iranian fathers to confer nationality to their children. This could be very problematic, in particular, in cases where the father is a non-Iranian, unknown or stateless person. In 2005, among a number of amendments which were proposed to Parliament on women's citizenship rights, an amendment to Article 976 was approved by Parliament. This led to a Constitutional Amendment by adding a Single Article and two Notes to Article 1060 of the Civil Code in 2006, allowing children born to Iranian mothers and foreign fathers in Iran to apply for Iranian nationality after reaching the full age of 18. The Amendment was ratified during the open meeting of the Islamic Consultative Assembly (Parliament), and approved by the Guardian Council on 21 September 2006.

Despite the positive aspect of the law, it was still difficult -if not impossible- for women to pass on their nationality down to their children. Providing documents such as proof of the child's birth in Iran, proof of renouncement of the child's foreign nationality, marriage certificate, and proof of legal residency of the foreign father in the country, presented difficult eligibility requirements which excluded children born to stateless/illegal fathers or those born out of wedlock from this law. Finally, and above all, naturalization under this law was only possible upon reaching the full age of 18 and, therefore, could not tackle the issue of childhood statelessness. In other words, this would put the children concerned at risk of deprivation of their rights to education, health care, etc., prior to being recognized as Iranian citizens at the age of 18. Furthermore, this Amendment caused a confusion for the Family Courts regarding the applicability of the appropriate law.

Due to these challenges and difficulties, finally, the Parliament signed a new law in 2019 which allows Iranian mothers to file an application for their children from the moment of birth, regardless of being borne in Iran or abroad. Those who are 18 or above are also able to apply for Iranian nationality independently. A security check by the Intelligence Ministry and the Intelligence Organization of the Islamic Revolutionary Guard Corps is required in both cases. The response to this security check will be made within a maximum of three months. The police

are also required to issue a residence permit for a non-Iranian father in the absence of a security problem. This means that children of Iranian mothers can now apply for Iranian citizenship. It may well be argued that the 2019 law takes a fundamental step towards eliminating the gap between men and women in the law. The most significant advantage of the new law is that it includes children born to Iranian mothers abroad- a crucial matter which was neglected in the 2006 Amendment. Although the new law is implemented fully and retroactively, the gap is still remaining. The Civil Code grants nationality to children born to Iranian fathers automatically, but that is not the same for Iranian mothers as they are still required to file an application for their children. Moreover, it still puts children of those Iranian women who are married to un-documented migrants or refugees at risk of statelessness.

The Administrative Action issued by the Cabinet on 2 June 2020 on this new law clarifies that the law applies to every Iranian woman who is married to a non-Iranian man and has a child bellow the age of 18. Under this regulation, an Iranian woman is a woman who has been an Iranian citizen, according to Iranian laws and regulations, before the birth of her child. Article 3 of the Action states that the criterion for an Iranian mother's legal marriage with the foreign father of the child covered by this law is an official marriage contract or any valid legal document demonstrating the occurrence of marriage or the issuance of a judicial decision (domestic or foreign) indicating marriage and the existence of a marital relationship. The issuance and enforcement of a final divorce decree or the annulment of a marriage does not preclude the consideration of an application for the declaration of Iranian citizenship for the children of a marriage resulting in a divorce decree.

It's worth noting that UNICEF has confirmed and welcomed this measure in the following terms: "UNICEF welcomes the adoption and implementation of the new Iranian Nationality Law which enables children born to Iranian mothers and non-Iranian fathers to obtain Iranian nationality. According to official figures, 28,000 children below the age of 18 years have filed applications to receive birth certificates and a nationality. The first group obtained their Iranian nationality and Iranian identity booklet (*shenāsnāmeh*). The implementation of this Law is a milestone for the protection of the rights of stateless persons in Iran, including children. Statelessness can hinder a child's access to basic social services such including healthcare and education. UNICEF welcomes this important development for children on the 31st anniversary of the adoption of the Convention on the Rights of the Child which recognizes the child's right to acquire a nationality in Article 7. UNICEF remains committed to continue supporting the Government of Iran and partners for promoting child wellbeing in the Islamic Republic of Iran".[1]

