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THE LAW ON DOMESTIC VIOLENCE AGAINST MEN IN CAMEROON: ADDRESSING THE ODD

Fon Fielding Forsuh[*]

ABSTRACT

Talking of female-on-male domestic violence in the form of Intimate Partner Violence within matrimonial setting in Cameroon seems to be an odd because of the understanding of masculinity rooted in societal stereotype and patriarchal beliefs of men superiority over women. The principal reason among others discussed in this paper can be attributed to the reasons underlying the non-regulation of female-on-male domestic violence by the Cameroonian legal system. This paper does not refute the existence of domestic violence against women but demonstrate that men are also victims of same. In decrying the gender-specific legislations and approaches towards domestic violence against women, it has been proposed that Cameroon should adopt a non-gendered configuration on legal policy options towards domestic violence which would not be biased.

Keywords

Law, Domestic Violence, Men, odd.

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1. Introduction

Domestic violence in normal parlance can be viewed as violence between family members. That is to say violence between members of the household which can constitute a violent act committed by one member of the household against another[1]. Aspects of domestic violence especially the decrying and repression has been done under the guise that such acts are mostly committed against women and children. This can be justified by a litany of international, regional, and local legislations,[2] coupled with several measures geared towards fighting against domestic violence. Therefore, talking of domestic violence against men seems to be an odd because the general trend is that violent acts within domestic settings are mostly perpetrated by men.

Violence against men is mostly unrecognized in many countries. That is why most legal systems like Cameroon perceive violence as a more serious or less serious depending on the gender of the victim and perpetrator. This can explain the reason why cases of domestic violence against women are mostly reported by a third party to the police whether the attacker is a male or female but if a victim is a male no one bothers to report the incident[3]. In Cameroon, comparably with the situation of domestic violence in the form of intimate partner violence (IPV) on women within the matrimonial setting, the most challenging aspect about IPV on men is the more silent nature of the phenomenon as most of them do not like to expose their problems in the public. The reticence in this dimension is because Cameroonian legal system has failed to see men as victims and women as perpetrators because of the culturally pervasive stereotype and viewing women as perfect victims. There is a stigma attached to being a man as a victim and that cultural patriarchal beliefs expect women to be submissive, weak and obedient. That is why men are less likely to admit and report that they are being physically, sexually and psychologically abused by their female partners.

Domestic violence in the form of IPV within marriage is a serious human rights concern and equally causes a public health problem that cuts across nations, cultures, religions and class[4]. It is perpetrated by, and on, both men and women and therefore needs to be addressed. The fact that the Cameroon Constitution upholds the principle of gender equality does not imply that only

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[1] Garner, B. A., Black's Law Dictionary, West A Thomson Reuters Business, 9th Edition, 2009, 1705.

[2] Examples of such instruments include the 1979 Convention on the Elimination of all Forms of Discrimination Against Women, the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the 1981 African (Banjul) Charter on Human and People's Rights, the 2003 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, the 1996 Constitution of Cameroon, the 2016 Penal Code of Cameroon etc.

[3] Vertommen, T. et al., "Profiling perpetrators of interpersonal violence against children in sport based on a victim survey", Child abuse & neglect, 63, 2017, 173.

[4] Ilika, A. L. et al., "Intimate partner violence among women of childbearing age in a primary health care centre in Nigeria", African Journal of Reproductive Health, 6, 2002, 53-58. See also: Olufunmilayo, I. F. et al., "Intimate partner abuse: Wife beating among civil servants in Ibadan, Nigeria". African Journal of Reproductive Health, 9, 2005, 54-64.

females are targeted[5]. Both sexes are concerned and that is why this paper argues that men equally face domestic violence in the form of intimate partner violence like their female counterparts requiring appropriate legal response. In addressing the subject matter under consideration, this write-up will focus on Intimate Partner Violence (IPV) on men within the matrimonial setting. That is female-to-male violence in other words, violence committed by wife or wives on their husband(s). In this light, discussions starts up with an attempt at bringing out what domestic violence in the form of IPV (female-to-male violence) is all about, identifying its various forms. It proceeds by examining gender based instruments as well as gender based institutional approached geared towards fighting against domestic violence in Cameroon. It goes further to identify the possible reasons underlying the non-regulation of female-on-male domestic violence in Cameroon and ends up with a proposal on a non-gendered configuration of legal policy options towards domestic violence in Cameroon.

2. An understanding of Domestic violence in the form of Intimate Partner Violence (IPV) against men within the matrimonial setting

Domestic violence generally means that in a relationship or marriage, one or both of the partners' uses physical, sexual or psychological violence to try to get power or control the other. Getting power or control over each other in a spousal relationship is an urge that can be exercised by both spouses. The general societal trend has been that men are always at the top of it debunking the whole idea of a women being at the top. But it should be understood that the quest for power and control in a spousal relationship has in recent times been more female oriented leading to cases of female-on-male Intimate Partner Violence (IPV) in marriages.

Intimate partner violence refers to physical, sexual or psychological or economic violence and controlling behavior that one partner may perpetrate against the other in relationship[6]. This can therefore be viewed in our context as those various forms of violence and control mentioned in the foregoing definition that wife/wives may perpetrate on her husband. Odd as it may sound, there are several forms of violence which can be perpetrated by wife/wives against their husband just in quest to have control which has not been addressed by any form of international or local legislation in Cameroon.

2.1. Types of Domestic Violence in form of Female-to-male IPV within matrimonial settings in Cameroon

There exist several forms of female-to-male IPV within matrimonial settings in Cameroon which can be physical or non-physical.

2.1.1. Psychological violence or emotional abuse

These are types of violence which does not warrant inflicting any physical pains on the husband by any act of any nature but refers to actions made by the wife with the intention of bringing down her husband's moral. Psychological or emotional abuse is defined as verbal or

[5] Preamble of the Constitution of Cameroon enacted by Law No. 2008/001 of 14 April 2008 to amend and supplement some provisions of Law No 96/06 of 18 January 1996 to amend the Constitution of 2 June 1972.
[6] Schuler, R.S. et al., "Justification of intimate partner violence in rural Bangladesh: what survey questions fail to capture", Studies in Family Planning, 42, 2011, 21-28.

non-verbal communication with the intent to hurt or control the other person[7]. It can emanate from poor treatment to husbands like refusing to give him food, especially in the case where the woman might be the bread winner. It can also involve pejorative insults even at the presence of children causing them not to have respect for their father. An informal interview conducted with most men came out with some shocking revelations to the effect that many wives are bread winners of their matrimonial home[8]. These ranged from taking care of the partial to total financial responsibilities. This has made most women involved in such responsibilities to resort to ill-treatment of their husbands as a means of dominance. With such treatments men have a greater risk of developing chronic health problems, mental health issues such as depression, Post-traumatic stress disorder PTSD, and rage which increases the risk of them becoming aggressors. The interview further revealed that most men subjected to such treatments have developed hypertension and cardiovascular diseases. Such psychological violence can be very dangerous because globally, men have shorter lifespans and lose more years of their lives to death or disability than women do[9], with higher rates of heart disease, respiratory infections, cerebrovascular disease, HIV/AIDS, and road injuries[10].

Emotional abuse can also take the form of intimate terrorism which is violence that is part of a general pattern of behavior aimed at controlling the partner. Although such violence can often escalate, it is not necessarily identified by its severity or frequency but by the fact that it is a part of a syndrome of behavior that creates an atmosphere of fear[11].

2.1.2. Emotional Blackmail

This entails all mechanisms or measures employed by a wife or wives to control their husband(s). Women use coercion as a form of control such as blackmail, isolation from family and friends, manipulation, withholding affection, money control, and exploitation among others[12]. Findings from an interview with several groups of wage earning men revealed that

[7] Smith, S. et al., *The national intimate partner and sexual violence survey (NISVS): 2010-2012 state report.* Centers for Disease Control and Prevention, 2017, retrieved from: https://www.cdc.gov/violenceprevention/pdf/nisvs-statereportbook.pdf, accessed: 12/01/2022.
[8] The researcher preferred an informal interview because of the perception held within the Cameroonian society seeing a man as the head of the family and supposed bread winners, thus most men even found it difficult to make certain revelations. For this reason, the researcher prefers to keep out names of interviewees. This was based on a random interview conducted with some men in the Bafoussam metropolis, Bamenda Metro pole, Dschang, some few localities in Yaoundé and Douala. Same conclusion was reached with informal interviews conducted with some selected men who the researcher estimated to be living healthy and comfortable. But was a daunting task as most could talk only after a strong pledge by the researcher not to reveal their names.
[9] Hawkes, S. & Buse, K., "Gender and global health: evidence, policy, and inconvenient truths". Lancet, Volume 381, Issue 9878, 2013, 1783- 7.
[10] Lim, S. S. et al., "A comparative risk assessment of burden of disease and injury attributable to 67 risk factors and risk factor clusters in 21 regions, 1990-2010: a systematic analysis for the Global Burden of Disease study 2010", Lancet, Volume 380, 2012, 2224-60.
[11] Follingstad, D. R. et al., "The role of emotional abuse in physically abusive relationships", Journal of Family Violence, Vol. 5, 1990, 107-120.
[12] Kalokhe, A. S. et al., "Correlates of domestic violence perpetration reporting among recently married men residing in slums in Pune, India". PLOS ONE, *13*(5), e0197303., 2020, retrieved from: https://doi.org/10.1371/journal.pone.0197303, accessed: 12/12/2021. An interview with some well-to-do men as the researcher puts it to refer to men who are wage earners both in the Cameroon public service and private sector revealed that most wives with the desire of controlling their husbands indulge in acts aimed at separating them from

women may use their children to place psychological strain on them by denying them custody rights or instigating violence against their fathers. All this is done in guise to have control over the wages of their husbands and divert resources towards satisfying what might be termed the interests of the wife/wives families[13].

Emotional blackmail has turn out to be the order of the day in most Cameroonian societies and seriously influenced by churches and religious establishments. Visits to several churches especially in main cities like Yaoundé, Douala, Bamenda and Bafoussam just to name a few, revealed that most churches or religious establishments especially those termed "born again Churches" are mostly populated with women. Such churches have gained strong hold on wives which in most cases have negatively affected the relationships with their husbands as most of them indulge in emotional blackmail to have control over their husbands. Some wives even go to the extent of looting from their husbands in view of meeting the demands of their church leaders whom they usually refer to as "papa" or "daddy", appellations which they do not give their husband(s). Just like the situation in Cameroon, Obeji et al found out in a research that 55% of male victims expressed being afraid of their wives with majority of them seeking help from their church leaders[14]. Some of these acts have caused some husbands to retaliate against intended control by their wives and it became issues that are attended to by law enforcement agencies. In most cases like in Cameroon, no one is interested in finding the circumstances that led to what is defined by society and one-sided law enforcement agencies as gender-based violence against women[15] .

2.1.3. Physical Violence or Abuse

Physical partner violence or abuse is defined as the intentional actions that could cause bodily harm or injury, disability, or death by an intimate partner[16]. As society holds it, it is odd to talk of physical violence or abuse on a man by a woman since he is by nature a protector and head of the family. But finding have revealed that most men have been object of physical abuse by their wives. The truth is that few wives would possess the physical stamina to assault or batter their husbands with their fist or hand, but the few that possess more than their husbands do in certain circumstances. Most women who do not possess such stamina resort to other forms of violence with the aid of certain equipment to inflict injury and pains. Some interviewed men revealed that they were attached by their wives while they were asleep. Other said they made use of certain objects to hit them without their notice. Physical abuse of men by women includes the use of house equipment such as chairs, tables, spoons, and they throw anything in front of them

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their families so as to have a grip on their earnings for something which they termed "personal" interest, covering taking care of their (wives) families and personal good looking.

[13] Interests like sponsoring the siblings of the wife, and even making extensive material and financial provisions to the detriment of the husband(s) interest and family.

[14] Obeji, M. et al., "Cases and incidences of violence against men in township ward of Nyamira County", International Academic Journal of Law and Society, 1(1), 2017, 106–125.

[15] Tran, T. D. et al., "Attitudes towards intimate partner violence against women among women and men in low-and middle-income countries", PloS one, 11 (11): e0167438, 2016, 167.

[16] Breiding, M. et. al., "Intimate partner violence surveillance: Uniform definitions and recommended data elements. Version 2.0. Centers for Disease Control and Prevention", 2015, retrieved from: https://www.cdc.gov/violenceprevention/pdf/intimatepartnerviolence.pdf, accessed: 18/1/2022. See also: Smith, S., et al., Supra Note, 2017, 7.

to men. They sometimes slap, hit, kick, and bites men and this is less noticeable to the body of men[17].

The foregoing demonstrates that men like women can be victims of domestic violence in the form of female-on-male IPV. Even though male-on-female IPV has been shown to cause significantly more fear and more severe injuries than female-on-male violence[18], it should be recognized that the opposite do equally has a serious damaging effect on male victims both on their mental and physical health. But the unfortunate aspect about this is that unlike domestic violence against women, domestic violence against men has not been regulated by law in Cameroon, talk less of that in the form of female-on-male IPV within the matrimonial setting. To demonstrate the foregoing, it is relevant to examine some instruments on domestic violence which are gender specific in that violence is directed specifically against a woman because she is a woman, or affects women disproportionately",[19] thereby ruling out the fact that men can also be victims of IPV.

3. Gender Specific Instruments on Domestic violence in Cameroon

Most instruments on domestic violence in Cameroon are gender-specific because majority of their provisions if not all consider only women as victims. This conveys an idea that males or men cannot be victims of such, justifying the patriarchal view held by society on this. It is therefore worthwhile to examine some of these instruments.

3.1. International Laws

There exists panoply of international instruments in the forms of hard and soft laws on question of violence in general and that can be attributed to aspects of domestic violence which are applicable in Cameroon. Most of these instruments are gender specific as men are not regarded as victims, ruling out the possibility of the existence of female-on-male IPV. These international instruments constitutes part of Cameroonian legal order by virtue of article 45 of the Constitution[20] which is to the effect that ratified treaties and international agreements shall, following publication, override national laws provided the other parties implement the said treaties or agreements.

3.1.1. Hard Laws on issues of domestic violence against women

3.1.1.(a). International Law

There is an international law applicable in Cameroon which prohibits any form domestic violence against women. In prohibiting violence against women, the Convention on the

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[17] Myhill, A., "Measuring domestic violence: Context is everything", Journal of gender-based violence, 1 (1), 2017, 38.
[18] Caldwell. E et al., "Gender differences in intimate partner violence outcomes", Psychology of Violence, 2, 2012, 42–57.
[19] United Nations Population Fund (UNFPA), *Gender Theme Group*, UNFPA, New York, 1998.
[20] Law No. 2008/001 of 14 April 2008 to amend and supplement some provisions of Law No. 96/06 of 18 January 1996 to amend the Constitution of 2nd June 1972.

Elimination of any form of Discrimination Against Women (CEDAW)[21] in its article 1 considers discrimination as a form of violence. This implies that any act which does not have any impact on the physical or psychological integrity of women is deemed to be violence so long as it is discriminatory. It therefore requires all state parties, Cameroon inclusive to eliminate such discrimination on women by any person, organization or even enterprise. The gender specific spirit of CEDAW is attributed force of implementation by its Optional Protocol which establishes complaint and inquiry mechanism for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)[22]. Thus, parties to the protocol allow the Committee on the Elimination of Discrimination Against Women to hear complaints from individuals or inquire into grave or systematic violations of the convention.

Cameroon's efforts towards re-enforcing the promotion and protection of the human rights of women and protecting them from domestic violence were empowered by the Beijing Declaration and Platform for Action (BPFA) of 1995[23]. Through this platform, participating government pledged their commitments to advance the goals of equality, development and peace for all women everywhere and to ensure the full implementation of human rights of women and girls. This equally covers all forms of gender based violence, including domestic violence against women.

3.1.1.(b). Regional Laws

Government efforts in the field of legislations aimed at protecting women from domestic violence has not been limited to ratifying and considering international laws. It has equally acceded to regional instruments which protect women against domestic violence on a gender based. In re-affirming gender equality provided for in other international human rights instruments, the African (Banjul) Charter on Human and People's Rights (ACHPR) of 1981 goes further to prohibit any form of discrimination against women[24] just like CEDAW. It thus requires state parties to take all relevant steps to eliminate any form of discrimination against women besides protecting their entitlements as enshrined under international conventions and declarations.

Unlike the ACHPR, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 2003[25], is a gender specific instrument which deals with specificities on several facets of discrimination against the African Woman especially when it has

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[21] This convention was adopted and opened for signature, ratification, and accession by General Assembly Resolution 34/180 of 18 December 1979. It entered into force on the 3rd of September 1981 and it was signed by Cameroon on the 6th of June 1983 but ratified on the 23rd of August 1994.

[22] The Optional Protocol to the Convention on the Elimination of Discrimination Against Women (OP-CEDAW) was adopted by General Assembly Resolution A/54/4 on the 6th of October 1999 and opened for signature and ratification on the 10th December 1991. It entered into force on the 22nd of December 2000 and Cameroon ratified it by accession on the 7th of January 2005.

[23] At the Fourth UN World Conference on Women in Beijing, China, in September 1995, government delegates from 189 states adopted by consensus the Beijing Declaration and Platform for Action (BPFA), which was subsequently endorsed by the UN General Assembly on 8 December 1995 (A/RES/50/42).

[24] Article 18. The ACHPR was adopted on the 27th of June 1981 and entered into force on the 21st of October 1986. Cameroon signed it on the 23rd of July 1987 and ratified it on the 20th of June 1989.

[25] Otherwise known as the Maputo Protocol, it was adopted by the Assembly of African Union in Maputo Mozambique on July 11, 2003. Cameroon ratified the Maputo Protocol on May 28, 2009.

to do with harmful customary practices. On the subject under consideration, this Protocol prohibits all forms of violence against women whether in public or private, implying that domestic violence is specifically prohibited from the reading of article 4. It has generally been viewed by many as a binding instrument which handles the specific interests of the African woman something which has not been done for men as well. In spite of the fact that both could be subjected to violation no matter the degree involved.

3.1.2. Soft Laws on issues of domestic violence against women

The ceaseless efforts aimed at proscribing and fighting against male-on-female IPV or domestic violence did not only lead to the ratification of international instruments in the form of hard laws. It also led to a host of non-binding soft law instruments to see the light of day. Such instruments seek to set certain standards which can sometimes be regarded as precursors of binding rules against domestic violence.

The Vienna Declaration and Program of Action of the World Conference on Human Rights of June 1993 (A/Conf.157/25) and the Declaration on the Elimination of Violence Against Women adopted by the General Assembly of the United Nations in Resolution 48/104 of 20 December 1993 all stress on the issues of violence against women and equally handles aspects of domestic violence to the greater benefit of women. In line with the foregoing, the 1998 UN General Assembly Resolution 52/86 on Crime Prevention and Criminal Justice Measures to Eliminate Violence against Women empowers the police to respond efficiently to incidents of violations against women as well as encourage their enrolment within the police corps[26]. This might go a long way to explain the attitude of law enforcement officers who in most cases positively respond to purported female victims of domestic violence without regards to the cause and possibility of seeing a man as the victim conforming to societal stereotypes.

Through the Solemn Declaration of Gender in Africa (SDGEA) of 2004, states, including Cameroon have agreed to engage in two years of sustained public campaigns against gender-based violence while reinforcing mechanisms that protect women and end impunity of crimes against women with a view to achieve social change and positively[27]. This could be translated to include aspects of domestic violence perpetrated against women undermining the fact that both men and women could be victims of violence within the domestic milieus, especially in the matrimonial setting. Cameroon being a signatory member to this Declaration has submitted its initial report on the activities related to the subject matter of the aforementioned declaration[28]. Also included is the Maputo Plan of Action for sexual and Reproductive Health and Rights, 2016-2030 which is a non-binding consensus document applicable to the continental policy framework on sexual and reproductive and health right. It primarily addresses issues that relate to the fight against and the prevention of gender-based violence. This indicates the interest of the feminine gender including aspects of male on female IPV ruling out the opposite direction.

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[26] See paragraphs a, b and c of the UN General Assembly Resolution 52/86 on Crime Prevention and Criminal Justice Measures to Eliminate Violence against Women, 1998.
[27] See Declaration 4 of SDGEA, 2004.
[28] African Union, *Abridged Eleventh Report of The African Union Member States and Twelfth Report of the African Union Commission (AUC) Chairperson on the Implementation of the African Union Solemn Declaration on Gender Equality in Africa (SDGEA)*, Community Centre for Integrated Development, Express Union Building, Checkpoint, Buea, 2021, 12.