Previously, in accordance with the Iranian Civil Code, children of an Iranian mother and a non-Iranian father who were born in Iran could only apply for citizenship after reaching the age of 18. This has led children of Iranian mothers to face various problems, for example as the most important one, to encounter of lacking identification documents. Hence, the legal status of the citizenship of these persons were unclear until the age of 18. Thus, the Iranian Cabinet passed a bill in 2021 to adopt the citizenship of children of Iranian mothers and foreign fathers, at the request of the mother before the age of 18 and at the request of the person, after the age of 18. Thus,

1 . See https://www.unicef.org/iran/en/press-releases/unicef-welcomes-irans.

Iranian women with foreign spouses whether inside the country or abroad can now obtain Iranian citizenship for their children. It is worth mentioning that before the adoption of the Single Article of the law determining the citizenship of children born of Iranian women married to foreign men, some Iranian jurists and lawyer, invoking paragraph 4 of Article 976, stated the possibility of granting primary citizenship to the child via mother. Because paragraph 4 of Article 976 of the Civil Code indicates that "foreign parents provided one of them is born in Iran". However, some other jurists rejected this argument and considered the non-transfer of citizenship to the child through the mother. Fortunately, this disagreement was ended by passing the law determining the citizenship status of children born to Iranian women married to foreign men, and this issue was solved. According to this law, even if children born to Iranian women married to foreign men were born in Iran, do not obtain the original citizenship, rather they can only obtain the acquired one.

Therefore, newborns of Iranian mothers are initially considered foreigners and they can only apply for Iranian citizenship through the legal process. Thus, obtaining an Iranian identity card for a newborn child in Iran, depending on the foreign citizenship of the child at birth requires the subsequent acquisition of Iranian citizenship by the mother or her/himself. These individuals will be accepted as Iranian citizens if they do not have a criminal or security background and declare the denial of non-Iranian citizenship. Also, when applying for Iranian citizenship, they must provide special permission for their mothers' marriage to a foreign father. This permission is issued by the government of Iran at the time of marriage following Article 1060 of the Civil Code. However, the issuance of special permission by the government requires its compliance with Article 1059 of the Civil Code stating that marriage of a Muslim woman to a non-Muslim man is not permissible. Therefore, in the case of an Iranian Muslim woman married to a foreign non-Muslim man, the government will not issue the special permission which deprives the newborn's citizenship. However, the child of a non-Muslim Iranian woman married to a non-Muslim or Muslim foreign man can apply for Iranian citizenship under other legal conditions. It should be noted that the provision of Article 1060 of the Civil Code, based on the need to acquire a special permission from the government, has a political aspect and it tries to protect the interests of Iran before protection of the Iranian women's rights. In this way, the Iranian legislature forces women to be more careful and contemplative when marrying foreigners. However, in case of meeting all legal conditions, finally, when an Iranian Muslim woman insists on marrying a foreign Muslim or non-Muslim man, the government must issue marriage license if the woman is also a non-Muslim. Though, it seems that if an Iranian woman legally marries a foreign man without obtaining the marriage license, their newborn child should still be eligible for Iranian citizenship at the request of the mother or her/his own. Because obtaining a marriage license is the only approval of their correct marriage, which is not effective in concluding the contract correctly while depriving the newborn of citizenship.

Thus, according to the above conditions, children born to Iranian mothers married to a foreign must pass the following process to acquire Iranian citizenship:

1. First, the applicant must make a case at the orthopedic residence of the applicant (Office of Foreign Citizens and Immigrants Affairs) or at the Office of Citizenship, Refugees, and Immigrants throughout the country.

2. Then, he/ she must apply for a request in the Article 3 Commission of the Citizenship Regulations.
3. Passing the first and second stages of the process, the inquiry from NAJA police and acquiring the certificate should be performed.
4. The citizenship application is then considered by the Delegation of ministers.
5. If approved, the applicant must show her/his commitment to the Constitution of the Islamic Republic of Iran by participating in the constitutional test and taking the oath.
6. In case of acceptance, the person should submit his/her foreign documents to the Ministry of Foreign Affairs.
7. Ultimately, the person should obtain the identity card by referring to the civil registry.

It should be noted that according to the Iranian Civil Code and the Civil Registration Law, a person born in Iran must be registered up to 15 days after birth, regardless of the nationality of the parents, and the birth certificate is issued. Parents registering the birth date later than this date are found guilty and will be dealt with according to the law.

To conclude, it appears that by allowing Iranian women to pass their nationality down to their children, the new law marks a ground-breaking step towards reducing the gap between men and women in Iran where nationality is mainly transmitted jus sanguinis by the father. While the law still does not put mothers and fathers on a fully equal footing with respect to their ability to confer nationality, it represents a significant incremental improvement. Furthermore, although Iran is not party to the conventions on statelessness, the Government of Iran is taking concrete steps towards the prevention and reduction of statelessness in the country.

Appendix

Provisions related to Nationality and Citizenship in Law of Iran

The Constitution of Islamic Republic of Iran (1979 as of amended in 1989)

Article 41:

Iranian citizenship is the indisputable right of every Iranian, and the government cannot withdraw citizenship from any Iranian unless he himself requests it or acquires the citizenship of another country.

Article 42:

Foreign nationals may acquire Iranian citizenship within the framework of the laws. Citizenship may be withdrawn from such persons if another State accepts them as its citizens or if they request it.

Iranian Civil Code (1928)

Article 976 – The following persons are considered to be Iranian subjects:

1. All persons residing in Iran except those whose foreign nationality is established; the foreign nationality of such persons is considered to be established if their documents of nationality have not been objected to by the Iranian Government.
2. Those whose fathers are Iranians, regardless of whether they have been born in Iran or outside of Iran;

3. Those born in Iran of unknown parentage;
4. Persons born in Iran of foreign parents, one of whom was also born in Iran.
5. Persons born in Iran of a father of foreign nationality and have resided at least one more year in Iran immediately after reaching the full age of 18; otherwise, their naturalization as Iranian subjects will be subject to the stipulations for Iranian naturalization laid down by the law.
6. Every woman of foreign nationality who marries an Iranian husband.
7. Every foreign national who has obtained Iranian nationality

Note – Children born of foreign diplomatic and consular representatives are not affected by Clauses 4 and 5 of this Article.

Article 977 – (a) If persons mentioned in Clause 4 of Article 976 wish to accept the nationality of their fathers, they must submit a written request to the Ministry of Foreign Affairs to which they should annex a certificate issued by the national Government of their fathers to the effect that the said Government would recognize them as their own nationals.

(b) If persons mentioned in Clause 5 of Article 976 after reaching the full age of 18 years wish to remain of the nationality of their fathers, they must, within a period of one year, submit a written request to the Ministry of Foreign Affairs to which they should annex a certificate from their father's national Government indicating that the said Government would recognize them as its own nationals.

Article 978 – Reciprocal treatment will be observed in the case of children born in Iran of nationals of countries where children born of Iranian subjects are considered nationals of that country and the return of such children to Iranian nationality is made dependent on permission.

Article 979 – Persons can obtain Iranian nationality if they:

1. Have reached the full age of 18;
2. Have resided in Iran for five years, whether continuously or intermittently;
3. Are not deserters of the military service;
4. Have not been convicted of non – political major misdemeanors or felonies in any country;

In the case of Clause 2 of this Article, the period of residence in foreign countries in the service of the Iranian Government will be considered as residence in Iran.