3.2. Local Instrument (principally the Penal Code[29])

There is no national legislation in Cameroon that comprehensively addresses violence against women or prohibits domestic violence. Worthy of note is the fact that some provisions of the penal code could be interpreted to address the question. The provisions address the interest of both sexes and attribute more importance to the female gender in certain circumstances. These seemingly gender-based or gender-specific provisions go contrary to the spirit of the Constitution[30] of Cameroon which in its preamble seems to be non-discriminative but in some sort takes the same direction as the penal code. The Constitution in its preamble assures its citizens equality and non-discrimination which includes and incorporates the Universal Declaration of Human Rights, the Charter of the United Nations, the African Charter on Human and Peoples' Rights and all duly ratified International Conventions relating thereto. Article 1(2) "ensures the equality of all citizens before the law." it goes further to make specific allusion to protection of women, the young, elderly and disabled in paragraph 22. This could be construed to leaving out men who do not fall within any of these categories based on gender.

In addressing the aspect of domestic violence some provisions of the penal code could be applied to cover violence on a non-gender specific basis. Very instrumental are the provisions of sections 275 (murder), 276 (capital Murder) 277-3 (Torture), 278 (assault occasioning death), 279 (assault accessioning grievous harm), 280 (simple harm), just to mention a few. These provisions make use of the word "whoever" meaning that both male and female (woman and man in this context) can be charged for committing the fore mentioned offences against each other within the domestic or matrimonial setting to address the subject matter of this write-up.

In spite of the above, the Penal Code equally in some provisions is gender based or gender specific. This can be seen from the provisions of sections 357 which prescribe an imprisonment term of 3 months to 5 years and a fine on any one who makes an abusive request for a bride prize. Also included is the provision of sections 338 punishing assault on a pregnant woman.

The most discriminative against men is the provision of section 296 which criminalizes rape. This section provides that;

> 'Whoever by force or moral ascendency compels any person, whether above or below the age of puberty, to have sexual intercourse with him shall be punished with imprisonment for from five to ten years'.

Rape from the reading of this provision is considered a male offence and that the victims can only be human beings of feminine gender. This therefore implies that only a husband(s) can commit rape on his wife in our context. This is based on the wide and wrong assumption that men always want sex or that boys and men are physically strong than women whereas we have some women and girls that are strong as men and even stronger. Rape is also viewed thus, because of the physiological impossibility of female gender.[31]

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[29] Instituted by Law No. 2016/007 of 12 July 2016.

[30] Law No 2008/001 of 14 April 2008 to amend and supplement some provisions of Law No 96/06 of 18 January 1996 to amend the Constitution of 2 June 1972.

[31] Women inability to penetrate men during sexual intercourse.

This provision may also be based on societal stereotype and belief that a man cannot be raped because erection which occurs on a man is a sign of will. For the offence to be consumed there must be sexual intercourse which involves the penetration of the erected penis into the vagina. Penetration here does not need to be complete. A degree of penetration which is slight and light without causing any injury or laceration of the hymen would be sufficient in law for the offence of rape to be complete[32].

The societal stereotype on the view that erection is a sign of will on men has become a problem for male who are victims of related abuse to report cases. An erection is not a sign that a man is willing and this cannot be used against men that have been abused and raped by women. Younger men can be intimidated into erection by older women[33]. Societal non acceptance of victimhood of men in rape related offences can also be explained by that fact that over the years, the history of rape has been an act of men against women,[34] forgetting to know that circumstances may exist in which there reverse can be true. The possible reason behind this is the fact that fewer or no cases of men rape are being reported due to fear. Men fear that if they report abuse by women people will doubt their sexual orientation. They therefore, hide and deny any victimization just to protect their ego. When there are visible injuries as a result of the abuse they rather say they have been hurt by something else[35].

The effect of rape on male victims is as traumatizing as on female victims debunking the notion that trauma is only on females. Male victims of rape and abuse are experiencing a social stigma in society. Unlike their female counterparts, they have more anger which is sometimes taken out on the wrong people[36]. They even see themselves as weak men or being effeminate or soft.

4. Gender Specific institutional approach towards domestic violence in Cameroon

Coupled with the litany of legislations that can comfortably be interpreted to cover male-on-female domestic violence in Cameroon, state and non-state institutions or organisations have been created with a gender based or specific approach. The measures carried out especially by non-state organisations have been aimed at seeing only women as victims of domestic violence.

4.1. State approach

In considering the interest of women in Cameroon, the state has taken several administrative moves ranging from the creation of structures and action plans. A special Ministry responsible for women's affairs was initially established by presidential decree in 1984. In 1988 the Ministries of Women's Affairs and Social Affairs were merged into a single Ministry by

[32] R v. Russen, 2, QB, 1891and also Jegede v. State, FWLR (Pt. 66), 72, 2001, 73.
[33] Karlsson, L. C. et al., "The Effect of Sex and Perpetrator-Victim Relationship on Perceptions of Domestic Homicide", Journal of interpersonal violence: 0886260518775162, 2018), 886.
[34] Russell, B. and Sturgeon, J. A. D., "Police evaluations of intimate partner violence in heterosexual and same-sex relationships: do experience and training play a role?", Journal of police and criminal psychology, 34 (1), 2019, 35.
[35] Savage, M. et al., "News stories of intimate partner violence: An experimental examination of participant sex, perpetrator sex, and violence severity on seriousness, sympathy, and punishment preferences", Health communication, 32 (6), 2017, 769.
[36] Myhill, A., Supra note 17, 2017, 33.

Decree No. 88/1281 of 21 September 1988[37]. In December 1997, because of the special problems of women and the anxiety to improve their status, a new Ministry of Women's Affairs was set up by Decree No. 97/205 of 7 December 1997 and later changed to the Ministry for the Protection of the Family and the Woman in 2004. The missions of this ministry include- the promotion of the status of Cameroonian women through education, improved access to credit facilities, decision making, gainful employment, prevention of all forms of discriminations and violent acts against women and girl children, the promotion of the right of women to inheritance, etc. To enable this Ministry function properly to accomplish its objectives, its budget was raised from 0.25% as the case between 2006 and 2009 to 0.27% in 2010[38]. In line with the aforementioned objectives, in 2012, the government drafted a National Strategy to Combat Violence against Women, established a hotline for victim support and reporting cases, and implemented awareness-raising activities at the national and local levels[39].

4.2. None-state institutional approach

The fight against male-on-female domestic violence has also witnessed the establishment of several non-state institutions in the form of non-governmental organizations. In line with the societal stereotype or construct that sees women as victims of domestic violence, various campaigns and actions on domestic violence are designed to protect women and not men. Several of such organizations support women that have been abused by men but men do not enjoy the same support and protection. Amongst many in this domain, the most prominent to just mention a few are Reach Out, Women in Alternative Action (WAA), Gender empowerment and Development (GeED), Women in Action against Gender-Based Violence (WA) Cameroon, More women in politics, the Centre for Human Rights and Peace Advocacy (CHRAPA), Help Out and Human Rights Focus, Association de Lutte contre les Violence faites aux Fememes (ALVF), the National platform to fight against violence against women (PLANALDIF), Ecumenical Service for Peace[40]. There aforementioned have been actively involved in activities to end violence against women in Cameroon[41]. WA Cameroon for example has been organizing sensitization activities to commemorate 16 Days of Activism to end violence on women. Faith-based organizations like Cameroon Women Fellowship (CWF) and Catholic Women Association (CWA) have been working on a marriage encounter sexual harassment etc. These activities range from lobbying and advocacy for the signing of the draft Family code, education and training on women's rights, sensitization activities at the level of parliamentarians, traditional leaders, administrators, the judiciary, the media and the women. A coalition of civil society networks led by Ecumenical Service for Peace(SeP), Women in Research and Action (WIRA), International Federation of Women Lawyers (FIDA) and Association des femmes Juristes (ACAFEJ) prepared the first ever shadow report on the implementation of CEDAW and presented to treaty bodies.

[37] The Ministry of Women's Affairs and Social Affairs were merged by Decree No. 88/1281 of 21 September 1988.
[38] Gender Empowerment and Development, *Assessing the Implementation of the Beijing Platform of Action in Cameroon*, Friedrich Ebert Stiftung, Review Beijing Cameroon 010/GeED/TKN, 2010.
[39] OECD Social Institutions and Gender Index, Country Profile, Cameroon, 2019.
[40] The creation of these organizations is facilitated pursuant to the Constitution and by Law No. 99/11 of 20 July 1999 to amend and supplement certain provisions of Law No. 90/53 of 19 December 1990 relating to freedom of association and Law No. 99/14 of 22 December 1990 governs Non-Governmental Organisations in Cameroon.
[41] See generally Review Beijing Cameroon 010/GeED/TKN, Beijing +15 The Reality of Cameroon and the Unfinished Business, Assessing the Implementation of the Beijing Platform of Action in Cameroon, By Gender Empowerment and Development, 2010.

International organizations operating in Cameroon such as United Nations Population Fund, UNICEF, WHO, UNAIDS, UNDP as well as local non-governmental organizations such as the Cameroon Association of Female Jurists and the Association for the Fight against Violence on the Women, etc have been actively engaged in the advancement of women and the fight against violence carried on them.

Unlike the situation where there exist instruments and actions taken to give life to them in the interest of fighting against male-on-female domestic violence, the contrary is true for female-on-male domestic violence. This could be attributed to several reasons worth addressing.

5. Reasons underlying the probable Non-Regulation of female-on-male domestic violence (IPV) in Cameroon

The non-regulation of female-on-male domestic violence especially in the form of IPV within the matrimonial setting could be attributed to the several reasons as explained below;

5.1. Non-availability of statistic or Reporting on Female-on-male Domestic Violence

It is difficult to address an issue which is not made known to the public especially in situations where such has been considered as inconsequential by societal construct. There is thus no available statistics or any reporting on female-on-male domestic violence in Cameroon which can trigger actions geared towards addressing such by statute and any judicial/non judicial move. Comparably with male-on-female domestic violence, there exist some statistics or reporting on domestic violence on women even though Civil Society Organizations on women's rights still pose under reporting as one of the major challenges towards fighting against male-on-female domestic violence. But there issue is that male-on-female domestic violence is in the lime light with some statistics provided. There are statistics to the effect that 53% of women are subjected to one form of violence or another as from the age of 15. In 36% of the cases it is the husband who is the perpetrator of violence. Amongst women who are assaulted, 55% are those living in marital unions while 19% are single women[42]. Moreover, a study conducted in 2016 in Cameroon found that, of 2,570 women, 995 (38.7%) reported physical violence and 381 (14.8%) reported sexual violence[43]. Such statistics/reporting and many others made available by NGOs on Gender equality have served as a catalyst towards continuous efforts aimed at addressing male-no-female domestic violence. But the reverse is true as regards male-on-female domestic violence.

The non-reporting of female-on-male domestic violence in Cameroon and its consequence of non-regulation could be considered as some sort of a global phenomenon given that some countries who try to take an opposite view (consider female-on-male domestic violence) face the challenge of underreporting. In England and Wales for instance, a 2010-2011 report found that whilst 27% of women who experienced IPV reported it to the police, only 10% of men did so,

[42] Women In Research And Action (WIRA), *Cameroon Non-Governmental Organizations Shadow Report to CEDAW, The Implementation of The Convention on the Elimination of all forms of Discrimination Against Women*, SPONSORED BY UNIFEM, 2008.
[43] Alio A. et al., "Association between intimate partner violence and induced abortion in Cameroon," 112 *International Journal of Gynecology & Obstetrics,* 2, 2011, 83-7.

and whilst 44% of women reported to some professional organization, only 19% of men did so[44]. Moreover, a 2005 report carried out by the National Crime Council in the Republic of Ireland estimated that 5% of men who had experienced IPV had reported it to the authorities, compared to 29% of women[45].

5.2. Social Status and Societal Stereotype (construct)

The status held by men in the society has been greatly influenced by the societal stereotype that men are strong and dominate in all aspects. This is true because of several aspects which are discriminative against women most especially within customary communities. But this does not cancel the fact that just like women, they can also be victims of abuse from the former. Thus societal stereotype/construct has made men to believe that they do not cry and do not talk of their problems. This is the reason most men do not even report nor seek professional help such as professional post abuse counseling. Some abused men hide the abuse from society because of fear of their dignity and the respect they receive from society. Discussions with several men especially those who are educated and of income earning capacities in most metropolitan towns like Douala, Yaoundé, Bamenda, Bafoussam,[46] don't admit that they are abused and feel that the community will see them as people that fail to fix their family affairs. The foregoing is based on preconceived social gender norms and roles as well as power asymmetry which mainly favor men who may not want to appear weak[47]. Stigma based on cultural beliefs[48] that men are not supposed to waver under female pressure is branded as a sign of weakness, and the pressure for masculinity is a major barrier. This has caused men to fear ridicule from their partners, extended families, friends, law enforcement, and even some church leaders[49].

Generally, unlike domestic violence in the form of IPV against women, female-on- male IPV within the matrimonial setting is less recognized by societies[50]. This is like the case with

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[44] Britton, Andrew, "Intimate violence: 2010/11 BCS", In Smith, Kevin (ed.), *Homicides, Firearm Offences and Intimate Violence,* 2010/2011, Supplementary Volume 2 to Crime in England and Wales, 2010/2011, London: Home Office, 2011, 96.

[45] Watson, D. and Parsons, S., Domestic Abuse of Women and Men in Ireland: Report on the National Study of Domestic Abuse, Dublin: National Crime Council of Ireland, 2005, 169.

[46] Most interviewees do not want their identity to be disclosed for obvious reasons i.e. fear of been humiliated so as to preserve their social status. That is why in keeping with this, the researcher avoids citing names.

[47] Obeji, M. et al., Supra note 14, 2017, 106–125.

[48] Examples of such cultures include those practices viewing women like properties after the payment of bride price therefore not subject to inheritance. Some customs equally encourage levirate marriage (widow inheritance) and the tendency of treating women like second class human beings. All these practices are prohibited by law. It is relevant to note that most of these practices are waning especially in areas opened to development coupled with the massive emancipation of women who are aware of gender equality. The activities of most NGO's have also been instrumental on this domain.

[49] Ayodele, J., "The socio-cultural causes of male victimization in domestic contexts in Lagos, Nigeria: A qualitative analysis", International Journal of Criminal Justice Sciences, *12*(2), 2017, 252–269. See also Gathogo, J., "Men battering as the new form of domestic violence? A pastoral care perspective from the Kenyan context"., HTS Teologiese Studies/Theological Studies, 71(3), 2015, retrieved from: https://doi.org/10.4102/hts.v71i3.2795, accessed: 12/02/2022. See further Thobejane, S. D. et al., "Gender-based violence against men: a muted reality". Southern African Journal for Folklore Studies, 28(1), 1-15.

[50] Lupri, E. and Grandin, E., *Intimate partner abuse against men*, National Clearinghouse on Family Violence, Family Violence Prevention Unit Public Health Agency of Canada, 2004. See also "A Framework for Understanding

Cameroon where there is little or no recognition of such in most communities and towns. For some men, admitting they are the victim of female perpetrated IPV could feel like admitting that they do not follow the established social role for men, and may be an admission they are unwilling, or unable, to make. In certain cases, some male victims fear people assuming that the woman is the real victim, and must have been acting in self-defense or retaliating for abuse[51].

5.3. Approaches or attitudes of Law enforcement officers

In Cameroon, law enforcement officers especially the police view domestic violence as family problem which should be handled within the family setting or at home. They always have the tendency to treat domestic violence cases with less priority and tend to focus on what provoked the abuse rather than the violent actions of the perpetrator[52]. Even though such attitudes are put forth, when cases are reported to them by female victims, they at times tend to even give listening ears than when it can be reported by a male victim. The attitude of not even giving listening ears to male victims can also be attributed to societal stereotype on masculinity which negatively influence the approach of law enforcement agencies. This has contributed to a serious dilemma as female-on-male violence has been ignored. A discussion with some police officers (whose identity cannot be revealed) indicates that they hide behind the idea of the physical structure of men. Their attitudes concur with that of the feminist who argue that men have the physical power to defend themselves but if they do so, they are arrested. Studies have shown that most women who abuse their male partners escape arrest. This is caused by the history of domestic violence where female perpetrators are viewed by law enforcement agencies and the courts as victims. This causes a lot of fear from men to report cases of abuse which then portrays a wrong perception in society[53].

In some cases, men who reported their wives or female partners are either made a joke by the police or they are arrested despite them being victims and are treated as second class victims of domestic violence by law enforcement agencies[54]. Police officers often take the side of the woman in most cases reported by males against female abusers. Some research has shown that women who assault their male partners are more likely to avoid arrest than men who assault their female partners,[55] because female perpetrators of IPV tend to be viewed by law enforcement

Women's Use of Nonlethal Violence in Intimate Heterosexual Relationships", Violence Against Women, 8 (11), 2002, 1364-1389.

[51] Migliaccio, T. A., "Marginalizing the Battered Male". The Journal of Men's Studies, 9 (2), 2, 2001, 226.

[52] Discussion with some selected police officers charged with investigating domestic violence cases revealed that they always have look warm attitudes especially when it has to do with matrimonial violence. Their response is that "such issues are better resolved in the family than in the police".

[53] Bjørnholt, M. and Hjemdal, O. K., "Measuring violence, mainstreaming gender: does adding harm make a difference?". Journal of gender-based violence, 2 (3), 2018, 466.

[54] Foubert, J. D. and Bridges, A. J., "Predicting bystander efficacy and willingness to intervene in college men and women: The role of exposure to varying levels of violence in pornography", Violence against women, 23 (6), 2017, 693.

[55] Richard B. F. and Paul-Philippe P., "Does the Criminal Justice System Treat Domestic Violence and Sexual Assault Offenders Leniently?", Justice Quarterly, Volume 24, Number 3, 2007, 440-447.

agencies and the courts as victims[56]. As such, some men fear that if they do report to the police, they will be assumed to be the abuser, and placed under arrest[57].

5.4. Religious inclinations

Religious inclinations have had a serious influence on the non-reporting of domestic violence cases on both men and women. Finding from discussions with some victims reveal that the few reported cases are women (wives in our case) who decide to waive their beliefs and quit their unions after reporting abuses mated on them by their partners. The reverse is true with men (husbands in our case) whom in most cases are convinced to adhere to certain denominations[58] with certain beliefs[59] making them endure whatever form of torment or abuse they might encounter in their union. In some cases women who are so attached to the beliefs and practices of their churches tend to follow the instructions of their pastors (papa, prophet, man of God, etc as most of them are called) to the detriment of their husbands. They even refuse their husband sex on the pretext that "papa has said we should not have sex". Some even go to the extent of refusing their husbands' food and loot from their husbands to appease their religions heads. The foregoing has made must men to undergo psychological torments and emotional abuses but cannot leave nor report because of religious convictions and cultural expectations. In majority of cases, women are seen as caring people by society and their religious settings while men that are abused by women stay in the relationship with the hope that the abusive women would change[60] the same perception held by abused women.

6. A Proposal for a non-gendered configuration on legal policy options towards domestic violence in Cameroon

In order to expel the societal stereotype that may distort any move towards a non-gendered specific approach in regulating and proscribing domestic violence, it is important to understand that victimization is not exclusive to women. It has been demonstrated above that men can also be victims especially as concerns IPV within the matrimonial setting. Therefore domestic violence is the violation of human rights which is supposed to be enjoyed by both men and women. To address violence on an equal basis, the following measures could be considered;

6.1. Legislative Actions

There are series of laws which through the interpretation of some of their provisions address domestic violence on a gender-specific perspective but there is no international or national law specifically addresses domestic violence. There is the need for legislations

[56] Kingsnorth, R. F. and MacIntosh, R. C., "Intimate Partner Violence: The Role of Suspect Gender in Prosecutorial Decision-Making", Justice Quarterly, 24 (3), 2007, 460–494.
[57] Cook, P. W., Abused Men: The Hidden Side of Domestic Violence, Westport, CT: Praeger, 1997, 43–91. See also Grady, A., "Female-on-Male Domestic Violence: Uncommon or Ignored?". In Hoyle, C. and Young, R. (eds.), New Visions of Crime Victims*,* Portland, Oregon, Hart Publishing, 2002, 93–95.
[58] Christianity generally upholds the view that marriage is a union between a man and a woman and divorce is not permitted. That marriage is for better or for worse implying that cases of abuse can only be reported to clergies or pastors (men of God) who will counsel them and request that they perceiver.
[59] Beliefs like marriage is for better or for worse, especially with couples who have celebrated or solemnize their unions in church.
[60] Drumond, P., "What about men?, Towards a critical interrogation of sexual violence against men in global politics", International Affairs, 95 (6), 2019,1272.

specifically addressing domestic violence which would not be gender-specific. This proposal is in line with the view that domestic violence is a human rights concern and since the Constitution of Cameroon upholds the principle of gender equality, it therefore implies that any action in that dimension should target both men and women. Since proscribing domestic violence entails upholding human rights, it is supposed to target both genders as provided for in the Pre-amble of the Constitution in line with Cameroon's commitments to international human rights instruments as indicated as indicated therein.