Article 980 – Those opting for Iranian nationality who have rendered services or notable assistance to public interests in Iran, or who have Iranian wives by whom they have children, or who have attained high intellectual distinctions or who have specialized in affairs of public interest may be accepted as nationals of the Islamic Republic of Iran without the observance of the requirement of residence, subject to the sanction of the Council of Ministers and provided that the Government considers their naturalization to Iranian nationality to be advisable. (Amended in accordance to the Law on Amendment of Several Articles of the Civil Law, 1991)

Article 983 – An application for naturalization must be submitted to the Ministry of Foreign Affairs directly or through the Governors or Governors-General, and be accompanied by the following documents:

1. Certified copies of identity documents of the applicant, his wife and children.
2. Certificate from the police stating the period of residence of the applicant in Iran, his clean record, and possession of sufficient property or of employment which ensures a livelihood. The Ministry of Foreign Affairs will complete, if necessary, the particulars concerning the applicant and will send them to the Council of Ministers in order that they make an appropriate decision in rejecting or approving the application. If the application is approved, a document of nationality will be submitted to the applicant.

Article 984 – The wife and minor children of those who obtain Iranian nationality in accordance with this Act will be recognized as Iranian nationals but the wife can submit, within one year of the date of issue of nationality documents to her husband, and the minor children can submit, within one year after reaching the full age of 18, a written request to the Ministry of Foreign Affairs thereby accepting the former nationality of her husband or the father as the case may be, provided, however, that the certificate mentioned in Article 977 is attached to the declaration of the children whether male or female.

Article 985 – Adoption of Iranian nationality by the father in no way affects the nationality of his children who may have attained the full age of 18 at the date of the father's application for naturalization.

Article 986 – A non – Iranian wife who may have acquired Iranian nationality through marriage, can revert to her former nationality after divorce or the death of her Iranian husband, provided that she informs the Ministry of Foreign Affairs in writing of the facts, but a widow who has children from her former husband cannot take advantage of this right so long as her children have not attained the full age of 18. In any case, a woman who may acquire foreign nationality according to this Article cannot possess any immovable property except within the limits fixed for foreign nationals. If she possesses immovable property more than that allowed in the case of foreign nationals, or if subsequently she comes into possession of such property through inheritance exceeding that limit, she must transfer by some means or other to Iranian nationals the surplus amount of the immovable property within one year from the date of her renunciation of Iranian nationality or within one year from the date of acquiring the inherited property. If there is Failure to fulfill the requirements, the property in question will be sold under the supervision of the local Public Prosecutor and the proceeds will be paid to her after the deduction of the expenses of the sale.

Article 987 – An Iranian woman marrying a foreign national will retain her Iranian nationality unless according to the law of the country of the husband the latter's nationality is imposed by marriage upon the wife. But in any case, after the death of the husband or after divorce or separation, she will re – acquire her original nationality together with all rights and privileges appertaining to it by the mere submission of an application to the Ministry of Foreign Affairs, to which should be annexed a certificate of the death of her husband or the document establishing the separation.

Note 1– If the law of nationality of the country of the husband leaves the wife free to preserve her former nationality or to acquire the nationality of her husband, the Iranian wife who

opts to acquire the nationality of the husband and who has proper reasons for doing so can apply in writing to the Ministry of Foreign Affairs and the Ministry can accord her request.

Note 2 – Iranian women who acquire foreign nationality by marriage do not have the right to possess landed property if this would result in the economic dominance of a foreigner. The finding of this issue is the responsibility of a commission comprising representatives of the Ministry of Foreign Affairs, the Interior Ministry and the Intelligence Ministry.