6.2. Non-Gender Based Domestic Violence (IPV) Eradication Programs

An understanding of domestic violence especially in the form of IPV against women only without considering that men can be victims is rooted largely with the patriarchal belief of women being controlled by men and societal construct on the fact that men are perpetrators and women victims. Clinking tight to the fore mentioned can have a negative implication on any program geared towards eradicating IPV. To be successful, domestic violence (IPV) eradication programs should be designed to empower women, change the understanding of masculinity rooted in patriarchal beliefs of men superiority over women recognizing the fact that both women and men can be victims. The fore mentioned can equally be more effective if adequate efforts are done to modify institutions, policies and laws towards greater equality. This agenda can be pushed forward through activities like education and training on the victimization of both women and men, sensitization activities at the level of parliamentarians, traditional leaders, administrators, the judiciary, the media and the women as well as law enforcement officers.

7. Conclusion

The analysis in the paper does not in any way refute the existence of domestic violence in any form or IPV on women perpetrated by men. It advocates the fact both men and women can be victims thereby looking at the existence of female perpetrators. The non-recognition of domestic violence against men by the Cameroonian legal system is attributed to the societal patriarchal construct on masculinity which has made the fore mentioned violence to be more of a silent crime unlike male-on-female domestic violence. This is exacerbated by the existence of some gender specific legislation and actions on the subject which the existence of such can be attributed to several reasons discussed herein. It has therefore been proposed that for this problem to be handled, the regulation against domestic violence in any form should be done on the basis of gender equality as upheld by the constitution of Cameroon.

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THE RIGHT TO EARLY CONSUMER LOAN REPAYMENT IN BOSNIA AND HERZEGOVINA AND EUROPEAN UNION

Irfan Osmanović*

ABSTRACT

The right to early repayment or repayment of the loan has a significant protective role for the consumer, who, especially in circumstances of lending need and under the pressure of a difficult economic situation, may find himself "trapped" in multi-year loan arrangements from which it is not easy for him to escape. In addition to an important protective role, the right to early loan repayment is also an instrument for stimulating market competition by enabling greater mobility of clients of loan institutions, i.e. consumers themselves. This right enables the consumer, especially when he has the means to settle existing obligations or has the opportunity to borrow from another loan provider under more favorable conditions, fulfill his contractual obligation towards the loan provider earlier, and thus save part of the interest amount. If there were no mentioned or similar mechanisms, the loan consumer would be "hostage" of the loan and the costs it carries, regardless of the possible possibilities to repay the loan debt earlier and thus free from unnecessary interest costs for the remaining repayment period.

KEYWORDS

loan, early loan repayment, Bosnia and Herzegovina, European Union

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1. Introduction

Despite the indisputable power of the general consumer population to influence the markets of goods and services, consumers are actually often vulnerable since they enter into consumer contracts and transactions individually rather than as the total population, and are often found in a subordinate relationship with sellers of goods and service providers. Consumer protection is necessary for several reasons: due to the significant difference in economic power between the consumer and his professional counterpart, due to the imbalance of information of consumers and service providers or sellers of goods, and because of the general perception of consumer inferiority, who can hardly stand up to banks, corporations and other business entities that are in the role of the other contractual party of a certain consumer contract.

Such financial, information and legal inferiority of consumers is the most obvious when contracting and during the period of repayment of consumer loan, which today represents the existential basis not only of a large number of consumers in Bosnia and Herzegovina (B&H) but also in the rest of the world, including many of the most developed of the countries. The consumer who encounters financial difficulties such as sudden unemployment or similar events, is in a vulnerable position of loan need that "forces" him to borrow, and repay the loan sometimes even for decades, producing additional costs for him in the form of loan processing costs and, of course, significant accrued interest.

Bearing in mind the above, the importance of protecting consumers as users of financial services, through relatively recently established special consumer rights in consumer loan agreements, the right to early repayment, the consumer's right to terminate a loan agreement concluded for an indefinite period of time, the right to withdraw from loan - is unquestionable. Analysis of the legal establishment and practical application of one of these protective institutes, the right to early repayment of consumer loan, will be the subject of further discussion in this paper.

2. Consumer and Consumer Loan

Over the past fifty years, consumer lending has been exposed to various changes, innovations and perceptions, but none have stopped or slowed down the constant growth of offers in the financial services market and the number of consumers who rely on them - not only to meet significant life and consumer goals, but also to ensure the fulfillment of their most basic needs. This is best evidenced by the recent statistics showcased by the European Banking Authority (2020) that indicate that the consumer lending market in 2020 was "worth" 1.4 trillion EUR in the European Union (EU), and in B&H almost 10 billion BAM (Bosnian Convertible Marks).

Statistics of the European Banking Authority show that the consumer loan market at the EU level reached a volume of 800 billion EUR[61] in 2010, and that it has been growing steadily in the last decade. Thus, in the period from 2015 to 2020, the number of consumer loans in the EU increased by 14.1%, and in 2020 their value reached a record amount of 1.4 trillion EUR.

When it comes to loans taken in B&H, a 2019 survey[62] shows that B&H citizens borrowed over six billion EUR from commercial banks that year. The most common are the so-called "survival loans".[63] According to data from the Central Bank of B&H, as much as 75% of the loans taken in B&H are

[61] http://sdw.ecb.europa.eu/reports.do?node=100000143, accessed on 03.07.2022.
[62] European Banking Authority: Consumer Lending in the EU banking sector. March 2020. EBA/REP/2020/11
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consumer loans. Statistics from the Central Bank of B&H from 2019 show that total loans that year exceeded the figure of 20 billion BAM for the first time, of which 47.7% represent loans to consumers.[64]

Pugh (2022) expects these trends to keep on rising, particularly due to the ongoing surging inflation which is expected to force consumers worldwide to borrow more and save less.[65] Global demand for consumer loan is expected to rise 7.2% until the end of 2022, and for additional 5.1% in 2023 as the cost-of-living pressures escalate.[66]

2.1. Consumer

The generally accepted definition of *consumer*, both in the legislative circles of the EU[67] and in B&H legislation[68], is that a consumer is a natural person who buys, acquires or uses products or services for his personal needs and for the needs of his household. Somewhat generalized, a consumer is therefore considered to be a natural person who acts in contracts for purposes that do not fall within the framework of his trade, business, professional or trade.

2.2. Consumer Loan

A *consumer loan* is a loan intended for individuals, usually without any or low collateral, for personal, family or household purposes. This loan is of great economic importance because it allows consumers to spend beyond their objective capacity and thus directly causes an increase in demand.[69] Šabić-Učanbarlić (2019, 65) defines consumer loan as "a contract that the consumer, as an exclusively natural person, acting in meeting private needs, concludes with a loanor, as a natural or legal person, who acts within the framework of his business activity".

Consumer loans are certainly vitally important for the livelihood of a large number of consumers. According to Mišćenić (2010, 4) The rise in the number of different new types and forms of lending and changing behavior of consumers living beyond their means of living today has led to loans being used as a "means of maintaining a certain standard of living" as opposed to a period when loan was used exclusively as a means of financing significant investments. For a long time now, consumers have been borrowing even to buy groceries and other household consumables, or even to go on summer vacation with their families. [70]

3. Consumer Right to Early Loan Repayment in the European Union

Mišćenić (2010, 5) points out that the right to early repayment of the loan has a significant protective role for the consumer, who, especially in circumstances of lending need and under the pressure

[64]"Life on loan" in Bosnia and Herzegovina, http://www.rtvusk.ba/vijesti/zivot-na-kredit-u-bosni-i-hercegovini/32324. Access on 01.07.2022nd year

[65] ‘’Borrowing to rise consumers grapple surging inflation’’, https://www.rsmuk.com/real-economy/economic-voice/borrowing-to-rise-consumers-grapple-surging-inflation, accessed on 30.10.2022.

[66] ‘’Consumer loan balloons as inflation bites’’, https://www.moneymarketing.co.uk/news/consumer-loan-balLOOns-as-inflation-bites/, accessed on 29.10.2022.

[67] The term consumer is defined in Article 2 (1) of Directive 2011/83/EC, previously by Council Directive of 20 December 1985 for the protection of consumers in respect of off-premises contracts, Official Journal of the European Communities L 372/31 of 31 December 1985.

[68] Article 1, Para. 3 of the Law on Consumer Protection in Bosnia and Herzegovina ("Official Gazette of BiH", No. 25/2006 and 88/2015), similar to the provisions of Article 2a of the Law on Consumer Protection in Republika Srpska according to which the consumer is a natural person who buys, orders, acquires or uses products or services for his own needs and for the needs of his household or to whom an offer for goods or services has been sent.

[69] Definition taken from Moj-bankar.hr, https://www.moj bankar.hr/Kazalo/P/Potro%C5%A1a%C4%8Dki-kredit retrieved 20 June2022 2.

[70] All these circumstances have led to the need to raise consumer protection standards. To which member states reacted by adopting various regulations in the field of consumer loan law. This has resulted in numerous and deep differences between the consumer loan rules of the Member States, which has had a negative impact on the marginal offer of borrowers on the one hand and consumer confidence on the other.

of a difficult economic situation, may find himself "trapped" in multi-year loan arrangements from which it is not easy for him to escape. In addition to an important protective role, as Mišćenić points, the right to early loan repayment is also an instrument for stimulating market competition by enabling greater mobility of clients of loan institutions, i.e. consumers themselves.

For Bajrić (2015, 14) this right enables the consumer to, especially when he has the means to settle existing obligations or has the opportunity to borrow from another loan provider under more favorable conditions, fulfill his contractual obligation towards the loan provider earlier, and thus save part of the interest he would otherwise pay to loan provider. Further, author elaborates that if there were no mentioned or similar mechanisms, the loan consumer would be a sort of a "hostage" of the loan and the costs it carries, regardless of the possible possibilities to repay the loan debt earlier and thus free from unnecessary interest costs for the remaining repayment period.

Mišćenić (2010, 7) reminds that the right to early repayment of consumer loans was one of the most pressing issues for the EU legislators considering the different attitudes of interested representatives of financial institutions, consumer protection associations and representatives of member states, and experienced several different formulations and proposals. The final solution contained in Directive 2008/48/EC[71] is still labelled today as a significant progress in consumer protection and a major contribution to limiting the arbitrariness of financial institutions.

Regarding the arrangements for the consumer's early loan repayment, contained in Directive 2008/48/EC, it should be noted that the Directive already in the point number 39 of the Preamble stresses that the consumer should be entitled to a full or partial early repayment of the loan, and that in this case the borrower should be entitled to reimbursement of costs directly related to early repayment. Also, according to Šabić-Učanbarić (2018, 9) Directive points out that when calculating the amount of compensation that belongs to the bank in case of early loan repayment, several rules should be followed. Among such rules are the rule on the necessity of transparency, intelligibility and simplicity of the method of calculating the amount of compensation, and the rule on the necessity of introducing the consumer to such a method before concluding a loan agreement or at the latest at its conclusion. Transparency, intelligibility and simplicity of the method of calculating the amount of compensation should serve not only to better and simpler information of consumers on this important issue, but also contribute to a kind of more effective control of compensation by the appropriate supervisory authorities.

Article 16 para 1 of Directive 2008/48/EC entitles the consumer to fulfil, in whole or in part, his obligations under the loan agreement, whereby he is entitled to a fair reduction of the total cost consisting of interest and costs for the remaining agreed duration of the loan, while the borrower is entitled to reasonable, limited and objectively determined compensation for any damage caused by premature repayment (Šabić-Učanbarlić, 2019, 78).

4. Consumer Right to Early Loan Repayment in B&H

Strengthening economic and political ties between the European Union, its Member States and those states that have affinities for joining the European Union – including B&H as a country with a status of potential candidate and aspirations for joining the EU, led to the need for active harmonization of national legislation in the field of protection of consumers as users of financial services.

When it comes to B&H, the Consumer Protection Act of 2006 (CPA B&H) was the first attempt to harmonize domestic legislation with EU standards in the field of consumer protection in consumer

[71] Directive 2008/48/EC of the European Parliament of the Council of 23 April 2008 on credit agreements for consumers repealing Council Directive 87/102/EEC of 22 May 2008

lending. By the aforementioned Act, just two years before the adoption of Directive 2008/48/EC, the Bosnian state legislator sought to transpose the already outdated solutions of Directive 87/102/EEC[72]. After the adoption of Directive 2008/48/EC, as stated by Šabić-Učanbarlić (2019), the need to harmonize domestic solutions with the solutions of this Directive was created. Unfortunately, the harmonization was undertaken at the impractical entity level, in the Federation of B&H through the Law on Protection of Financial Service Users[73] (LPFS FB&H), and in Republika Srpska within the existing Law on Banks of Republika Srpska[74] (LOB RS), in a special chapter titled Protection of rights and interests of banking services.

Prior to the adoption of the CPA B&H and the entity laws, the issue of the right to early repayment of loans in B&H was regulated by the provisions of the Law on Obligations[75] (LOO) – more specifically, by the virtue of Article 1068. In accordance with the provisions of this article, the loan consumer can repay the loan even before the deadline set for repayment, with the obligation to inform the bank in advance and with the obligation to compensate for any damage caused to the bank. From this we can conclude that even before the adoption of the *lex specialis* regulations, there already existed a certain set of rules that regulated the issue of early repayment of the loan and allowed the borrower/consumer to repay the loan before the lapse of the agreed time, and enabled the bank to exercise the right to a certain damage compensation. (Šabić-Učanbarlić, 2018, 17)

However, as a result of the undertaken obligations of B&H to harmonize regulations with EU law, which is an obligation arising from Article 70 of the 2008 Stabilization and Association Agreement[76] (SAA), the right to early repayment of consumer loan is contained in two entity laws, which represents a significant – yet unofortunately unharmonized - progress in the process of protection of consumers entering into a loan and a step forward from earlier regulation.[77]

Although B&H has a state-level Consumer Protection Act[78] (CPA B&H), which also contains a chapter dedicated to consumer loan, the harmonization of domestic legislation with the regulation of Directive 2008/48/EC has been undertaken in the legislation of B&H in the most complicated way possible – via entity legislation. In 2011, LOB RS was amended as to integrate the regulation of the Directive, along with supplementing decisions and interventions of the Banking Agency of the RS. The legislation of the Federation of B&H was harmonized with the solutions of Directive 2008/48/EC about three years later, i.e. in 2014. Thus, since the moment of adoption of entity level legislation, in B&H, we have a parallel application of the CPA B&H modeled on outdated Directive 87/12/EEC and LPFSU FB&H and LOB RS modeled on the Directive 2008/48/EC. (Šabić-Učanbarlić, 2018, 10)

4.1. Regulation Under B&H Consumer Protection Act

According to Article 65 of the CPA B&H, within chapter XI that regulates consumer loan, the consumer, as a loan consumer, has the right to perform his obligations on the loan even before the agreed

[72] Council Directive 87/102/EEC of 22 December 1986 on the revocation of the laws, regulations and administrative provisions of the Member States relating to consumer credit, OJ LLL 42/48 of 12.02.1987
[73] Law on Protection of Users of Financial Services of the Federation of Bosnia and Herzegovina ("Official Gazette of FBiH" no. 31/14)
[74] Law on Banks of the Republika Srpska (Official Gazette of RS, No. 44/03, 74/04, 116/11, 05/12, 59/13)
[75] Law on Obligations of the FB&H (Official FB&H Gazette " no. 29/2003, 42/2011)
[76] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part of 06.06.2008.
[77] Article 70(1) of the SAA states: The Parties recognise the importance of aligning existing legislation of Bosnia and Herzegovina with that of the Community, as well as its effective implementation. Bosnia and Herzegovina will seek to ensure the gradual harmonization of its existing laws and prospective legislation with the EU Consumer *Acquis*. Bosnia and Herzegovina will ensure the appropriate implementation and application of existing and future legislation.
[78] Law on Consumer Protection in Bosnia and Herzegovina ("Official Gazette of B&H", no. 25/2006 and 88/2015)

deadline, in which case the total loan costs will be reduced by interest and other expenses calculated for the period after early repayment. With the exception of the this provisions, the CPA B&H does not contain any further provisions regulating the issue of early repayment of loans, and in particular does not contain provisions that would more precisely regulate the bank's right to compensation. This omission is partly a reflection of the fact that Directive 87/102/EEC on wich CPA B&H is based, itself did not regulate this issue, and in part it is the result of the fact that the issue of compensation as a bank's right in the event of early repayment of loans regulated the existing solutions from the LOO.

Bajrić (2015, 24) explains how such forumation left place for the banks to contract a clause on the basis of which they retained the right to calculate and collect a one-time fee in case of early loan repayment, but the amount of this fee was defined by the bank's internal act, which essentially indicates that it was an unfair practice of banks. Bearing in mind that banks lose part of the interest that represents their profit by premature loan repayment, they have developed special methods in business practice by which they have secured significant earnings and to some extent discouraged loan users from using the right to early loan repayment. In the loan agreements, banks have conceived repayment plans in which most interest is paid in the initial stages of the loan, when the consumer is less likely to decide on early repayment, and the same was enabled by entity regulations of banking regulators.[79]

Bajrić (2015, 25) further elaborates that by conceiving such repayment plans in which the interest rate at the beginning of the loan repayment is significantly higher compared to the principal, banks mitigated the negative consequences in case the consumer exercises his right to early loan repayment, i.e. they reduced the risk of losing most of the interest and incurring other possible costs. Such repayment plans also reduce the effectiveness of this tool, since the profitability of its realization is the lowest in the final stages of repayment when it is more likely that the consumer will be financially able to repay his loan debt early. In addition to the aforementioned problem of structuring loan repayment through repayment plans that favor the position of the loan provider, another factor that also discouraged loan beneficiaries from early repayment are the significantly high fees that banks charged in these cases. Author explains that the practice of banks in B&H "was such that banks regularly charged fees for early loan repayment in the amount of 2-5%. For example, if the borrower of 30,000 BAM decided to repay the loan early when the remaining debt is 20,000 BAM, he would be obliged to pay the bank the amount of 1,000 BAM at the closing fee of 5%, without any objective explanation of what constitutes such compensation." Therefore, such actions of the banks lead to the conclusion that banks charged the aforementioned fees in the name of losing part of the interest (evaded profit) that they expected until the end of the repayment period, which is certainly contrary to Article 1068, para. 4 of the LOO.

4.2. Entity Level Regulation

The entity legislators, when transposing the regulations of Directive 2008/48/EC into domestic legislation, decided to adopt different solutions, certainly missing the opportunity to undertake harmonization with the EU standards at the state level, thus avoiding the problem regarding the application of different regulations within one state.

The first difference that is noticed between the regulation contained in the LPFSU FB&H and those contained in LOB RS is related to the fact that the LOB RS does not specifically mention the

[79] A repayment plan or loan repayment plan is an integral part of a loan agreement in which individual payments and periods are indicated, as well as conditions related to payment of installments. The plan contains a specification of each payment, thus showing amortization principal, interest calculated on the basis of the interest rate and any possible additional costs. If the interest rate is not fixed or if the additional costs may change under the loan agreement, the repayment plan shall indicate clearly and stipulated that the data will remain valid only until such time as the change in the interest rate or additional costs in accordance with the loan agreement – a provision of Article 10 of the Charter of Fundamental Rights of the European Union. Para. 2 letter (i) of Directive 2008/48/EC.

conditions that must be met in order for the bank to be entitled to compensation for early repayment of loans that finance the purchase of real estate.

In Article 98 LOB RS, the RS legislator omitted to define important issues from the segment of early loan repayment, such as the upper limit of the request for reimbursement of costs, and the aforementioned omission was eliminated by the Decision of the Banking Agency of the RS on the conditions of early repayment of loans of natural persons not intended for their business or other commercial activity, which literally took over the rules from the Directive 2008/48/EC. The bank is entitled to an objectively justified fee provided that early repayment occurs during the period in which a fixed interest rate is charged, and in terms of the amount of early repayment over a period of one year, it refers to the limit values defined by the Banking Agency of Republika Srpska. In Article 2 of the Decision on the conditions of early repayment of loans of natural persons that are not intended for their business or other commercial activities it is pointed out that the bank is entitled to compensation for damages where the amount of early loan repayment in a period of one year exceeds the amount of 10,000 KM. Banking Agency of RS in Article 3 of the mentioned Decision limits the maximum amount of damage compensation as it was done in the LPFSU FB&H – by limiting the amount of damage compensation to 1% of the loan repaid early if the period between the early repayment and the period of fulfillment of the obligation under the loan agreement is equal to or longer than one year. If the period is shorter than one year, the limit of damage compensation is set to a maximum of 0.5% of the amount of early repaid loan.

In the provisions of Art. 27 LPFSU FB&H points out that the consumer has the right to repay the loan at any time, in full or in part, before the deadline set for repayment, and that he is entitled to reduce the total loan costs by the amount of interest and costs for the remaining period of the contract, with the obligation to notify the bank in advance of the intention to repay the loan in advance within the agreed deadline (Šabić-Učanbarlić, 2018, 13)

From the aforementioned, it is clear that the loan consumer has the right to early repayment at any time after the conclusion of the contract, and before the expiry of the agreed deadline, and that he can repay the loan in whole or in part. In order to exercise this right of his, the loan consumer should notify his contracting party of early repayment within the contract unceasing period, which means that this deadline should be specified at the latest when concluding the contract.

4.2.1. Issues with Transposition on Entity Level Regulation

The entity model of harmonization of regulations in B&H with EU law certainly is not the the best solution for the implementation of directives because it resulted in vertical inconsistency of regulations, i.e. non-compliance of state with entity regulations on consumer protection, e.g. although through amendments to the LOB RS and LPFSU FB&H, solutions of the Directive 2008/48/EC were taken over, while the solutions of the old Directive 87/102/EEC remained in the CPA B&H. (Bajrić, 2015, 28)

Such transposition, which Bajrić (2015, 30) characterizes as "inconsistent and unsystematic transposing EU directives into the legal system of B&H", given that the same legal issue is regulated by the CPA B&H, which was modeled on "very tight regulations" of the old consumer loan directive, i.e. Directive 87/102/EEC. In this way, a unique situation has been created in B&H where both the old and the new regulations of consumer directives continued to coexist, although with the entry into force of Directive 2008/48/EC the old Directive 87/102/EEC ceased to be valid. When we add the subsidiary application of the LOO, i.e. the provisions of that Law concerning loan agreements, then it is clear that the fragmentation of regulations of the consumer protection often leads to confusion and various problems regarding the adequate and complete use of the right to early loan repayment.

Resolution of possible non-compliance of regulations is contained in the provision of Article 1, Para. 2 of the CPA B&H, according to which "in case of doubt or conflict of provisions, a provision that provides a higher level of consumer protection shall apply." Although this collision can also be solved by applying the rules *lex specialis derogat legi generali*, the application of the quoted provision indicates precisely the specificity of the consumer relationship and the need to provide increased protection to the weaker contractual party.

Bajrić (2015) also problematizes "time-taking over stipulations of the decision of Directive 2008/48/EC where the same was carried out in the RS three years earlier in relation to the FB&H, which indicates that two different legal regimes existed in the territory of B&H, which are not fully harmonized even after the adoption of new regulations. Therefore, everything points to the conclusion that the transposition of Directive 2008/48/EC into the legal system of B&H should have been carried out at the state level, i.e. through state law, and not entity laws and bylaws, because due to fragmentation of regulations creates additional disharmony and confusion in the process of exercising the right to early repayment of consumer loans."[80]

The entity model of transposing EU directives and harmonization of national legislations that is present in B&H creates a serious horizontal normative mismatch given that there are certain differences between the regulations in FB&H and RS. Also, another important issue is the fact that certain regulations in RS were adopted through bylaws, which is contrary to the European practice of implementing consumer directives. Poščić (2004) lists acceptable models of adopting European regulations: transposition into civil codes, transposition in special laws on consumer protection of limited field, in special laws regulating specific consumer relations, and in laws of special areas. Thus, the significant portion of the transposition in RS which has been done through the various decisions of the Banking Agency is flawed and disputable.

5. Creditor's Right to Compensation of Damages

Although the protection of consumer interests is definitely seen as a priority of these regulations, it is also necessary to take into account the fact that the bank might sustain damages caused by the debtors'early loan repayment. Such damages might occur in forms of administrative costs, the costs of the source of funds from which the loan was approved, costs of the time required for its re-valorization, and possible differences of lending yield. Perović (1995, 32) anticipated that the damage in these cases may also consist in the fact that the average interest rate for the same type of loan has fallen, so the bank will receive interest from the next borrower who will "take over" the early repaid amount, at a lower rate than that of the user who repaid the loan early. Thus, both the EU legislator and legislators in B&H foresaw and regulated the banks' right to compensation of such damages.

In order for damage to be compensated to the bank, the damage must be reasonable and objectively determined in accordance to specific criteria. Bajrić (2015, 42) points out that banks are professional business entities with loan as their primary activity and "will very soon re-evaluate the

[80] Such a conclusion may also be drawn from the provision of Article 76 of the SAA: "The Parties shall cooperate with a view to harmonizing standards for consumer protection in BiH with the same standards in the Community. Effective consumer protection is necessary to ensure the proper functioning of the market economy, and this protection will depend on the development of administrative infrastructure to ensure market advancing and law enforcement in this area. To this end, and in terms of their common interests, the Parties shall encourage and ensure: (a) an active consumer protection policy, in accordance with Community law, including greater awareness and the development of independent organization; (b) alignment of legislation in the field of consumer protection in Bosnia and Herzegovina with legislation in force in the Community; (c) effective legal protection of consumers to improve the quality of consumer goods and maintain appropriate standards; (d) that the competent authorities follow the law and ensure access to justice in the event of a dispute.

previously repaid amount and re-market it to other users by charging new interest." Both entity laws contain a solution according to which, in the case of early repayment, the bank is entitled to objectively justified and agreed reimbursement of costs directly related to early repayment.

For the realization of this right, however, further conditions prescribed by both Banking Agencies of the FB&H[81] and RS[82]must be met, and entity legislation regarding these conditions differs. The maximum amount of compensation is limited by the provisions of Art. 27 para. 3 LPFSU FB&H in such a way that this amount cannot exceed 1% of the early repaid loan, if the period between early repayment and the deadline for fulfilling the obligation under the loan agreement is longer than one year. Where this period is less than one year, compensation may not exceed 0.5% of the amount of the loan repaid early.

Both the LPFSU FB&H and LOB RS prescribe the cases where the bank cannot demand compensation for early repayment. Thus, it is not possible when the repayment was made on the basis of a concluded insurance contract whose purpose was to secure the repayment of the loan, where repayment is made during the period for which the variable nominal interest rate is agreed, whereby in the legislation of the FB&H this is allowed for loans that finance the purchase of real estate and in case of permitted overdraft of accounts.

Both laws, the LPFSU FB&H[83] and the LOB RS[84] emphasize that the fee for early repayment of the loan cannot exceed the amount of interest that the user would pay during the date of return the loan until the day the loan under the contract was to be repaid. Although Directive 2008/48/EC in Article 16 para. 4 stresses that a bank may exceptionally seek higher compensation provided that it proves that the loss suffered by early repayment exceeds the limits of Article 16 para. 2, neither the LPFSU FB&H nor the LOB RS provide for this possibility in B&H. (Šabić-Učanbarlić, 2018, 22)

Since the borrower must not find himself in a more favorable position than it would be if the consumer repaid the loan within the contract set time limit, Article 16 para. 5 of the Directive provides that the fee may in no case exceed the amount of interest that the consumer would have to pay in the event of repayment of the loan within the contract unceasing period. Article 27, para. 5 of the LPFSU FB&H and Article 98, para. 4 of the LOB RS establish a general rule that the fee for early repayment of the loan in no case may exceed the amount of interest that the consumer would pay within the contractual specified repayment period.

It is important to mention that Directive 2008/48/EC, as well as the Bosnian and Herzegovinian legislators, fail to provide a solution to an extremely important issue concerning the establishment of a single model of calculating the reimbursement of costs suffered by the bank as a result of early loan repayment, and the regulation of the method of presenting the same consumer in a manner that will not unnecessarily discourage the consumer from paying such possible compensation and therefore early repayment of loan debt.

[81] Decision of the Banking Agency of the FBiH on a uniform method of calculating and expressing the effective interest rate on loans and deposits (Official Gazette of the FBiH No. 48/12, 23/14)
[82] Decision of the Banking Agency of the RS on a uniform method of calculating and expressing the effective interest rate on loans and deposits (Official Gazette of the RS No. 15/12)
[83] Article 27, para. 5 of the LPFSU FB&H
[84] Article 151, para. 4 of the LOB RS

4. Conclusion

The consumer's right to early repayment of consumer loans is certainly a valuable instrument of its protection, but also a tool for achieving better financial conditions. Its legal and economic importance will surely keep on rising in the times of surging inflation when more and more consumers are struggling to make ends meet with their income and decide to borrow in order to maintain their standard of living.

With the early repayment of the loan, the loan provider comes early to funds and will be able to reinvest more efficiently than the consumer himself and thus make additional profit, or at least compensate for the possible loss he had due to early repayment of the loan. On the other hand, this right whose primary role is certainly consumer protection certainly gives the consumer significant flexibility by allowing him to change the loan provider in case of finding more favorable conditions on the loan market, and lowering his total expenditure related to the loan.

However, common practices of borrowers of concepting repayment plans in such a way that the consumer in the period of the consumer loan agreement first repays a higher share of interest and then a smaller one still somewhat defeats the purpose of early loan repayment. With such a repayment regime, in the event that the consumer opts for early repayment, the consumer "damages" the bank for a smaller part of the interest, given that it is more logical and more likely that the loan will be repaid early in the advanced phase of the loan, than in the initial one when the interest is higher. Therefore, the financial viability of using this right is greatest at the very beginning of the loan repayment, and over time it becomes smaller, and once the consumer repays the loan provider most of the interest, the early repayment of the loan becomes unprofitable. In the case of B&H, entity regulations of LPFSU FB&H and LOB RS introduced significant novelties and made progress in the field of protection of consumers in the financial services market through the special consumer rights, such as the right to early loan repayment. However, B&H regulation still remain vertically inconsistent, where different laws offer different consumer protection. Therefore, B&H needs to undergo a internal harmonization of regulation in this area, in order to ensure that consumers are well aware of their rights and well protected by their application.

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STRENGTHENING THE RECOGNITION OF THE RIGHTS OF PHYSICALLY CHALLENGED PERSONS UNDER INTERNATIONAL HUMANITARIAN LAW: MOVING BEYOND HUMANITARIAN PARADIGM

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Abstract

Arguably the adoption of the Convention on the Rights of Persons with Disabilities represents an important progressive development in the protection framework accorded to physically challenged persons under International Humanitarian Law. The objective of this paper is to examine the extent of protection accorded to physically challenged persons from harm in situations of risk consistent with International Humanitarian Law. The paper argued that examining the applicable legal and policy framework aimed at protecting the rights of physically challenged persons under international humanitarian law is not only a programmatic goal to be attained in the long term, but rather an immediate task on Countries to adopt measures in this without delay. This is against the backdrop driven by the desire to create stability between the rules of International Humanitarian Law(IHL) and the Convention on the Rights of Persons with Disabilities(CRPD) both in times of peace and armed conflict. It is therefore important to reiterate the fact that if the future of physically challenged persons must be guaranteed, the need to take cognizance of their peculiarities must not be overlooked. It is therefore advanced that the continued neglect of peculiarities of physically challenged persons both under the Convention and International Humanitarian Law portends a clog in the general protection against the effects of armed conflict or humanitarian emergencies. This paper adopts an analytical and qualitative approach and built its argument on existing literature which is achieved by a synthesis of ideas. Nevertheless, this article provides some recommendations that will guarantee special protection to physically challenged persons derivable from the principle of humanity.

Keywords:

Physically Challenged, Persons, Rights, International, Humanitarian Law.

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1. Introduction

The manner in which Physically Challenged Persons continued to suffer from all forms of discrimination, especially in armed conflict situations has been a global concern because of its attendant consequences. It is of course, at the heart of this need that this paper evaluates the strength and weaknesses of the rules of International humanitarian law, particularly, the entire provisions of the Convention on the Rights of Persons with Disabilities[85] and its Optional Protocol[86] which contains important protections provoked by the vulnerable nature of the physically challenged persons. Further, an analysis of the obligation to protect physically challenged persons is one that is entrenched in Article 11 of the Convention on the Rights of Persons with Disabilities.[87] The obligation to protect physically challenged persons is then analyzed against its relationship with the international humanitarian law responsibility in the protection regime. The important factor to be noted is that Article 11 of the Convention imposed an obligation on States to protect physically challenged persons at all times.[88] It may be argued that although the United Nations can be held responsible for failure to protect physically challenged persons, the ensuring decision cannot be upheld against due to the absolute immunity that it possessed under international law.

More specifically, it must be emphasized that the entire provisions of the Convention on the Rights of Persons with Disabilities[89], however, ensures that State parties are under an obligations to promote, protect and/or provide necessary facilities that will guarantee adequate and equal protection and enjoyment of inalienable rights and fundamental freedoms meant for all physically challenged persons, as well as their right to health, and to increase respect for their inalienable rights and inherent dignity[90]. Further, it should be noted that the principle of non-discrimination and equality[91] has an important implication for the specific application of international humanitarian law to the situations of physically challenged persons in armed conflict situations.[92] In this sense, as International Humanitarian Law is responsible for the regulation of international and non-international armed hostilities, it must be acknowledged that the main essence of the law of armed conflict is to protect human rights and respect for parties to a conflict, or are no longer directly involved in an armed conflict situation or to restrict the means of combat or instruments of warfare or to expect combatants in armed hostilities desirable special respect and protections for persons with disabilities and partake in ensuring their inclusion in any human rights programs capable of recognizing their vulnerabilities[93].

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[85] See the *Convention of the Rights of Persons with Disabilities* adopted 13 December, 2006.
[86] *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 2006.
[87] *Convention on the Rights of Persons with Disabilities* adopted 13 December 2006, Article 11.
[88] Available at: <https://www.icrc.org/eng/war-and-law/ihl-other-legal-regimes/ihl-human-rights/index-jsp> accessed 12 July 2022.
[89] Ibid.
[90] *Convention on the Rights of Persons with Disabilities,* 2006, Article 3.
[91] Ibid, Article 5.
[92] J.E. Lord and M.A.Stein, "Implications of the United Nations Disability Convention for Refugees and Internally Displaced Persons," Arizona Journal of International and Comparative Law, (2012) 27, 401.
[93] See ICJ Advisory Opinion on the Legality of the Threat or use of Nuclear Weapons, *ICJ Reports* (1996) P. 226, Para 7.

On the basis of the foregoing, it must be stressed that the perceived barriers that physically challenged persons experienced during peacetime in accessing education, employment, health services, and rehabilitation are intensified in times of armed conflict or humanitarian emergencies.[94] Indeed, an understanding of international humanitarian law through a Disability lens enabled the identification of ill-treatment rooted in the disability experience, such as physical and sexual abuse, inhuman living conditions, and isolation and neglect. In light of the above, the paper is structured as follows: It started with an overview of the analytical framework of the status of physically challenged persons under international humanitarian law.

Thereafter, the paper examined the basic concepts, and does not attempts to resolve the controversies between international humanitarian law and international disabilities rights, but found out that the disability rights paradigm extant in the Convention on the Rights of Persons with Disabilities, by contrast, breaks free from paternalistic models of protection evident in international humanitarian law instruments and requires law and policies to be animated by a social model understanding of disability, as opposed to medicalized conception, and informed by principles of autonomy, non-discrimination, Independence, inclusion and equality of opportunity.[95] Subsequently, it elaborated on the humanitarian protection within the 1949 Geneva Convention and 1977 Additional Protocols. This is followed by a detailed insight into the tension inherent in the protective models of international humanitarian law and international disabilities rights. The paper concludes by considering whether and how the future development and understanding of an international humanitarian law disability perspective will contribute to the resilience and overall effectiveness of international humanitarian law in the area of strengthening the protection of physically challenged persons through addressing their specific needs during and after an armed conflict. The paper adopts the doctrinal method of research.

2. Disabilities Rights

From a scholarly perspective, it is generally acknowledged that disability rights are basic human rights of physically challenged persons who are beneficiaries of development and are entitled to adequate protection at all times given their vulnerabilities. According to the definition of disability' rights, as provided under the African Charter on Human and People's Rights, Disability's rights is the right of those persons with disabilities who deserves or entitled to certain basic rights or adequate protection at all times given their vulnerabilities to attacks in line with their basic needs.[96]

Also, in defining disability rights, this paper only offers a broad overview in order to provide the necessary understanding of the term with regard to the subject matter. Importantly, in order to gain a full understanding of the concept of disability rights, it must be emphasized that the basis for establishing treaty-based protection is well-known and arose out of the concern for seriously wounded soldiers left to die on the battlefield and war veterans experiencing a traumatic injury. Thus, the first-hand observation of Henry Dunant on the Battlefield of Solferino who witnessed soldiers left unattended and unassisted on the battlefield provided the impetus for

[94] Ibid.
[95] R. Kayess and P. French, "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities," Human Rights Law Review 1, 8 (2008): 1-34.
[96] *African Charter on Human and People's Rights*, 1979, Article 18 (4).

the establishment of what ultimately became the International Committee of the Red Cross.[97] In this context, disability's rights will be better understood from the definition of the word "Disability" as provided in several literature or organizations. However, the Disability Discrimination Act[98] perceived those with disabilities as persons with "a physical or mental impairment" which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. In a similar fashion, the World Health Organization[99] (WHO) defines disabilities as a "universal concept encompassing impairment, restrictions, and a level of incapacitation from doing or performing an act". It is important to acknowledge that the concept "disability" is a complex issue, looking at the interactions with the features of a person's body as well as the societal features in which he or she lives. In another vein, it must be stressed that the United Nations Convention on the Rights of Persons with Disabilities (CRPD) provides that, disability is an evolving concept.[100] It provides thus:

> Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which is interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

In contemporary usage, despite several and multi-dimensional approaches to the definition of disability's rights, its fluidity allows several understandings of disability and/or impairment. But however, defining the concept "disability" as an interaction, has made it simple in such a manner that disability cannot no longer be seen as part of a person, but as a situation where a person is physically challenged by one ailment or the other.[101] In light of the above definition of disability, it should be noted that the most important rights for a disable person is otherwise called disability's rights. It is with this in mind that this study maintained that the concept "disability" is a human rights issue since persons with disabilities experience unfair treatment and marginalization, are perceived as violations of human dignity, and oftentimes are denied autonomy. However, this assertion is thus related to a potential United Nations Obligation to ensure respect for persons with disabilities. Also, while there is real scope for this argument on positive obligations, it is complicated and requires disentangling of a range of legal issues which arises within the scope of the basic human rights of persons with disabilities. As a normative guide, several international documents and regional legal documents such as the World Programme of Actions concerning Disabled persons, the Convention on the Rights of the Child,[102] and more importantly, the Standard Rules on the Equalization of Opportunities for People with Disabilities have shown that disability is, however, a human rights issue.[103]

In this sense, it may be argued that, in the context of the United Nations, understanding the interpretative approach on disability rights stems from the perception that the Convention on the Rights of Persons with Disabilities(CRPD) applies human rights concept to disabilities as a way of associating general human rights specifically to physically challenged persons, persons

[97] *H. Dunant, 1862*, accessed 15 July 2022, https://www.icrc.org/icrc-062-0361.
[98] Ibid.
[99] World Health Organization (WHO) *Understanding Disability,* 2011, p.5.
[100] *Convention on the Rights of Persons with Disabilities,* 2006, Article 1.
[101] Ibid.
[102] The Convention on the Rights of the Child 1989(adopted by the UNGA Res.44/25 of 20 November 1989 and entered into force 2 September 1990).
[103] The Standard Rules on the Equalization of Opportunities for people with Disabilities (1993).

with ailments or any form of disorder[104] in buttressing what is particularly the common definitions of disabilities rights which may be viewed as a natural development in the fulfillment of certain obligations of International human rights law which, however, rests heavily on the Charter of the United Nations and regional frameworks. However, it is important to emphasize that the fact that the inherent powers of this International Organizations informed the Ministerial Declaration[105] on July 2010 that recognizes the disability concept as "cross-cutting" issues necessary for the realization of the Millennium Development Goals (MDG) points to the fact that there is now need to protect women and girls with disabilities from any unpleasant or unwarranted punishment that will amount to discriminatory practices or be excluded from participating in the execution of the agenda of the Millennium Development Goals.[106]

As part of the efforts to ensure adequate protection and recognition of disability rights, emphasis was laid by the United Nations on women who are physically challenged as a result of one ailment or the other.[107] Notably, at the conceptual level, it should be pointed out that Article 7 of the Convention on the Rights of Persons with Disabilities (CRPD)[108] however, encourages Member States to ensure that all necessary precautions or measures in ensuring that, there is the full enjoyment of rights of children with disabilities as well as other human rights and fundamental freedoms in such a manner that guarantees equality with other children. Addressing this concern, it is important to emphasize that in every measure bothering on physically challenged children, the best interest of such children should be a primary consideration. The principle of non-discrimination is a common phenomenon in international human rights law. Also, state parties should ensure that physically challenged children have the right to express their views freely on all matters in their best interest. In this case, such children's views should be attended to and taken into the cognizance of their age and maturity on an equality with other children of similar age, as well as provisions of adequate protection, support, and adequate assistance that will guarantee his enjoyment of his human rights.[109]

In addition, placing the above descriptions within the context of Article 2 of the Convention on the Rights of the Child 1989(CRC) obliges member States to endeavor to provide adequate protection for the children which will guarantee their enjoyment the rights provided under the Convention on the Rights of the Child devoid of any form of discriminatory practices against the Child. Moreover, in appreciation of what adequate protection and humanitarian assistance implies in the purview of other international instruments, it is pertinent to note that while several of grounds for discrimination as provided under the Convention on the Rights of the Child have an affinity with that found in the human rights treaties that have preceded it, it is, however, different in many ways. Consequently, it can be deduced using human rights frameworks as the fundamental underpinning approach to disability need not undermine the validity of conceptualizing disability or a physically challenged person's rights and freedoms in

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[104] F. Megret, "The Disabilities Convention: Human Rights of Persons with Disabilities or Disable Rights", Human Rights Quarterly, 30 (2008): 494-516.
[105] See "The Ministerial Declaration of the United Nations", accessed on June 28- July 2, 2010, available at: <https://www.un.org/july his/pdf10.
[106] See "The Ministerial Declaration Report on Millennium Development Goals (MDG)" 2015, accessed July 15, 2022, https://www.un.org/pdf/MDG 2015.
[107] *Convention on the Rights of Persons with Disabilities,* 2006, Articles 6, (1) and (2).
[108] *Convention on the Rights of Persons with Disabilities,* 2006, Articles 7(1) (1) and (3).
[109] Ibid., Article 3.

other ways that have proved significant to physically challenged persons. It may be argued that the social model and a human rights approach are mutually reinforcing.[110] A further argument in this regard is that the cumulating of this human rights and social model approach was the United Nations Convention on the Rights of Persons with Disabilities which came into force in May 2008. Article 11 of the Convention specifically outlined the obligations of national States to physically challenged persons to ensure their human rights and protection during situations of armed conflict or humanitarian emergencies.[111]

2.1. The Phenomenon of International Humanitarian Law

According to Jennifer Moore,[112] the law of armed conflict is agnostic as to the rationales for armed hostilities and unimpressed by its purported justifications. In this sense, what it implies is that instead of trying to show a distinction between what is lawful from an unlawful conflict, the law of armed conflict is determined to guarantee adequate measures that will ensure that all violence of any sort is less dangerous to humanity. However, the widely accepted view of humanitarian law in this context implies that no conflict or violent act should be ignored or disregarded to amount to a lawless zone. However, it may be argued that while it is conceded that the essence of humanitarian law is to regulate the means of combat and instruments of war as well as reducing dehumanization of individuals, it must be emphasized that such rules may be viewed as reinforcing the idea that war is an acceptable or unavoidable aspect of human relations and however, its occurrence and possible reoccurrence makes it a subject of relevance worthy of academic attention. Moreover, the fact that International Humanitarian Law is also referred to as the "Laws of war", the "Laws and Customs of War" or the "Law of Armed Conflicts makes it more necessary for legislative actions both at the international, regional and national levels of operations on the subjects in order address subsisting inconsistencies in its application.