The provisions of Article 988 and its note on persons who have renounced Iranian nationality and must leave do not apply to the above – mentioned women. (Amended in accordance to the Law on Amendment of Several Articles of the Civil Law, 1991)

Article 988 – Iranian nationals cannot abandon their nationality except on the following conditions:

1. That they have reached the full age of 25.
2. That the Council of Ministers has allowed their renunciation of their Iranian nationality.
3. That they have previously undertaken to transfer, by some means or other, to Iranian nationals, within one year from the date of the renunciation of their Iranian nationality, all the rights that they possess on landed properties in Iran or which they may acquire by inheritance although Iranian laws may have allowed the possession of the same properties in the case of foreign nationals. The wife and children of the person who renounces his nationality according to this Article do not lose their Iranian nationality, whether the children are minors or adult, unless the permission of the Council of Ministers allows them to renounce their nationality;
4. That they have completed their national military service.

Note A -Those who may venture to apply for the renunciation of their Iranian nationality according to this Article in favor of a foreign nationality must, besides carrying out the stipulations of Clause 3 of this Article, leave Iran within three months. If they fail to do so, the proper authorities will issue Deportation Orders for their expulsion and will sell their property. The above – mentioned prescribed grace period may be extended subject to the approval of the Ministry of Foreign Affairs up to a maximum period of one year.

Note B – The Council of Minister may in the course of approving the denunciation of nationality by an unmarried Iranian woman, approve the denunciation of the nationality of her children provided that they are without father or paternal grandfather and are less than 18 years of age, or otherwise lack legal capacity. Also, her children of less than 25 years of age can denounce their nationality in conformity with their mother's denunciation of nationality

Article 989 – In case any Iranian subject acquired foreign nationality after the solar year 1280 (1901 – 1902) without the observance of the provisions of law, his foreign nationality will be rendered null and void and he will be regarded as an Iranian subject. Nevertheless, all his landed property will be sold under the supervision of the local Public Prosecutor and the proceeds will be paid to him after the deduction of the expenses of sale. In addition, he will be disqualified to attain the position of Cabinet Minister or Deputy Minister or of membership in

the Legislative Assemblies, Provincial and District Councils and Municipal Councils, or any other governmental positions.

Note – The Council of Ministers may on the basis of certain considerations, upon the request of the Ministry of Foreign Affairs, recognize the foreign nationality of those persons who are subject to this Article. Such persons may be given, with the approval of the Ministry of Foreign Affairs, the permission to visit or reside in Iran.

Article 990 – Iranian subjects who may have personally, or whose fathers may have renounced Iranian nationality in accordance with the provisions of law and who may wish to re – acquire their original nationality can be reinstated in their Iranian nationality by a mere application unless the Government may deem the grant of their application to be inadvisable.

Article 991-Particulars and instructions concerning the enforcement of the law of nationality and the exaction of the administrative fees in the case of those who may apply for naturalization as nationals of the Islamic Republic of Iran, or renunciation of Iranian or retention of original nationality, will be specified in the regulations which will have to be sanctioned by the Council of Ministers. (Amended in accordance to the Law on Amendment of Several Articles of the Civil Law, 1991)

Article 1060 – Marriage of an Iranian woman with a foreign national is dependent, even in cases where there is no legal impediment, upon special permission of the Government.

Law on Determining the Nationality of Children who are the Result of Marriage between Iranian Women and Foreign men

Single Article (2006)

Children who are the result of marriage between foreign men and Iranian women, who have been born in Iran, or are born in Iran within one year from the date of the ratification of this law, will be able to apply for Iranian citizenship when they reach the full age of 18. These persons will be accepted as Iranian citizens if they lack criminal records or security violation backgrounds and renounce their non-Iranian citizenship. The Interior Ministry obtains evidence of the birth of the child in Iran as well as the issuing of marriage permit as stipulated in Article 1060 of the Civil Law, and the Law Enforcement Forces after being informed by the Interior Ministry issue the residence permit of the foreign father stipulated in this article. Children concerned with this article are permitted to reside in Iran prior to obtaining citizenship.

Note 1– If persons to whom this Articles applies, are older than 18 years of age at the time of the approval of this article, they must, within a period of one year, apply for Iranian citizenship.