International Humanitarian Law focused on ensuring human protection to persons rendered disabled during armed conflict and as well aimed at preventing unnecessary suffering.[113] Additionally, international humanitarian law instruments accorded protection to persons affected by the effects of armed conflict, for instance, the wounded or sick combatants, and later increased its emphasis on civilian populations.[114] In this sense, physically challenged persons are protected in general terms under the principle of international humanitarian law that is aimed at shielding all persons not actively engaged in hostilities from harm and under specific rules specifically protection on account of being physically challenged.[115] Importantly, it should be noted that under the rules of international humanitarian law, physically challenged persons are entitled to the same protection accorded to all persons under both the rules pertaining to treatment and protection as well as the rules relating to the means and methods of warfare. In this respect, it may be argued that while disability is not specifically mentioned as a prohibited

[110] J. Bickenbach, "Disability Human Rights, Law and Policy," in G. Albrecht, etal. (eds), The Handbook of Disability Studies (Thousand Oaks, CA: Sage 2001).
[111] Accessed on July 13, 2022, https://www.un.org/disabilities/documents/convention/convopt prot-e.pdf.
[112] J. Moore, *Humanitarian Law in Action within Africa*, (Oxford: Oxford University Press, 2012), 53-54.
[113] M.Sasoli and A.A. Bouvier, How Does Law Protect in War? (Geneva: International Committee of the Red Cross, 2006)1: 2, 219.
[114] Geneva Convention of 1864.
[115] D.M Greig "The Underlying Principles of International Humanitarian Law," 9 Australian Yearbook of International Law, (1985): 696-85.

ground of adverse distinction, it would be covered under other status and in the light of developments in international law that amplifies disability status as worthy of protection against the discriminatory practice.[116] Apparently, one may further argue that the idea of adverse distinction centres on the notion of positive discrimination in contemporary human rights law.[117] By extension, this does not in any way suggests otherwise, but the basis for this line of argument is that positive discrimination holds that specific measures necessary to advance or achieved equality of historically marginalized groups, such as physically challenged persons, or women should not be considered discriminatory practice.[118] In this same line of argument, the principle of humanity in international humanitarian law animated the formulation of a wide range of both general and particular rules.[119] The above reason implies that the general protections of International humanitarian law reflecting the principle of humanity applied equally to physically challenged persons and additionally, international humanitarian law specific rules of special protection for physically challenged persons.

2.2. Humanitarian Protection Within The 1949 Geneva Conventions and The 1977 Additional Protocols

Basic knowledge of humanitarian protection from the provisions 1949 Geneva Conventions, and its Additional Protocols of 1977 is really of great assistance and must be extensively understood in order to conscientiously appreciate its relevance in an armed conflict situation. Against this background, the question is: How does the law of armed hostilities specifically contribute to ensuring adequate protective measures for physically challenged persons in armed conflict situation?. That said, it must be emphasized that beyond the specific obligation it imposes on State parties to Additional Protocol 1, it has shown that the rules of international humanitarian law with regard to the conduct of hostilities contributed to the prevention and minimization of harmful practices to physically challenged persons. As a matter of fact, it is pertinent to state that the general rules of armed conflict bothering the regulations of armed hostilities prohibit direct attacks, [120]unwarranted attacks,[121] and disproportionate attacks.[122] It is against the foregoing, that we affirm that strict adherence to the rules of armed conflict may prevent, and minimize harmful practice to physically challenged persons as non-combatants who deserves adequate protection.

At the same time, it could be noted that the responsibilities of combatants in armed hostilities are to take precautions measures in attack, and against the effects of combatants' operations which are specifically important in the circumstances. In other words, it emerges that with respect to precautions in attack, effective restrictions must be placed on unwarranted attacks which may be harmful or injurious to civilian populations or to their objects, unless in unavoidable situations.[123] In this sense, it implies that proper implementation of the above

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[116] ICCPR 1966, Article 7 and CRPD 2006, Articles 5 and 2.
[117] CRPD 2006, Article 5 and CEDAW 1979, Article 2.
[118] CRPD 2006, Article 5(4).
[119] R. Coupland, "Humanity: What It is and How Does it Influenced International Law?" *International Review of the Red Cross* 83, (2001): 844, 969-90.
[120] Additional Protocol 1 1977, Article 51(2).
[121] Additional Protocol 1 1977, Article 51 (4).
[122] Additional Protocol 1 1977, Article 51(5)(b).
[123] Additional Protocol 1 1977, Article 57(2)(C).

obligation to issue effectively a pre-restriction notice suggests that the prospective persons is likely to receive the notice and would be able to appreciate the reason behind the pre- restriction notice on time in order to comply with it. That is to say be able to vacate or be able to be evacuated from the danger zone.

Indeed, it is worth asserting that this marks the beginning of the presentation of valuable information that will be accessible to physically challenged persons as well as avoid any form of discriminatory practices against them. Having examined the extent of the normative provisions, it should be asserted that the above would also be relevant under the provisions of the Convention on the Rights of Persons with Disabilities.[124] For purposes of examining humanitarian protection of physically challenged persons within in line with the provisions of the 1949 Geneva Conventions, and the 1977 Additional Protocols, it must be acknowledged that Common Article 3 is significant in another regard, for codifying, in a humanitarian law treaty, a number of non-derogable human rights norms, which includes the restrictions against torture, inhuman and degrading treatment, and arbitrary execution.[125]

Given the overall purpose of the Four Geneva Conventions of 1949, it is unquestionable that the First Geneva Convention of 1949 predominantly focuses on the protective measures accorded to the wounded and sick soldiers in the war zone.[126] However, a remarkable point to note is that First Geneva Convention, unlike the other three of the four conventions, have been universally ratified. That being said, Article 12 maintains that all combatants “shall be respected and protected in all circumstances.” In a similar manner, the second Geneva Convention extends the full protections accorded to wounded soldiers under the First Geneva Convention to wounded and shipwrecked sailors as well.[127]Having established that, it should be noted that, the Third Geneva Rules of 1949 otherwise known as the "Prisoners of War Convention" also protect casualties of war in situations of armed hostilities. Aside from the above provisions, one should bear in mind that Article 13 of Geneva Convention III provides for adequate safeguard for casualties of war at all times, and should be humanely treated or protected against situations of war, intimidations, assaults, degrading, and inhuman treatment.[128]

In a similar situation, the Fourth Geneva Convention of 1949 otherwise known as the "Civilian Convention" protects civilians and is universally ratified like the other Conventions. Additionally, it is essential to note that the Fourth Geneva Convention specifically provides for the economic and social welfare of non-combatants who are not parties to the armed conflict. The importance of the civilian convention is that it focuses on additional protections for persons in custody who are deprived of their deserved protection as provided under the Casualties of War Convention. However, Article 37 of the Civilian Convention provides that "a person or persons

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[124] *The Convention on the Rights of Persons with Disabilities*, 2006.
[125] *The Convention Against Torture, and Other Cruel, Inhumane or Degrading Treatment or Punishment* (adopted by the UNGA Res.39/46 of 10 December 1984 and entered into force 26 June 1987).
[126] *Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field*, 1949.
[127] GCII 1949, Article 12.
[128] *Geneva Convention Relative to the Treatment of Prisoners of War,* 1949, Article 13.

awaiting trial or have been sentenced for an offence involving loss of liberty, shall in the course of his incarceration be humanely and fairly treated".[129]

Furthermore, it is an issue worth noting in light of the relevance of the provisions of Article 37 of the Civilian Convention. This Civilian Convention has provided essential protections for individuals detained without any reason in the War on Terror as well as ensured that there is no lawless zone between the due process protections of criminal law and the special humanitarian protections accorded to Prisoners of war. However, the above expressions, on the other hand, have shown the relevance of humanitarian protections as provided by the 1949 Geneva Conventions. Therefore, a specific question that arises in the protection of physically challenged persons with respect to evacuating them from a war zone as a precautionary measure bothers on whether international humanitarian law rules contain specific protections for this category of persons during an armed conflict. The answer is that, in situations of evacuation, or prohibited zones, certain non-combatants, like physically challenged persons who are vulnerable deserves adequate protections. Moreso, in recognizing the nature of these vulnerable persons, Article 2 of the Convention[130]provides that:

> "State parties are obliged under International Humanitarian law and human rights law to take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk and armed conflicts."

Undoubtedly, there are two notable observations from the above provisions of Article 2 of the Convention on the Rights of Persons with Disabilities which centers on the provisions of adequate protection during public emergencies or internal violence. Firstly, the provisions of the Convention doesn't have a derogatory clause allowing the suspension of certain human rights in a public emergency situation as provided under Article 4(1) of the International Covenant on Civil and Political Rights[131] which provides thus:

> In times of Public emergency that threatens the life of a nation and the existence of which is officially proclaimed, the states parties to the present covenant may take measures derogating from their obligations under the present covenant to the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with their provisions under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.

Secondly, it should be noted that the Convention on the Rights of Persons with Disabilities took a different dimension with respect to issues of protection of the rights of physically challenged persons in public emergency situations. This stems from the fact that its approach is different from other core human rights treaties by invoking rules guiding armed hostilities, and human rights norms and principles during armed conflicts. However, it must be acknowledged that on the contrary, it is only the Convention on the Rights of the Child that is the only core treaty of human rights that recognizes this situation.

Another remarkable issue worthy of mention is, Article 38 of the Convention on the Rights of the Child 1989 prohibits Member States from drafting any individual or individuals

[129] *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1949, Article 37.
[130] *Convention on the Rights of Persons with Disabilities*, 2006, Article 2.
[131] *International Covenant on Civil and Political Rights*, 1966, Article 4.

below the statutory age of 15 years into the armed forces.[132] Basically, the object and purpose of International humanitarian law in general and in particular is to ensure that there is a threshold of violence for there to be an international armed conflict wherein provisions are made to avoid a gap in protection, particularly, the protection of persons with disabilities from the harmful effects of war. In this sense, it should be pointed out that:

> "State parties shall take, in accordance with their obligations under international law, including international law, including international humanitarian law and international human rights law, all necessary precautions that will guarantee the protection and safety of persons with disabilities in situations of risk, armed conflict, humanitarian emergencies and or occurrence of natural disasters."[133]

Looking at provisions of Article 11 of the Convention, it appears the most relevant human rights provisions in the Convention that it's frameworks on protections extends to persons with disabilities. Also, considering the importance that member States attached to the protection of physically challenged persons in situations of armed hostilities, humanitarian emergencies, or natural disasters. It might well be the case, that physically challenged persons under international humanitarian law are already noted in the provisions of 1949 Geneva Convention as persons who deserves adequate protection due to their vulnerabilities to risk, breakdown in access to, and, accessibility of support structures.[134] However, despite the arguments in favour of expanding the type of protection giving to physically challenged persons in situations of risk, or armed hostilities, it must be stressed that, the possibility of evacuating this category of persons, who most times, are faced with particular barriers to fleeing to safety during armed conflict or internal violence, should, however, not to be abused in such a manner that it will amount to violations of other international humanitarian law prohibitions on forcible deportation, transfer, or displacement, other than their safety, or compelling military commands.[135] International Humanitarian law, like the general culture, associates disability with disease, defectiveness, or deformity. In this regard, disability as historically reflected in international humanitarian law is centered on the concept of the wounded and broken body, first in relation to the soldiers rendered inactive in combat and in need of protection and later more broadly to civilians and the concept of survivor assistance.[136]

2.3. Mechanism for Monitoring the Protection of Physically Challenged Person's Rights in Situations of Armed Conflicts or Other Emergencies

Evidently, a number of International Humanitarian Law instruments recognized that special respect and protection are to be accorded to persons with disabilities and others whose status may render them vulnerable or disadvantaged without, however, articulating the parameters of such protection. In this sense, however, it may be argued that the language used to describe disadvantage on the basis of disability is not uniform and, not surprisingly given the era in which international humanitarian law instruments we're drafted. However, this departs from modern conceptualizations of disability under human rights law. It is imperative to emphasized that the term "disabled" while appearing in the Geneva Conventions, is not used with consistency

[132] *Convention on the Rights of the Child*, 1989, Article 38(3).
[133] *Convention on the Rights of Persons with Disabilities*, 2006, Article 11.
[134] *Geneva Convention (GC 111) 1949*, Article 30 and Geneva Convention (GC IV) 1949, Article 16.
[135] *Geneva Convention* (GCIV) 1949, Article 49 and Additional Protocol (AP 11) 1977, Article 17.
[136] R. Amundson "Disability, Handicap, and The Environment, Journal of Social Philosophy 23, 1 (1992): 105-119.

in international humanitarian law instruments or in national military manuals. In other words, physically challenged persons are severally captured in the provisions referencing the " infirm," wounded, sick, and disabled as exemplified in Article 1 of the Convention. However, it is useful to highlight that Additional Protocol 1 supports a broad-based approach and lends some definition to these various terms associated with disability.

A pertinent question at this juncture is to consider whether the existing legal frameworks on disabilities rights protection have been able to address the protection gap. To a large extent, the above question could be better addressed by looking at the relationship existing between particular norms of the Convention on the Rights of Persons with Disabilities, and the rules of the Law of Armed Conflict in specific Contexts. Thus, given the prevailing wide interpretation as well as the unique nature of the Convention, it can thus be argued that a specific rule of a convention may be applicable as a specialized rule to qualify, or displace a less favorable rule of international humanitarian law. However, while this might seem reassuring at first sight, it leaves the problem that whether or not, in its usage, certain questions may arise on, whether it is appropriate to see some rules of the convention of the law of armed conflict as the more distinctive regulations in the prevailing circumstances. Drawing from the above development, it can be most readily understood that the Convention on the Rights of Persons with Disabilities(CRPD) 2006 contains different forms of mechanisms used in monitoring and enforcing all inalienable rights provided in the aforesaid Convention. In this sense, monitoring of the extent of compliance with the provisions of the convention at the national level of all human rights treaties requires all Member States to adopt, or apply domestic measures in their national laws wherein binding, effective and accessible remedies are provided for individuals whose rights are breached. In furtherance of the above, it is worth noting that article 34 of the Convention on Physically Challenged Person's Rights,[137] however, expands the above provisions by introducing an international treaty body which is a body responsible for monitoring and supervising state's implementation of their respective Conventions obligations. Of even greater concern is that, unlike other treaty bodies, the authorizing body responsible for the protection of the rights of physically challenged persons lacks the basic power to issue legally binding decisions capable of addressing cases of violations of victim's rights, rather, they are seen to engage in dialogues with member states concern, in identifying the problems of implementation, as well as encouraging member States to harmonize their laws, and practices into line with the provisions of the Convention.

Conversely, while it would indeed be advantageous to enhance the protection of physically challenged persons in conditions of armed hostilities, it can also be assumed that Article 1 of the Optional Protocol to the Convention on Rights of Persons with Disabilities provides that "aggrieved persons may submit petitions on violation of their rights through a body responsible for that".[138]In doing this, and, with the aim to fully implement the provisions of the Convention, member States of the Convention on the Rights of Persons with Disabilities have been requested to, introduce measures capable of safeguarding the human rights of physically challenged persons without discrimination or harmful practice to them. However, these could be achieved by enacting anti-discrimination legislation or eliminating discriminatory laws and practices, or by adopting policies and programs, ensuring that goods, services, and facilities can

[137] *Convention on the Rights of Persons with Disabilities,* 2006, Article 34.
[138] *Optional Protocol to the Convention on the Rights of Persons with Disability*, 2006, Article 1.

be easily accessible to physically challenged persons, as well as creating a national monitoring mechanism that will complement the existing frameworks. On the other hand, while it is understandable that the rules contain special provisions bothering on the roles of civil society in ensuring the proper execution of the convention. Further, Article 33 provides that "civil society shall be involved and participate fully in the monitoring process established by State parties". Indeed, in order to submit individual's petitions, it should be noted that the Optional Protocol to the Convention, however, empowers the authorized body to examine petitions from individuals, or groups of individuals, with respect to the violations of the provisions of the rules by the Member States. That being said, there are, of course, situations where this authorized body may deem a petition unacceptable especially when:

i. Such petition is anonymous,

ii. Such petition has been determined by other authorized bodies, or has been, or is being scrutinized by the different procedure of international investigation or settlement approved to do so,

iii. Other relevant domestic remedies have not been exhausted unless where the adoption of such remedies is unduly delayed, or may not give the desired results,

iv. There is a clear manifestation of ambiguity or absurdity,

v. When issues raised are the subjects of the petition that took place before the Optional Protocol becomes effective for the Member States, unless the issues remained operative after the said commencement date.

2.4. Reinforcement of Disabilities Specialized Protection

While the Law of Armed Conflict and the Convention on the Rights of Persons with Disabilities operates from different dimensions with significant commonalities that accommodates specific perception of physically challenged persons in situations of armed hostilities, it must be acknowledged that physically challenged persons deserve respect and protection in situations arising from international, or non-international armed hostilities or other humanitarian crises.[139] As an approach that is widely conceptualized, the International Committee of the Red Cross, a non-humanitarian organization believes that the Fourth Geneva Convention stipulates that " infirm persons" deserve adequate recognition given the fact that they are vulnerable and distinctive from others as well as are rights-bearing individuals.[140] The contention here is that the use of the word "respect" in this sense implies " to spare" and not "to attack". On the other hand, protection in this context implies defense or support given to such individuals.

Obviously, in reinforcing disability's specialized protection, it should be pointed out that the principle of protection or respect as applies to the law of armed hostilities contains specific responsibilities related to the physical health or safety of Physically challenged persons. In this regard, the Geneva Convention III Relative to the Treatment of Prisoners of War, however,

[139] J. Henckerts& L.D. Becks, "International Committee of the Red Cross", *Customary International Humanitarian Law*, (Cambridge University Press, 2005).
[140] *Geneva Convention* (GC IV) *Relative to the Protection of Civilian Persons in Time of war,* 1949.

requires that special facilities must be put in place in areas where casualties of war are kept in order to take appropriate care of the physically challenged persons who may as well be kept their for resettlement.[141]

Also, in a similar vein, the Fourth Geneva Convention upholds the right of physically challenged persons in receiving medical treatment wherein restrictions are placed on armed attacks on convoys of vehicles, or vessels carrying people who may be sick as well as giving such people similar protection as civilians.[142] It must be placed on record that the intent of the Fourth Geneva Convention is to show that the obligation to safeguard physically challenged persons, also includes the responsibility to prioritize the evacuation of physically challenged persons from war zones or unsafe areas.[143] One aspect of this development is that rights that are now enshrined in the Convention on the Rights of Persons with Disabilities such as the Right to Life provides that:

> "States parties should reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with other".[144]

Also, the right to respect others physical and mental integrity as well as the right to the enjoyment of the highest attainable standard of health has long been promoted through the rules of the law of armed conflict. A significant point to note herein is that, while the law of armed conflict bothers on the treatment or protection of civilians that largely relates to the charity and medical patterns of disability, the Rules on physically challenged persons instead advance the social pattern of disability. It must be acknowledged that one of the central features of this Rules on Physically Challenged Persons is that it contains certain basic rights that is beyond physical security and health, as well as basic rights that are far more than a mere guarantee provided in other human rights treaties. Arguably, one of the most important considerations which ultimately distinguished the convention from the law of armed conflict, in this respect, is that the Convention imposes on the Member States the duty to conduct programs that will create awareness on cases bothering physically challenged persons[145] as well as an emphasis on the continued existence of these rights even in emergency situations.[146] More specifically, as has already been mentioned, the Convention on the Rights of Persons with Disabilities has provided for adequate Protection of the right of physically challenged persons during armed conflicts which could not be found in other international human rights treaties. It can thus be said that the convention vested rights in individuals and, however, goes beyond the International humanitarian law paradigms that primarily impose duties on member States without recognizing personal rights. In light of the foregoing, it is important to stress that the Convention on the Rights of Persons with Disabilities ensures that additional avenues are provided wherein the rights of Physically challenged persons are implemented and monitored adequately as provided in its provisions. On the other hand, International humanitarian law frameworks, while ensuring that there is a minimum desirable standard of treatment which oftentimes does not usually confer

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[141] *GC III Convention Relative to the Treatment of Prisoners of War,* 1949, Article 30.
[142] GC IV 1949, Article 21.
[143] *The Fourth Geneva Convention,* 1949, Article 17.
[144] *Convention on the Rights of Persons with Disabilities*, 2006, Article 10.
[145] Ibid, Article 8.
[146] Ibid, Article 11.

any procedural rights on individuals to seek remedies for international humanitarian law violations, or rather establish any enforcement mechanisms that will be necessary for the pursuit of such rights.[147] It is important to note that the entire provisions of the convention equally suggest its universal application which in Article 1 of the Convention, it is meant to promote, protect, and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all physically challenged persons as well as promoting respect for their inherent dignity.[148]

To explore this further, drawing from the Pictet theory may lead to a situation where the determination of whether a person is a "protected person" will be in conflict with the other test used in determining whether there is "an occupation". This regime justifies several protective interests. However, it should also be noted in this context that the fact the convention clearly refers to situations of emergencies and armed hostilities without a distinction between nationals and aliens could raise doubt on whether a distinction could as well be made between civilians and non-civilians regarding situations in which they are to be protected. This approach, with due respect justify the assertions that States have universal obligations.[149] In addition, it could be argued that like its parent instrument, the Optional Protocol to the Convention on the Rights of Persons with Disabilities shows no demarcation between citizens and non-citizens as the case may be. Admittedly, in a similar fashion, it suggests that any person or persons have the right to bring a petition before the authorized body, as the committee provides that he or she is under the jurisdiction of the State with regard to the situations that gave rise to the petition.[150] Put differently, the above issues have raised questions on the extraterritorial applicability of the Convention. This critical and contextual prism can also be of help in assessing the level of application of the convention for the protection of those who are sick or wounded as provided in the Fourth Geneva Convention that could apply to persons within their territorial boundaries or foreigners in occupied territory. Also, given the question on the extraterritorial application of the Convention on the Rights of Persons with Disabilities, it is submitted that the convention is yet to incorporate in its provisions the geographical scope of application, but however, certain obligations provided apply implicitly to the territory of such State. On the contrary, it has been noted that the explicit application of the Convention to armed hostilities in Article 11 reinforces the argument as it is applicable to the conduct of the State abroad. More specifically, as has already been mentioned, the above view of course, conforms with the belief that certain responsibilities under the key United Nations Human Rights Treaties are applicable within the territory of the State or where such a State exercise control extraterritorially.[151] However, it is important to bear in mind that the overall object or purpose of the Convention and the international humanitarian law rules is gears towards ensuring adequate protections for physically challenged persons in situations of armed conflict.

[147] J.S. Pictet, "Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War", 1949.
[148] *Convention on the Rights of Persons with Disabilities,* 2006, Article 1.
[149] See Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2 2008 (7).
[150] *Optional Protocol to the Convention on the Rights of Persons with Disabilities,* 2006, Article 1(1).
[151] *Democratic Republic of the Congo v. Uganda (Judgment)* [2005] ICJ Rep. 168, 242-3

3. Conclusion

This paper has attempted a survey on the commonalities and differences existing between the law of armed conflict and the rules regulating the rights of physically challenged persons which bothers on ensuring adequate protection of physically challenged persons in situations of armed hostilities or humanitarian crisis. As a way of emphasis, the entire provisions of Article 2 of the Convention on the Rights of Persons with Disabilities, (2006) that is regarded as a primary regulatory mechanism for physically challenged persons is in tandem with the rules of the law of armed conflict as well as the international human rights law respectively. Therefore, it is not wrong to submit that physically challenged persons are rights bearers who deserve adequate protection in an armed conflict situation or other humanitarian emergencies.

Additionally, given the humanitarian impact of armed conflicts on persons with disabilities, as well as their vulnerabilities, this paper argues that an examination of the applicable legal and policy frameworks meant to safeguard the rights of physically challenged persons in situations of an armed conflict is not only a programmatic goal to be attained in the long term but rather an immediate obligation on states to take steps in this regard without delay. More importantly, this paper has come to a conclusion that adequate safeguarding of physically challenged persons under the provisions of international humanitarian law emanates from the fact that international humanitarian law prescribed certain responsibilities on private military organizations and to armed forces of the State, whereas the Convention on the Rights of Persons with Disabilities is only applicable to Member States.

Ultimately, this paper appreciates the complementary or mutually reinforcing nature of the rules of International Humanitarian Law and that of the Rules on the Rights of Physically Challenged Persons, however, submits that the emergence of this Convention has contributed immensely to advancing the rules of international humanitarian law or human rights norms in its application to the rights of physically challenged persons in situations of armed hostilities or humanitarian emergencies. Be that as it may, recommendations are made to better enhance the adequate safeguard of physically challenged persons in situations of armed hostilities or other humanitarian emergencies.

Recommendations:

1. States parties should be responsible for the treatment of physically challenged persons humanely without any form of discrimination.
2. States parties are obliged to allow and or facilitate access to humanitarian reliefs to persons with disabilities during an armed conflict without any form of discrimination or harmful practices to them.
3. Also, in situations arising from international or non-international armed conflicts, physically challenged persons should not be denied access to any medical treatment or care because denial of this will amount to cruel or inhumane treatment.
4. State parties to the convention are required to take measures to ensure that physically challenged persons have access to mobility devices or rehabilitation services when the situation arises.
5. States should ensure that full and equal enjoyment of all human rights by physically challenged persons are addressed comprehensively in the Convention.

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THE LEGAL POSITION OF WAQF IN BOSNIA AND HERZEGOVINA: PAST, PRESENT AND FUTURE POSSIBILITIES

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Abstract

This article aims to provide an overview of the historical origins of waqf in Sharia law and the development of waqf in Bosnia and Herzegovina, along with an overview of its legal position through different periods. It points to the problems that the waqf has faced in the past, but also to the problems it faces today, such as the failure to pass a law on restitution that would enable the return of property confiscated in the previous periods. This article also points to the significant role the waqf has played throughout the history of Bosnia and Herzegovina, especially in the development of urban areas. Waqf, as a legal concept based on Sharia law, has its own distinct characteristics, however, it shares many similarities with other legal concepts such as foundations and trusts. A positive attitude towards waqf can release its potential in the future as well. If approached with a positive and proactive attitude and if properly codified, waqf could also gain new life in the context of European integrations of Bosnia and Herzegovina. Through one of the basic legal principles in European Union law, the principle of mutual recognition, a potentially codified waqf could gain recognition within the legal space of the European Union law and represent a contribution that Bosnia and Herzegovina could make to the common legal culture of the European Union.

Keywords

waqf, waqf property, restitution, Sharia, legal culture

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1. Introduction – historical development

The main topic of this article is an overview of the legal position of the waqf with a focus on the most significant issues that the waqf and waqf property faced in the past and still face in the context of the current legal/political framework of Bosnia and Herzegovina, as well as the potential possibilities it can offer, especially in the context of the integration process of Bosnia and Herzegovina into European Union (EU). Waqf, as a form of philanthropic disposition of one's property by placing it into the function of the common good, either to be used for religious, or, quite often, for purposes of general public usage, represents a form of private initiative with moral-religious motivation and background.[152] It has been used primarily to satisfy the needs a community might have, but which are not of interest or focus of other economic actors, who are primarily driven by profits. The importance of the legal and societal concept of waqf, which left a visible mark in the history of Bosnia and Herzegovina, can be seen in many aspects of life. Such a phenomenon certainly has a special place in the legal heritage of Bosnia and Herzegovina, and as such, can potentially represent an excellent contribution to the wider European legal heritage. However, such an outcome requires additional efforts and a positive approach willing to strengthen the understanding of the waqf, its legal nature and features. Primarily, acts aiming to protect and return the confiscated waqf property are needed. Further, a proactive legislative activity, like the possibility of the drafting of a new and separate codification for the waqf as a legal concept itself, together with similar legal concepts that can be found in other religious traditions of Bosnia and Herzegovina (such as endowment – "zaviještanje" belonging to Christian traditions. These modes of endowment, however, are outside the scope of this article, since the article's primary focus is on waqf, but the similarities could be identified), or, in a lesser scope, through amendments in the existing legislature (e.g. entity laws related to foundations), could be a positive step forward.

Waqf originated in the teachings and legal framework of the Sharia law, which primarily shapes and defines its legal regime.[153] Its historical traces lead to the original Muslim communities on the Arabian Peninsula. In Bosnia and Herzegovina, waqf is introduced with the expansion of Ottoman Empire[154] and exists since the 15th century.[155] The legal framework and rules defining the waqf belong to the regulations of Sharia law, and as such are closely intertwined with the structure and rules of various institutions administering Islamic religious matters in Bosnia throughout its history and more recently the internal regulations and procedures of Islamic Community of BiH (ICBiH), whose internal regulations and procedures related to waqf property revive and give life and existence, to a limited extent, to the rules of Sharia law in today's Bosnia and Herzegovina.

However, the basic principles of the waqf do not in any way contradict the positive legal regulations of both Bosnia and Herzegovina and the European acquis, therefore, at least from

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[152] Ćeman, Senad. „Vakufi i fondacije u svijetu i kod nas (sličnosti i razlike)". *Glasnik Rijaseta Islamske Zajednice u Bosni i Hercegovini.* Vol LXX, no 7-8, 2008: 627 – 641, 637

[153] Hrvačić, Enes. Vakuf – Trajno dobro. Sarajevo: El-Kalem, 2001, 6

[154] See further : Imamović, Mustafa. Historija Bošnjaka. Sarajevo: Preporod, 1997, 107

[155] Čajlaković, Muhamed. "Nastanak i razvojinstitucije vakufa s posebnim osvrtomna vakuf u BiH" *Glasnik Rijaseta Islamske Zajednice u Bosni i Hercegovini*. Vol LXXI, no 3-4, 2009: 239 – 257, 244

that aspect, there are no obstacles to legislative shaping of the waqf as a separate legal institute, by the way of novel legislation or in the form of supplementing some existing solutions (e.g.: supplementing the existing entity Laws on foundations, by introducing the waqf as a special type of foundation, together with similar concepts from other traditions), which would raise the waqf from the internal regulations of the Islamic religious community to a status of an integral part of the legal system of the state. A precondition for such an optimistic development certainly is the need to find solutions to the problems that the waqf faces, primarily related to the issues of reparation of still unrepaired waqf property destroyed and damaged in the recent war in Bosnia and Herzegovina, as well as other problems such as finding solutions to ensure legal protection and return of waqf property confiscated by state interventions during previous periods and political systems. The reduction, confiscation and legal expropriation of the waqf property, throughout various political systems, starting from the agrarian reforms of the State of Serbs, Croats and Slovens (SHS State), continuing with the dramatic reduction of the substance of waqf property, as a result of a series of legal solutions adopted during socialist Yugoslavia, had such an extremely negative effect, that in moments the very existence of the waqf as a phenomenon existing for centuries in Bosnia and Herzegovina was threatened. In the period after the independence of Bosnia and Herzegovina, which was followed by the destruction of the whole country and its society, as experienced during the war, waqf property was one of the specifically aimed targets of deliberate attacks and, as such, took a heavy toll. In the period after the war, which was marked by partial rebuilding and repair of the destroyed waqf property, the waqf is still facing a series of open questions and waiting for legal solutions that should solve the issues related to the return of property confiscated in the previous periods.

In this article, besides the legal overview of the concept of waqf and the problems it faced and still faces, the benefits that the waqf has offered throughout history, as well as the potential it carries, in the economic, cultural and legal sense, will be examined.

2. Historical development and Sharia law foundations

The word waqf originates from the Arabic word "waqafa" which can be translated as "to separate", or "to dedicate" something.[156] The term itself indicates the legal nature of the waqf, which represents the act of excluding someone's property from free market circulation. Such an act, which is prompted by moral and religious motives, puts certain property to the function of the common good.[157] The specific feature of the waqf is that the property, by the act of endowment, becomes "God's property" which results in the basic rule of the waqf, that it cannot be traded or inherited and must be used in the manner and for the purposes determined by the waqif (person giving the property) through the act known as waqfnama.[158] Waqffnama is an act by which a wakif, i.e. a person who gives part or all of their property for the purpose of waqf, specifies the information such as: identification of the property, the guidelines for its management, as well as the purpose for which its substance and profits derived from it, can be

[156] Ćeman, Senad. Vakufi i Fondacije - Komparativna studija o položaju vakufa i fondacija u šerijatskom pravu i pozitivnim zakonskim propisima u Bosni i Hercegovini. Sarajevo: El-Kalem, 2011, 21
[157] Mašović, Sulejman. "Značaj i uloga vakufa u razvoju islamske doktrine i danas". Anali GHB, IX-X, 1983., 121.-127, 125
[158] Mehmedalija Hadžić. "Vakufi i Vakufname – Definicija i Implementacija". Vakufi u BiH - Zbornik radova, Sarajevo, (2011), 18

used.[159] Those purposes can be religious, but can also be economic and cultural in nature, or they can be used for several purposes at the same time if the nature of the waqf itself and the circumstances allow it. The word waqfnama is a compound of the Arabic word "waqafe" and the Persian word "nama" or regulation.[160] Waqf and the endowment of property have their roots in Islamic legal culture and jurisprudence, and its beginning is linked with the emergence of Islam. Sharia, as an Islamic legal framework, determines the foundations and rules of waqf as a legal concept. As the most important sources of Sharia, the Qur'an (as a holy book) and the Sunnah of the Prophet Muhammad (as a practice that serves as a source and as an auxiliary tool when interpreting Sharia rules) treat waqf as a commendable act of charity, and it is believed that Prophet Muhammad himself gave part of his property for waqf purposes as well.[161] In the early period of its existence, waqf was extremely informal, however, with the spread of Islam and the growth of the complexity of social relations, various new questions and concerns arose and it became necessary to find an answer to them and to give a legal structure and framework to the waqf itself.[162] This is by no means an isolated case because many other issues of Islamic theology and religious practice also required more precise legal formulation. Such formulation happened simultaneously in various parts of the Islamic world leading to the formation of four legal schools (madhabs) in Sunni Islam (Hanafi, Hanbali, Maliki and Shafi'i).[163] Madhabs have certain differences in the answers and solutions they offer to many questions. However, all four madhabs are valid as conventionally accepted. Accordingly, just as there are differences between madhabs in various other questions, so in matters of waqf, there are differences between the four Sunni Sharia legal schools in questions such as the question of the possibility of the endowment of movable property, the question of the possibility of the waqif using the endowment property during his lifetime and many other issues, all of the interpretations being accepted as valid.[164]

Throughout history, various nations have known various forms of charitable giving of property for religious and other collective purposes. Many such different forms of charitable giving, both in the past and in the present, have similarities with waqf. The concepts closest to waqf in terms of comparability and content can be concepts such as legatus, foundation or trust. Trust, as a concept of common law tradition, separates the management of property and ownership or ownership entitlement over such property in a manner not very dissimilar to waqkf. In the cases of trusts or foundations, certain property is given by a voluntary act with the intention to serve certain purpose or to be at the disposal of specified or unspecified beneficiaries. However, the waqf, although it can be considered a type of endowment, has its own specific features and special rules that set it apart as an independent legal concept which, although comparable, is by no means identical to the trust or a foundation or similar, but represents a sui generis legal concept.

The specific feature that sets the waqf apart is that the property belonging to waqf becomes goods *extra commercium*, and such property should not be traded, inherited, transferred

[159] Čajlaković, "Nastanak i razvoj institucije vakufa s posebnim osvrtom na vakuf u BiH", 245
[160] Hrvačić, Vakuf, 6
[161] Čajlaković, "Nastanak i razvoj institucije vakufa s posebnim osvrtom na vakuf u BiH", 241
[162] Hrvačić, Vakuf, 9
[163] Ibidem
[164] Ćeman, Vakufi i fondacije, komparativna studija, 80

or in any way be alienated to third parties.[165] A further specific feature of waqf is that its property must be used only for the purposes prescribed by the waqif (person giving the property), or in absence of such instruction, in accordance with the rules of Sharia law. The manner of using the substance of the property and the profits derived from it is also determined by the waqif, and any deviation from the instructions of the waqif is not allowed unless they are following the regulations of the Sharia and performed with the best interest of waqf property in mind.[166] The waqfnama determines, or at least makes it possible to determine, the person who will be in charge of managing and taking care of the waqf property (mutaveli). The waqf has similarities but also differences with the foundations. Unlike a foundation, waqf is usually managed individually, i.e. by the mutaveli designated by the waqfnama.[167] However, Sharia rules and legal practice recognize the possibility of supervision over the work of the mutaveli by a third party, which can also be included in the decision-making by giving prior consent for decisions (nazir). Also, judicial supervision of the waqf and the work of the mutaveli by the Sharia court (qadi) can be foreseen, so it can be concluded that the collective decision-making and management, which is a characteristic of the foundation, is not opposed to the concept of waqf.[168]

3. Conditions for the validity of the waqf in Sharia law

To better understand the nature of waqf we need to make a brief overview of the basic legal framework defining waqf. As the waqf is a legal concept belonging to the tradition of Sharia law, the legal framework for the validity and functioning of the waqf is determined by the interpretation of the sources of Sharia law (fiqh), which is done by Islamic theological jurists (Mualim) within one of the four legal schools (madhab). Historically speaking, the application of the Hanafi legal school of fiqh, which was the one applied in Bosnia and Herzegovina, starting from the early days of the Islamization of these parts of the Balkans which occurred during the enlargement of the Ottoman Empire, is the primary focus of the analysis, because this legal school was officially accepted and applied by the relevant authorities throughout the entire period of application of Sharia law in Bosnia and Herzegovina. The overview will follow the main points as defined by the Hanafi madhab, with additional comparisons from other madhabs.[169]

For the validity of the waqf, certain criteria must be fulfilled, related to the personality of the waqif (person giving the property to waqf), the characteristics of the object that is given to the waqf, the characteristics of the beneficiary of the waqf, and the form of the act of endowment itself. [170]

According to Sharia regulations, a person of male or female gender can appear as a wakif, regardless of their marital status and social status, if they are capable of freely disposing

[165] Ćeman, Vakufi i fondacije, komparativna studija,77
[166] Hrvačić, Vakuf, 7
[167] Ćeman, Vakufi i fondacije, komparativna studija,185
[168] Ćeman, Senad. „Vakufi i fondacije u svijetu i kod nas (sličnosti i razlike)". *Glasnik Rijaseta Islamske zajednice u Bosni i Hercegovini*, No. 7-8, (2008): 627- 641, 631
[169] Ćeman, Vakufi i fondacije, komparativna studija, 85
[170] Begović, Mehmed. Vakufi u Jugoslaviji. Beograd: SANU, 1963, 20

of their property. Necessary characteristics related to the personality of the wakif, i.e. persons who give part or all of their property for waqf purposes are:

1) A free person, who at the time of endowment is healthy and conscious, mentally mature and capable, and able to dispose of their property;
2) An adult. Age for adulthood varies in interpretation and according to different interpretations of Sharia jurists, it is a range between fifteen and twenty-five years of age. The Hanafi Madhhab is of the opinion that a person is considered an adult when they turn 17; [171]
3) That the person makes the statement voluntarily and without coercion;
4) That the person is the legal owner of the object (mulk) at the time of endowment.[172]