Note 2 – Persons who after the date of the ratification of this law are born in Iran, are the result of marriage between a foreign man and an Iranian woman, and the marriage of their parents has been registered from the inception of the marriage in compliance with Article 1060 of the Civil Law, will be accepted as Iranian citizens within one year after reaching the full age of 18 and without meeting the residence requirement stipulated in Article 979 of the Civil Law.

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Book Review of Encyclopedia of Public International Law in Asia

(Seokwoo Lee, ed. 2021)

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ABSTRACT

The Encyclopedia of Public International Law in Asia copyrighted in 2021(3 regional volumes) is an invaluable work of numerous distinguished authors. This comprehensive collection drafted by eminent academic scholars, describes how Asian States deal and interact with public international law. The book organized in 16 State Volumes, reveals the examination of international law and its application in Northeast Asia, Southeast Asia, and Central and South Asia. This reference work has a distinctive feature, compared with others of the genre, in the way that it places a strong focus on the States as the main actors in law-making and law enforcement in international law. Numerous timely issues in international law are covered in each State Volume. Thus this encyclopedia offers a thorough consideration of the many dimensions of Asian States' approaches to international matters. Iran Volume is also included in the book which will be briefly analyzed in this book review. In this brief text, I will try to give a short overview of the book's main points and discuss some detailed opinions about it.

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As it is widely known, the regional and national legal approaches of States to international law can be a source of enrichment and consolidation of international law if these approaches are carried out for the benefit of developing an absolutely universal international law and not calling into question its foundations. In other words, regional and local approaches to international law constitute frameworks for reflection and liveliness of the norms of international law. Currently, despite a common thread of universality of international law, "Western Centrism" remains a central aspect of it. The dearth of academic studies describing Asian and other non-Western State practices and views, and the disintegration of international legal studies, among other factors are critical reasons for the dominance of Western centrism in international law. However, the relationship between International law and States, as its principal subject, is continually evolving. Actually, the unity of international law is developed from the unity of different approaches and States' diverse interpretations of international law. The focus on regional approaches to international law and regional international law requires that adequate information on different legal systems be available, understood, interpreted and applied widely.

In light of the above introduction, the "Encyclopedia of Public International Law in Asia", as the editor of the collection truly contends, "is motivated by this lack of scholarship on an important, yet underrepresented area of study in international legal studies[1]", and is bound to become the reference work on how Asian countries are applying and implementing international law. The central theme of the Encyclopedia is a detailed consideration of the many dimensions of Asian States' approaches to international matters. This comprehensive and thought-provoking encyclopedia reviews and describes how Asian states deal and interact with public international law.

Organized into three volumes, the Encyclopedia is an outstanding work of eminent scholars who strived to cover elements of great interest to the readers and the wider audience. The authors are remarkably a diverse group of eminent scholars in their respective fields. Each author, given the necessary limitations of space, has endeavored to offer a fair amount of research on their country's approach to international law.

1. Seokwoo Lee(Ed.). Encyclopedia of Public International Law in Asia, 3 vols, Leiden, Boston: Brill, 2021, Introduction.

The content of the collection is organized in 16 State Volumes (chapters) and is printed in three volumes, which are categorized in terms of geographical regions encompassing the major sub-regions of the continent (i.e. Northeast Asia, Southeast Asia, and South and Central Asia). This is a weighty selection because, these countries, as the editor maintains, "unlike the great variety of cultures and the existing different interests, enjoy numerous mutual cultural and religious contacts and interconnections" that give rise to a "strong albeit rather undefined feeling of familiarity, mutual understanding, and even coherence and solidarity"[1]. It would have been ideal to include other Asian States such as Southwest Asian countries, too.