There is disagreement among madhhabs about whether a non-Muslim can appear as a waqif, considering that a waqf is an endowment with a primarily religious character, and therefore, the very purpose for which a waqf property is used is often for religious acts.[173] Sharia jurists belonging to Maliki Madhhab, for example, allow a person who is not a Muslim to endow his property without restrictions, while the Hanafi madhab allows the endowment of property by non-Muslims for secular and purposes of general public use, but not for purely religious purposes (e.g. a mosque).[174] Further, in Sharia law, there is a specific legal institute of guardianship, that can be compared to the notion of limited legal capacity, found in the modern legal systems, which was applied to persons who were declared as reckless and excessive spenders (usually due to gambling or addiction issues) and thus, their property was put under the guardianship of a third person. In their case, any disposal of property, including to waqf, was restricted while the person was under guardianship. However, even in that case, a person declared a spendthrift can dispose of his property into waqf up to the amount of 1/3 of their property.[175]

Regarding the qualities of the object to be endowed, according to the Hanafi madhab, both movable and immovable property can be gifted, as well as consumable or non-consumable property. The property to be endowed must be:

1) Allowed according to Sharia regulations. Accordingly, things which are forbidden for Muslims to use, according to Sharia regulations, cannot be the subject of waqf (e.g. alcohol);[176]
2) The asset must have a market value which must be known or at least determinable. A useless thing or scrap or waste cannot be the object of the endowment. On the other hand, if the object of the endowment is insufficiently specified, the endowment cannot be

[171] Ibrahim Džananović, Vakuf u svjetlu islamskih propisa, u: "Anali Gazi Husrev-Begove biblioteke", knjiga IX-X, Sarajevo, 1983, 10
[172] Ćeman, Vakufi i fondacije, komparativna studija, 86
[173] Ibid, 95
[174] Ibidem
[175] Ibid, 86
[176] Ćeman, Vakufi i fondacije, komparativna studija, 89

implemented. In the same way, one cannot endow only the income, without the endowment of the main object that brings the income;[177]

3) That the property is free of encumbrances or other restrictions of its disposal. In history, however, the endowment of state property (erazi miri) that does not belong to the wakif's private property (mulk) was accepted. However, that waqf was considered "incomplete" and was subject to the consent of the Sultan or other competent official.[178] Likewise, waqf property that is encumbered by the rights of third parties (e.g. a lien, hypothec etc.) becomes valid only when the third party's right to that property ceases.[179]

When it comes to requirements related to the beneficiary of the waqf, a named and specified person or persons who are known to the waqif may appear as a beneficiary of the waqf. However, waqf can, and usually was, given for general charitable purposes, to be used by the public i.e. where an unknown and unspecified person as a member of the general public may appear as a beneficiary. However, the madhabs differ regarding the right of the unborn child (*nasciturus*) to be a beneficiary of the waqf. While the Hanafi and Maliki schools allow it, the Shafi'i and Hanbali do not. Likewise, the Hanafi madhhab allows the waqif him/herself to be the beneficiary of the waqf, while the Shafi'i and Hanbali madhhabs do not allow this.[180]

When it comes to the form of an endowment, as already mentioned, in the first period of development, waqf was an informal act of charity. Due to the increase in complexity of the relationships in society, there was a need for more legal certainty and thus a need for a document with a precise specification of the object and necessary instructions, information and conditions of the waqf for the sake of its correct fulfilment. Thus, concerning the wakif's declaration of will, such a declaration must indicate whether the wakif wants:

1) Waqf to be unlimited in time. According to the interpretation of all madhhabs, except the Shafi'i one, the waqf must be unlimited in time. The Shafi'i Madhhab, on the other hand, allows a waqf to be established for a certain period, after which the property is returned to the person giving (waqif);[181]

2) The waqf must be irrevocable. The waqf property ceases to be the private property of the waqif through the act of endowment, although, according to the Hanafi Madhhab, he can be both its beneficiary and its manager (mutaweli) during his lifetime;

3) The waqf cannot be handed over under conditions and instructions that are contrary to the very purpose of the waqf (e.g. to request a return of the property under certain conditions). Furthermore, according to the interpretation of the Shafi'i Madhhab, the income that the waqf could generate (e.g. rent) and the manner of their expenditure must be determined by the waqf as well and Shafi'i Madhhab requires declaration in this regard as a condition for waqf's validity. Other madhhabs do not consider it necessary, and if the use of the waqf's income is not specified by the waqif, it can be used for charitable purposes.[182]

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[177] Ibidem
[178] Ibid, 102
[179] Ibid, 90
[180] Ibid, 93
[181] Ćeman, Vakufi i fondacije, komparativna studija, 96
[182] Ibid, 98

In the historical context, the act of giving property as a waqf appeared in the form of:

a) Declaration of the last will, i.e. through a testament (vasijjet),
b) Declarations of will in front of witnesses and the Sharia judge - qadi (tesjil).

If the endowment is made through a will (vassijet), it can be read and signed in front of witnesses. If the wakif has legal heirs, waqif can give as waqf only 1/3 of their property. More than 1/3 of the property can be disposed of as well, but on the condition that heirs agree to it.[183]

When the endowment is performed in front of the qadi (judge) and witnesses (tasjil), the historical practice required the waqif to make the declaration in the presence of the qadi and the mutaweli. The form itself was an interesting form of mock litigation. As the first step, the wakif would describe the property to be placed in the waqf, determine the mutaveli and the possible supervisor who would manage the property, determine the purpose and conditions under which the property must be used, and how its profits and costs must be distributed. After that, the wakif would declare that he was withdrawing his previous declaration and statement they have just made. This would then be opposed by the muteveli, who would request the waqif to stand by and honour the promise just given. That would result in a mock dispute between them in front of the judge (qadi). Finally, the qadi would give a ruling that the waqif cannot withdraw the promised endowment and decides in favour of the establishment of a waqf under the conditions previously specified, which results in a type of judgment that establishes the waqf, the status of the property and the conditions of its management and use.[184]

4. Types of waqf

According to type, waqfs can be classified in accordance to several criteria with regard to the goal of their endowment, the way of using waqf's income and the way the property itself should be used.[185]
According to the use of their income, waqfs can be classified into:

a) Independent (srf),
b) Family (evladijat) and
c) Mixed (mushtarak) waqfs.

Independent waqfs are those that were established to be used for benefit of the general public and to achieve the goals specified in the waqfnama, and anyone can be their beneficiary. This type of waqf is the most suitable when it comes to the fulfilment of the task of the waqf as a giving of property for the common good. Another type of waqf regarding the question of purpose and beneficiary is the family waqf (evladijyat). In this type, the beneficiaries can be the descendants of the wakif or some other persons designated by the wakif. Historically speaking, the purpose of this waqf was to keep the property within the family and to prevent its alienation and wasteful use by the descendants. Mixed waqfs are those whose parts are used for general

[183] Hrvačić, Vakuf, 26
[184] Ibid, 24
[185] Hrvačić, Vakuf, 27

charitable purposes, and the other parts are for the needs of the wakif's descendants or persons specified by waqif.[186]

According to the goal that the waqf should fulfil, which is determined by the act of endowment, waqfs can be divided into a) waqfs with a purely sacred and religious purpose; b) waqfs with a scientific and educational purpose; c) waqfs with a general social purpose. In historical experience, waqfs with a purely sacred purpose represent objects and property which is used exclusively for individual and group performance of religious rites and pertinent objects and property which serves to maintain the main religious objects. In most cases, these are buildings such as mosques, tekke, masjids, musalas, etc. The second type, waqf designated for educational purposes, was in the past closely related to the first type of waqf, because facilities such as madrassas, schools, but also reading rooms, libraries and other facilities that may or may not have exclusively religious purposes were usually grouped together. The third type relates to waqfs which have a general social goal to benefit the whole population. Beneficiaries are usually designated as groups such as the poor, orphans, students, travellers, debtors, sick, etc. In the past, these were buildings such as hans, sarais, caravanserais, wells, waterworks, bridges, bezistans, hospitals etc.[187]

With regard to the way of using waqf, we can distinguish between the non-income-producing waqfs (mu'asassa hayriyya) and the income-producing waqfs. Waqfs that do not generate income are usually those that by their nature are not suitable to be used for some economic activity and are usually property used for religious purposes such as mosques, madrasas, etc. In the past, very frequently, it was the case of the establishment of a large waqf, where, in addition to the non-income producing objects and religious objects, there were pertinent dedicated objects that brought income (e.g. real estate and objects that can be leased), which would in some cases be close to each other and form an architectural unity and in others would be physically distant. The revenues from income-producing waqf property would then be used to maintain and cover the costs of those waqfs, which due to their purpose do not generate income, thus creating one societal and economical, as well as if suitable, one architectural unit.

5. Origin and importance of waqfs in Bosnia and Herzegovina

The expansion of the Ottoman Empire to the territory of Bosnia and Herzegovina, which took place in different stages and for which the fall of the medieval Bosnian kingdom and the occupation of Jajce in 1463 is taken as a key starting point is also crucial for the process for Islamization of this areas. Among the first bearers of this process, the travelling dervish groups can be identified. They began their long-term presence even before the Ottoman conquest and would reside in buildings (tekkes) usually procured through the waqf.[188] The Ottoman state, primarily a feudal state in terms of its social organization in that period, spent most of the state's resources on meeting military expenses and financing the military class of society. One of the key factors in establishing Ottoman rule and culture in the newly conquered areas was the

[186] Ćeman, Vakufi i fondacije, komparativna studija, 101
[187] Ibid, 104
[188] Handžić, Adem. „Vakuf kao nosilac određenih državnih i društvenih funkcija u Osmanskom carstvu". Anali Gazi Husrev-begove biblioteke IX-X, 1983, 114

foundations of new cities and towns, either by creating them anew or by building on already existing settlements. One of the key instruments in the formation of city cores, around which the cities themselves would later develop, were in fact, the waqfs established by wealthy and high-ranking feudal lords.

Among the first such examples are the endowments from 1462, made by Isa-Beg Ishaković, to which the beginning of the city core of Sarajevo is linked. Guided by moral, economic and political goals, wealthy officials, who often originated from those very regions themselves, invested and endowed not only sacred buildings, but also a whole series of buildings used for economic benefits, such as *hans, bezistans*, bridges, and entire complexes of buildings around which towns would eventually spring up and cities would begin to develop.[189] Many toponyms in Bosnia and Herzegovina have the word waqf (Vakuf) in their name, which indicates that some of them were created in that way. Some are known with a certain level of reliability to have been created around the core of the waqf. In some cases, the process was one of the developments of settlements in the area with already existing settlements, but there were also cases of creation of the new settlements, towns and cities. For example, The town of Mrkonjić, or Varcar Vakuf, was founded by Hadži-Mustafa Aga, at the end of the 16th century, which started by building and endowing a mosque, a school, an inn with 20 rooms and 24 shops and a bakery, giving the settlement the status of kasaba.[190] Also, the development of already established settlements is often linked to the charitable endowment of property given by "their" respectful waqif. Such are, to name a few: Turali-beg for the development of Tuzla; Karađoz-beg and Koski Mehmed-pasha for Mostar; Ferhad-bey for Tešanj; Muhamed Pasha Kukavica for Foča; Ahmed Pasha Budimlija for Gračanica, etc.[191] One of the most important waqifs, to whom the development of Skopje (North Macedonia) and Sarajevo is linked is Isa-beg Ishaković. After being appointed as the Bosnian sanjak-bey, Isa-beg Ishaković built the Begluk-Sarai (Bey's palace) on the site near today's Emperor's Mosque in Sarajevo. The name Saraj-ovasi, which can be translated as the field around the court, appears in 1455.[192] The name is considered the precursor of today's name Sarajevo.[193] Another great waqif of Sarajevo, responsible for the urban development of the city certainly is Gazi Husrev-beg. His endowment numbered around 200 buildings, among which the most important are the madrasa, mosque, bezistan, imaret and several other buildings that created the core needed for the development of the urban settlement. Of the famous high-ranking Ottoman officials from the area of Bosnia and Herzegovina, Mehmed Pasha Sokolović, certainly stands out, since he, as a high-ranking Grand Vizier, serving under several Sultans, is the one who endowed the bridge in Višegrad. The importance of waqfs was crucial for the development of those cities, such as the ones left by Gazi Husrev-beg for Sarajevo, Ferhat-paša Sokolović for Banja Luka, who also left about 200 buildings, among them the most recognizable Ferhadija mosque. Likewise, endowments of Hadži Mehmed-beg Karađoz, were of great importance for the development of the city of Mostar.[194]

[189] Durmišević, Enes „Vakufi u različitim političkim sistemima". Vakufi u BiH - Zbornik radova, Sarajevo, (2011): 111-130, 112
[190] Hrvačić, Vakuf, 51
[191] Vakufska direkcija IZ BiH. Vakufi u Bosni i Hercegovini, Historijat, trenutno stanje i perspektive. Sarajevo: Islamic community of Bosnia and Herzegovina, 2018, 20
[192] Imamović, Historija Bošnjaka, 219
[193] Hrvačić, Vakuf, 52
[194] Ibid, 51

This all confirms the historical significance of waqfs for the very creation of urban areas in Bosnia and Herzegovina as well as the fact that some of the most recognizable objects and parts of cultural heritage and identity owe their existence to the waqf.

The decline of the Ottoman Empire also led to the decline of waqfs and waqf property, which will be discussed in the following text, but it is also worth noting that with the arrival of the Austro-Hungarian monarchy, the waqf continued to live and even thrive, under a completely new setting, and there were some new interpretations of the role of waqfs. So the fact that the first modern hospital in Bosnia and Herzegovina was built from the income generated by the property belonging to the Gazi Husrev Bey waqf, stands as a positive example. The hospital was built in Sarajevo, in the area of Kovači in 1866 and was used up until the construction of the new general hospital in Koševo, after which it continued to be used for the care of the mentally ill, which lasted until the construction of a special hospital with a psychiatric ward.[195]

All of that points to the conclusion that waqf has its moral strength as well as its function of wealth redistribution and a type of targeted investment in projects which are of great social and general social importance but which are not of primary economic interest for the profit-driven investors. Also, it shows that the concept of waqf is not only linked to the Ottoman state, with which it was introduced to the territory of Bosnia and Herzegovina and within which it played a significant role but is able to live and go beyond the original cultural framework, positioning itself as a phenomenon, capable of functioning and adapting to a different setting of Austro Hungarian Monarchy.[196]

6. Legal arrangement of waqfs in Bosnia and Herzegovina throughout the history

Since the appearance of waqfs in Bosnia and Herzegovina, especially when Bosnia and Herzegovina was part of the Ottoman Empire, which is generally considered to be the period between cca 1463 and 1878, the legal political system was regulated by the principles found in the sources of Sharia law, i.e. primarily the Qur'an and the Sunnah.[197] Legal gaps generally and specifically those related to land law relevant to waqfs, were filled by specific laws (*canuns*) and imperial orders (fermans) and local customs. The trend of codification, starting from the 19th century and the period of reforms (tanzimat), led to an increase in legislative activity in the Ottoman Empire as well, which led to the passing of the Law on Waqf Administration in 1863.[198] Rules relevant to waqfs were also found in other adopted laws, primarily the Ottoman Land Law from 1858 and the Ottoman Civil Code (*Megelle*), whose regulations were adopted successively in the period from 1869 until 1876. At the end of the 19th century, a unified administration of waqfs was established in the Ottoman state, with the ministry of waqfs, with the aim of collecting surplus income from waqfs, supervising the mutavelis and trying to stop the abuses and mismanagement of waqfs that had become rampant.

[195] Čajlaković, „Nastanak i razvoj vakufa sa posebnim osvrtom na vakuf u BiH", 246
[196] Salkić, Muhamed, "Islamska zajednica i vakufi". Vakufi u BiH - Zbornik radova, Sarajevo, (2011), 28
[197] Hrvačić, Vakuf, 29
[198] Čajlaković, „Nastanak i razvoj vakufa sa posebnim osvrtom na vakuf u BiH", 244

Meanwhile, Bosnia and Herzegovina has already entered the Austro-Hungarian Empire, first by occupation and then by annexation. Austria-Hungary saw the importance of waqfs and waqf property and engaged in the activities of listing and organizing the management of waqf property, by adopting several temporary Regulations on the organization and management of waqf property dating from 1881, 1883, 1884, 1885 and 1894.[199] According to the government's temporary Regulations/orders, the waqfs were managed by the Land endowment commission, or later the Land endowment directorate. However, a major source of discontent among the local population was the influence and control that the Austro-Hungarian authorities exercised over the work of those bodies through their officials and representatives of the Ministry of Finance. For example, according to the provision of the Regulation from 1883, no decision could be made without the consent of the government commissioner for endowment issues, and from 1894, the directorate was under the direct management of government officials.[200] Perhaps, the most significant development, in addition to the detailed recording of waqf property, was the establishment of the waqf foundation in 1894, which enabled the management of surplus income by the waqf administration, which opened the way for significant investments and humanitarian actions.

Referring to the 1879 convention between the Ottoman and Austro-Hungarian empires (Constantinople Convention), Bosnian Muslims (Bosniaks) demanded certain autonomous rights and the possibility of managing religious, waqf and educational matters. This led to the beginning of the movement for waqf-mearif autonomy, initially led by the Mufti of Mostar, Ali Fehmi Džabi.[201] The movement began with the submission of the first petition to the occupation authorities in 1886 with a request to hand over the management of waqfs to the local population.[202] In essence, it was the first example of the political organisation of Bosniaks within the Austro-Hungarian monarchy, later leading to the creation of a movement demanding autonomy in matters most important for their identity, such as religious, waqf and education issues. Accordingly, it can be said that the waqf played the role of a catalyst for the first political and party organization and activities of Bosniaks in a modern political context.

Those efforts gave results and in 1909, the Austro-Hungarian Monarchy adopted the "Statute" (Štatut) for the autonomous administration of Islamic-religious and waqf-mearif affairs in Bosnia and Herzegovina. That Statute established that all movable and immovable waqf property is the sole property of the waqf, that it is managed on the basis of Sharia regulations, that it is managed by bodies elected by local Muslims, and that it serves exclusively for religious and educational purposes of local Muslims.[203] That Statute brought positive changes and solutions regarding the management of waqf and was positively received by the local population. However, historical changes very quickly led to the collapse of the Austro-Hungarian Empire in 1918 and the establishment of the State of Serbs, Croats and Slovenes (SHS State) a precursor to the first Kingdom of Yugoslavia. In the initial period, the Statute remained valid under the new political system, however, with the introduction of the January 6 dictatorship in 1929, the Law on the Islamic Religious Community of 1930 was adopted, which repealed the Statute of 1909.

[199] Ibid, 248
[200] Ibidem
[201] Imamović, Historija Bošnjaka, 392
[202] Čajlaković, „Nastanak i razvoj vakufa sa posebnim osvrtom na vakuf u BiH“, 248
[203] Ibidem

The Islamic Community formally remained the holder of the waqf property, however, with the adoption of the Decree on the Provisional Authority and Organization of the Affairs of the Islamic Community, the management of the waqf property was very quickly placed under the direct authority of the Ministry of Justice of the newly proclaimed Kingdom of Yugoslavia.[204]

A very negative mark was left by the interference of the state in the management of the waqf, but more significant interference happened during the agrarian reforms, which did not spare the waqf property even though it could not be regarded as private feudal or landlord property. It is estimated that the agrarian reform took away about 4 million dunums[205] of the waqf land alone,[206] which all contributed to the sudden decline of the waqf property. This continued during the period of socialist Yugoslavia. Within the Federative Peoples Republic of Yugoslavia (FNRJ), later renamed as the Socialist federative republic of Yugoslavia (SFRY), the abolition of Sharia courts started and with the adoption of the *Law on the Legal Status of Religious Communities* in 1953, the issue of waqf management was formally returned to the jurisdiction of the Islamic Community. However, the process of expropriation, nationalization and confiscation of waqf property, as well as other private property started at an increasing pace.[207] These expropriations reduced the substance of the waqf property to the point that it called into question the very existence of the waqf, which resulted in the shutdown of the waqf directorate itself in 1959, due to the fact that almost the entire waqf property was confiscated and reduced to a minimum and there was no point for the directorates existence since it had no property to manage.[208]

After the independence of Bosnia and Herzegovina and the destruction brought by the war which further destroyed the substance of the waqf property, the Constitution of the Islamic Community in Bosnia and Herzegovina (ICBIH) from 1997 placed the management of waqfs under the authority of the Riyaset of ICBIH and the Directorate of Vakufs, which was re-established by the decision of the of ICBIH in 1996.[209] However, although there is now the possibility of autonomous management of waqf property, there are still no legal solutions for the return of confiscated and nationalized waqf property.