The Book starts with an introduction and a State Volume contents overview by the editor, in which the authors of each part lay out a richly detailed description of the state in international law, institutional relations and particular international law subjects. Particular international law subjects mainly include International Economic Law, International Environmental Law, Law of the Sea, Air Law & Law of Outer Space, Human Rights, International Humanitarian Law, International Criminal Law, and Use or Threat of Force. Within each State Volume the contents integrate into a country snapshot that provide basic information of each state including the Date of Independence, Date of Admission to the United Nations, Geographical Size, Population, Demographic Information, Form of Governance and System of Law. Each state volume also includes a State Report Overview that is an executive summary of the country's current international law issues and approach to international law and highlights the prevailing State practice of each country.

The Encyclopedia thereby places a strong focus on the States as the main actors in law-making and law enforcement in international law arena. This immediately distinguishes the Encyclopedia from previous works on the topic which have mostly focused on different subjects within international law. In this sense, the book has a distinctive feature, compared with similar works such as the Max Planck Encyclopedia of Public International Law[2].

Overall, the Encyclopedia comprises sixteen Asian States: China, Japan, Korea, Mongolia, Taiwan, Indonesia, Malaysia, Philippines, Singapore, Thailand, Viet Nam, Bangladesh, Central Asia, India, Iran and Sri Lanka. Each State Volume includes an introductory review on a specific country's legal system, covering a set formula encompassing the State in International Law, Institutional Relations and particular International Law Subjects. It is unfortunate that some reviews on specific states' legal systems are mostly brief - many of them three to four pages - and not legitimately comprehensive references. On the whole, the array of topics included is broad, but the need for a discussion of some particular new subjects of international law remains essential.

Iran Volume editor is the eminent Iranian Professor Jamal Seifi. Twenty more authors have contributed to the work, all of them outstanding Iranian professors and scholars. Under the State Report Overview, the executive summary of Iran's encounter with international law in the 20th century is provided by Iran Volume editor. This part highlights Iran's current preoccupations with international law. Most important issues covered in this part are Iran's nuclear program, the 2015 nuclear deal (JCPOA) and The Caspian Sea Convention.

1. Supra note 2.
2. Rudiger Wolfrum (Ed.). The Max Planck Encyclopedia of Public International Law, 10 vols, Oxford, New York: Oxford University Press, 2012.

Iran's history with regard to her approach to international law is divided into two epochs, the pre-Revolution era (1800-1979) and the post-Revolution era (1979-present). After the revolution era, Islamic Fiqh or the Sharia constituted an important part of the domestic legal system and state governance. Islamic Fiqh and the contemporary public international law offer different expressions of world order. Yet, it does not imply that Muslim States are willing to shift or even offer an alternative legal framework to that of post-Westphalian order. The most doctrinal human rights maxim, the principle of "non-discrimination" is the reason why human rights treaties are of utmost importance for the Islamic Republic of Iran. A brief history of Iran's position on international law and its participation at intergovernmental conferences is covered in the period 1800-1979.

In other subcategories, the insightful conceptual discussions of law of treaties, international and regional organizations and settlement of disputes are discussed by the contributors. The jurisprudence of the Iran-United States Claims Tribunal, Iran's international arbitration laws and practices and its past and present International Court of Justice cases are the most important subjects covered in the chapter on settlement of disputes in Iran Volume.

Finally, the content of Particular International Law Subjects of Iran Volume is devoted to some more subcategories of Asylum and Migration, Nuclear Energy and International Law and Cultural Heritage. Still, there are more subjects to be covered under this category. Given the amount of materials involved and considered, however, a selective approach in this regard is fully understandable. This book would become, an essential reference work for field practitioners as well as individuals who are interested in learning about international law in Asia.

All in all, the Encyclopedia represents a timely and comprehensive contribution to Asian States' stands and practices on international law. Strongly argued and well-structured contents make the Encyclopedia beneficial for two groups. First, it is a valuable reference book of public international law for scholars and students in different Asian countries. The book would be helpful to academics from a variety of disciplines, such as political studies and international relations. Second, because of its reflective context, the volume makes a helpful contribution to practitioners and policy-makers within the states in adopting a unified approach to international law. It would also be an appropriate addition to all libraries with a public international law collection.

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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