7. Management of waqfs

Throughout history, the management of waqfs has been a very important issue, which has also been the subject of disputes and interferences by various political systems, as well as misuse by those entrusted to take care of them. The adoption of the Statute by the Austro-Hungarian Monarchy in 1909, which gave autonomy over the management of waqf property,[210] turned out to be the last legislative act adopted by the state that dealt with the issue of waqfs in the territory

[204] Durmišević, Enes „Vakufi u različitim političkim sistemima“. Vakufi u BiH - Zbornik radova, Sarajevo, (2011): 111-130, 122

[205] Dunum (Donum) – an area of land in Balkans usually counted as 1000 m2, not a SI system measurment, but an historical measurment unit, originating from the Otoman era

[206] Durmišević, „Vakufi u različitim političkim sistemima“, 124

[207] Čajlaković, „Nastanak i razvoj vakufa sa posebnim osvrtom na vakuf u BiH“, 249

[208] Ibid, 125

[209] Zajimović, Senaid. „Petnaest godina rada vakufske direkcije“. Vakufi u BiH - Zbornik radova, Sarajevo, (2011): 137 – 160, 138

[210] Salkić, Muhamed, "Islamska zajednica i vakufi", 29

of Bosnia and Herzegovina in an acceptable manner. The management of waqfs has mostly been the subject of unfavourable legal solutions imposed by different political systems. In the post-war period of legal and political life in Bosnia and Herzegovina, the management of waqf is once again under the jurisdiction of the Riyaset of the Islamic Community in BiH and the Waqf Directorate.

Currently, waqf is regulated solely by internal acts of the Islamic Community of Bosnia and Herzegovina (ICBIH) and the Directorate, such as the Statute of the Waqf Directorate from 1999, which gives the Waqf Directorate status of a legal entity, under positive norms of the Bosnian legal system. Further important internal acts are Rules on Waqf from 2000 and 2011; Rules on giving real estate property belonging to waqfs for lease, from 1998 and 2003, as well as other internal regulations.[211] According to the provisions of the Statute of the Waqf Directorate, independent waqfs (srf) and family waqfs (evladijet waqfs) are recognised. As a specific type of independent waqfs, "special waqfs" is defined, with a goal to represent waqfs with a significant economic utility and which could finance certain institutions of the Islamic community, in accordance with the waqfnama. Bodies participating in the management of waqf assets, according to the Statute of the Waqf Directorate, can be the Majlis of the Islamic Community (regional body), a representative of special waqf that has equal rights and obligations with the Majlis, and a mutaveli, which can be a mutaveli of an independent waqf or a mutaveli of a special waqf. Accordingly, the Majlis takes care, among other duties, of property records, concludes lease contracts and other contracts related to waqf property within their territory, based on the consent of the Waqf Directorate. Further, it supervises the work of the mutevelis, approves the waqf budget if it does not exceed the amount of 10,000 KM, undertakes protection and improvement activities and submits reports on the state of waqfs in their area to the waqfs directorate. Muteveli can be both a natural person and a majlis as a legal entity.[212] Muteveli deals with the management of waqf property and with fulfilling of the provisions of the waqfnama, supervises the use of waqf property, submits the final account of approved spending and proposes the waqf budget if it does not exceed 10,000 BAM, represents the waqf and performs other tasks.[213] Muteveli of a special waqf has similar powers, modified to take into account the importance of a special waqf and is appointed for a term of 4 years.[214]

When it comes to current experience and practice of establishing waqfs in Bosnia and Herzegovina, the bearer of these activities is the Islamic Community in Bosnia and Herzegovina (ICBiH) and the Waqf Directorate. According to the internal regulations of the ICBiH, when a request for the endowment of the property appears, the Waqf Directorate in cooperation with the Mejlis of the ICBIH, carries out the endowment procedure. The first step is to check whether the property fulfils the conditions needed for the purpose of the waqf and if it is suitable to be the subject of the endowment (e.g. in the case of immovable property, whether it is encumbered or otherwise restricted). After that, a written statement is taken from the wakif and mutaveli, if the same is appointed by the wakif. Such a statement is submitted to Rijaset ICBIH, which makes

[211] Zajimović,"Petnaest godina rada vakufske direkcije", 141
[212] Buljina, Halid. „Osnovni uzroci osiromašenja i propadanja vakufa u BiH". Anali GHB biblioteke, knjiga IX-X, 1983, 155
[213] Hrvačić, Vakuf, 43
[214] Ibid, 44

the final decision. In the case of a positive decision, it is issued to the endowments in the Bosnian language, one copy of which is submitted to the waqif, and the other to the Waqf Directorate.[215]

8. Issues facing waqf

The reasons leading to the decline of waqf and waqf property in the past have been correctly identified in the literature[216], and they can be grouped into:

1) Destructive activity during the war and intentional destruction;

2) Fires, floods and other natural disasters;

3) Repressive legal solutions;

4) Abuse of waqf property.

Throughout history, the ravages of war have led to the destruction of waqf property. In fact, waqf has regularly been one of the specifically intended targets of attack. Historically, one of the biggest single acts of destruction that hit the territory of Bosnia and Herzegovina, especially the waqf property, was the invasion of Eugene of Savoy,[217] which left a particularly destructive mark in the area of Sarajevo. According to some reports, all the mosques in Sarajevo were burned on that occasion and almost all the waqfs were destroyed and burned down.[218] In the last war and aggression against Bosnia and Herzegovina in the period 1992-1995 the waqf property, especially sacral property, was the target of a systematic and widespread attack with the aim of complete destruction and eradication of every trace of its existence. The destruction of waqf property was a part of systemic attacks, crimes against humanity and war crimes, amounting to what can be identified as cultural genocide.[219] Thus, it is estimated that 1185 mosques and 335 other religious buildings of the Islamic community in BiH were destroyed.[220]

In addition to the destruction suffered during the war, great damage was also caused by fires, which were particularly frequent in the 17th and 18th centuries. Due to the closeness of buildings in urban areas and the use of wood as a building material, fires were frequent and very destructive. For example, the great fire in Sarajevo in 1879 was particularly destructive, when, among other objects, Đulaga Khan, Tašlihan and Gazi Husrev-beg's bezistan were destroyed.[221]

[215] Ibid, 26
[216] Ibid, 58
[217] Eugen Savoy, an aristocrat and military leader that lead the incursion in Bosnia, on which occasion, on 23rd of October, 1697, Sarajevo, then an undefended city was completley destroyed and burned down. According to his own memoir notes, the city was burned and his forces plundered great material gains and taken „many women and children" as slaves. (see further: Imamović, Mustafa. Historija Bošnjaka. 1997, Sarajevo, Preporod, 288)
[218] Hrvačić, Vakuf, 61
[219] Novic, Elisa. The concept of cultural genocide: an international law perspective. Oxford: Oxford University Press, 2016, 46
[220] Hrvačić, Vakuf, 62
[221] Ibid, 78

A particularly negative impact was left by repressive measures in the form of legal solutions adopted by various political systems, which primarily resulted in the confiscation of property belonging to waqf. For example, the “agrarian reform” carried out by the SHS State, starting in 1919, took away 4 million dunums of waqf land, and about 17 million dunums of private land held by Muslims in Bosnia and Herzegovina.[222] The regulations guaranteed payment for confiscated land and property, however, when it comes to property in the territory of Bosnia and Herzegovina, the planned compensation payment was much lower than the one paid in other parts of the SHS State, and in many cases, it was never paid at all,[223] resulting in rapid decline in personal wealth and rise in poverty. As a particularly striking individual example, the act of confiscation by the decision of the Vrhbosna Banovina of the land belonging to the Gazi Husrev-beg waqf and which was located in the area of Doboj, Tešanj and Teslić can be cited. From the total area of 136,925 dunums that belonged to Gazi Husrev-bey's waqf, 107,676 dunums were taken away, which reduced the property of waqf to only 11,955 dunums.[224]

Most of the damage in terms of confiscation of waqf property was suffered during socialist Yugoslavia as the result of the application of legal solutions, such as the Law on Agrarian Reform and Colonization from 1946, the Law on Nationalization of Rental Buildings and Construction Land from 1958, the Basic Law on Expropriation from 1949, the Basic Law on Agricultural Land Utilization from 1959, the Decree on arrondissement from 1946, the Law on Property Rights in Business Buildings and Business Premises from 1979 and many other laws and regulations. In that period, particularly vulnerable was the valuable property located in urban areas. For example, it is estimated that 377 apartments were confiscated in the Sarajevo area and 524 real estate properties used for business purposes, i.e. 408,011 m2 of real estate, all belonging to waqf property.[225] Thus, the waqf property practically disappeared, and the property of the Islamic community was reduced to a minimum, which led to the closure of the Waqf directorate in 1959.[226]

It should also be noted that beginning with the rule of the Austro-Hungarian Monarchy and continuing through the two Yugoslavia's, waqf property was often the object of destruction in the processes of urbanization, urban development and reconstruction. Many mosques, mektebs, tekkes and especially, Muslim cemeteries (mezaristans) were destroyed and demolished, and buildings or parks were built in their place, which was the cause of great dissatisfaction of the Muslim population and expressed in many petitions submitted to the authorities.[227]

A very important factor that contributed to the decline of waqf and waqf property is also the unscrupulous management by those entrusted with it. During the inventory of waqf property, it often happened that the mutavelis or beneficiaries illegally registered the waqf property as their own personal property. A special problem was the appropriation of the income that was produced by waqf. This became particularly pervasive when the control over the waqfs was more

[222] Vakufska direkcija IZ BiH. Vakufi u Bosni i Hercegovini, Historijat, trenutno stanje i perspektive. Sarajevo: Islamic community of Bosnia and Herzegovina, 2018, 30
[223] Hrvačić, Vakuf, 81
[224] Hrvačić, Vakuf, 31
[225] Ibid, 84
[226] Ibid, 84
[227] Vakufska direkcija, Vakufi u Bosni i Hercegovini, Historijat, trenutno stanje i perspektive, 28

decentralized. For example, according to the decision of the Waqf Assembly in 1923, the decentralization of the waqf took place and surplus income from waqfs was assigned to the regional waqf commissions. With the re-introduction of centralized management, it was apparent that the previous situation of decentralised management was abused by many mutavelis and county commissioners, leading to many negative consequences and a decrease in property and income.[228]

Among the main open issues currently facing waqf property, as well as the Wakf Directorate, which is primarily responsible for taking care of the waqfs, is certainly the ongoing failure to adopt the legislation on restitution/denationalization and return of property confiscated by previous political systems. Some legal solutions in post-war BiH, which enabled the purchase of nationalized apartments, may have had an irreversible impact on waqf property. Certainly, in that situation, there was a conflict between two rights, i.e. the rights of the waqf and the rights of the users of apartments, both of which are legitimate. Therefore the titleholders of waqf property (ICBiH) should have been entitled to fair compensation.[229] Attempts to enact entity laws on restitution were stopped by the High Representative and it is unlikely that the issue will return to the spotlight, especially considering the projections of extremely high compensations that would follow in the events of the impossibility of natural restitution and the return of the confiscated property. The argument that a large amount of valuable property, especially the one located in the central urban areas would be “frozen” under the waqf can be described as unsubstantiated since such property is in most cases put to an economic use by the way of leasing unless it is obviously unsuitable for economic use and serves primarily for religious functions. On the other hand, unresolved legal issues and litigations can be identified as a large factor contributing to the exclusion of property from the market and useful economic employment.

Further problems are the disorderly conditions in land registers and cadastral registries and the way waqf property and the property of the Islamic community in general have been registered over the years. A problem also is a large number of lost waqfnamas, which makes it impossible to consistently implement the wishes of the waqif.[230]

9. Future possibilities

Certainly, one interesting question is the question of the possible codification of the institute of waqf in Bosnia and Herzegovina. Such an activity would have both its advantages and possible disadvantages. The waqf is practically inseparable from the Islamic Community of Bosnia and Herzegovina because within the ICBIH it can, through internal regulations and procedures, and the discretionary evaluation of the Riyaset of the ICBIH, be carried out in accordance to the rules prescribed by the Sharia, which defined and shaped the legal concept of the waqf itself and are inseparable from it. The introduction of positive law in form of state codification could be faced with the impossibility of the full application of Sharia requirements.

On the other hand, codification would provide greater legal certainty and the waqf would once again become a part of state legislation and not just exist within the internal rules of the ICBIH. The last state-made legislation concerning waqf applicable in the territory of Bosnia and

[228] Čajlaković, „Nastanak i razvoj vakufa sa posebnim osvrtom na vakuf u BiH“, 251
[229] Ćeman, Vakufi i fondacije, komparativna studija, 180
[230] Zajimović,“Petnaest godina rada vakufske direkcije“, 156

Herzegovina was adopted during Austro-Hungarian Monarchy. This codification could be achieved by the adoption of separate legislation which would, of course, include the similar religious charitable endowments found in other traditions in Bosnia and Herzegovina. Less ambitious, but not less effective, would be a limited legislative change recognizing waqf as a special type of foundation in laws related to the establishment of foundations (entity legislation, e.g. Law on foundations of the Federation of Bosnia and Herzegovina). That would be effective because essentially, there are no contradictions between the basic Sharia principles related to the waqf and the principles applicable to the foundations. This is also confirmed by the fact that separate foundations operate under the auspices of the Waqf Directorate as well.[231] Foundations are particularly suitable legal vehicles for the establishment and management of waqfs in the countries of the European Union.[232] Such a proactive legislative approach would enable waqf property, if established as a foundation, to enjoy certain tax privileges granted by certain jurisdictions, especially in dealings abroad, given its charitable nature.

On the other hand, the possibility of Bosnia and Herzegovina progressing on the path of European integration, and potentially becoming a member of the European Union (EU) in future, would bring new and interesting possibilities for making waqf a part of the legal space of the EU. Namely, for some legislation to be considered as part of the community law of the EU (*acquis communautaire*), it has to be adopted at the level of the European Union in form of the legislative acts of the Union (such as regulations, directives and decisions).[233] However, one of the fundamental principles of EU law is the principle of mutual recognition. The principle serves as a tool for the harmonisation of legislation between the member states, without the need for the imposition of new legislation on the community level.[234] Through that principle, member states must recognize and give the same treatment to the legal entities recognized under the laws of another member state's jurisdiction. The rationale of that principle is to avoid disruption within the single market and attempts of member states to adopt subsequent legislation and introduce discrimination between the legal entities (or discrimination in other areas such as products, services etc. which all fall under the principle of mutual recognition). Parallel to the EU Law as a positive normative legislation of the European Union, stands legal culture, as a societal phenomenon. Legal culture, as a phenomenon that is in close connection with other aspects of society like economic and political influences, is a fluid concept open to the influence of various actors. Therefore, the legal culture within European Union is shaped and defined by various contributing actors.[235] With the proactive approach to the regulation of waqf through legislation, Bosnia and Herzegovina, as a potential future member state of the EU would ensure the recognition of its waqfs as legal entities throughout the union, which would also be an excellent contribution made by Bosnia and Herzegovina to the legal culture of European Union.

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[231] Mehmedović, Ahmed. Upravljanje vakufima u BiH 1847-2017. Sarajevo: El-Kalem, 2017, 151

[232] Karčić, Fikret „Mogućnost uspostavljanja vakufa u EU". Vakufi u BiH - Zbornik radova, Sarajevo, (2011): 131 - 137, 135

[233] Craig, Paul and De Búrca, Graine. Eu Law : Text Cases and Materials, fifth edition. New York: Oxford University Press, 2011, 104

[234] Rainer, Arnold. "Aspekti ujednačavanja prava unutar EU, državama-kandidatkinjama i trećim državama." *Zbornik radova Pravnog fakulteta u Splitu,* 44, br. 3-4 (2007): 393-401, 396

[235] Visegrady, Antal. "Legal Cultures in the European Union," *Acta Juridica Hungarica* , 42, no. 3-4 (2001): 203-218, 204

10. **Conclusion**

The long-term experience Bosnia and Herzegovina had with waqf, as well as the current situation, all provide a special insight and lessons which waqfs in other parts of the world probably have not encountered. The same can be said for future possibilities.

Waqf as a legal concept that originated in the Sharia Law certainly is not an invention of the people of Bosnia and Herzegovina but represents a cultural good, which is shared with other societies, primarily those with large Muslim populations and traditions. The waqfs can be seen as a motor of urbanisation and development in certain periods of the past of Bosnia and Herzegovina. On the other hand, the issues waqfs in Bosnia and Herzegovina have encountered in the past include intentional destruction and targeting as well as legislative interventions from different political systems which included the acts of large-scale confiscation and nationalisation of waqf property. Remedying such a situation still represents an open issue.

From a legal and historical point of view, the concept of waqf, shaped and codified by the state, or at least, by the entity, would be an excellent contribution that Bosnia and Herzegovina could bring to the legal cultural heritage of the European Union. Creating a legal culture and heritage is a two-way process. Bosnia and Herzegovina would certainly be under the obligation, and already partially is, to adopt the acquis of the EU and harmonize its regulations with those of the EU. However, with the possible accession of Bosnia and Herzegovina to the EU, Bosnia and Herzegovina would become an active participant and would be in a position to contribute. In such a case, specific legal concepts become part of the legal heritage of the European Union. If not through legislation at the community level, then through the application of the principle of mutual recognition, as applied and understood in EU law. Thus, it would be ensured that the accepted legal entities recognised under the laws of Bosnia and Herzegovina are also recognized throughout other member states.

However, as a precondition for such a possibility, there is a need for an open debate, understanding and proactive legislative action. Such a legislative activity could be done by the adoption of a separate law which would deal with waqf as well as other similar endowments that could be identified in other religious traditions in Bosnia and Herzegovina. Another option would be a limited amendment in the legislation related to Foundations (like the Law on foundations of Federation of Bosnia and Herzegovina), which would recognise waqf as a separate form of a foundation. That would be an opportune solution, since sharia rules applicable to waqf essentially do not oppose the general rules applicable to foundations, and such a legislative intervention would enable waqf to enjoy legal protection and benefits (such as tax benefits granted by some jurisdictions). Moreover, that would represent the return of waqf into positive legislation of the state, which was not seen in Bosnia and Herzegovina for a long time.

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THE IMPACT OF THE UNITED STATES SANCTIONS ON INTERNATIONAL RELATIONS

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ABSTRACT

This study aims to show the impact of the United States of America (the US) sanctions on international relations, principles of international law, and the countries targeted and not targeted by sanctions. Since sanctions are not issued by a legislative authority of the international community, which constitutes a clear violation of the principles of international law, they may lead to the US having an impact on those countries and issuing potential questions of neo-colonialism. Also, they can lead to creating alliances between countries that support sanctions and others that reject them, which may result in the collapse of world peace. The effects of the US sanctions go beyond the principles of personality and territoriality of law and affect the sovereign states recognized in international law, as well as the global economic and social system, and the rights of peoples in the sanctioned countries. These sanctions may question the legal principle that there is no crime or punishment without law.

KEYWORDS

The United States, American sanctions, international law, sovereignty, international security, international alliances, public order

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Introduction

The US is the leading country in imposing sanctions on its opponents, whether they are countries, individuals, or entities. The US Congress issued a package of laws that included sanctions against some countries, including those directed at Russia[236] and other against North Korea, Cuba, China, Iran, Syria, and Sudan, for instance, Caesar's Law.[237] Those laws aimed to stop armament programs or combat terrorism and stop dealing with some countries; the sanctions affect the regulation of internal and external relations of countries.

The sanctions imposed by American legislation go beyond the principle of the territoriality of law. Their scope includes other countries that are members of the United Nations and are recognized by the international system as independent and sovereign countries, which entails recognition of their legal systems. International law governs the relationship between states; it is general and aims mainly to protect states and civilians.

However, most of the provisions of those laws passed by the US Congress deal with economic, financial, and banking sanctions that focus primarily on the economy of those countries. These sanctions undoubtedly affect the standard of living of individuals in those countries and create high levels of poverty. Thus, the law distances itself from its supposed goals of stability and welfare of societies and the creation of decent livelihoods for their members. It

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[236] The US imposed a series of economic sanctions on Russia for many reasons, including launching cyber-attacks on American interests, interfering in the 2020 US elections, destabilizing the international community, in addition to the 2014 annexation of Crimea, the poisoning of opposition figure Alex Navalny, and allegations that Moscow paid rewards to Afghan militants for targeting soldiers. Among those sanctions are the expulsion of diplomats, the US Treasury, the ban on the purchase of Russian debt by US institutions, the ban on dealing with Russian technology companies, the freezing of the assets of all Russian companies operating in the United States, in addition to sanctions against Russian officials and individuals. Euronews 2021 <https://arabic.euronews.com/2021/04/15/most-prominent-us-sanctions-on-russia>.

[237] The US has begun activating a package of economic sanctions against the Syrian regime, its allies, and companies and individuals doing business with it. Emad Karkas, 2022. What is "Caesar's Law"? [online] The New Arab. Available at: <https://www.alaraby.co.uk>.

also constitutes the influence of the US over those countries and creates room for questioning potential colonialism and violation of the principles of international law.

The scope of those sanctions affects natural and legal persons, whether they are private or public utilities. Also, those who deal with countries that have imposed sanctions are subject to the same penalties.

Hence the importance of the topic of this paper, indicating the overlap between law and politics, and between the rules of public law and private law. These sanctions may contradict the general principles of law, for instance, the principle of the territoriality of the law and the personality of the law, and the principle of no crime or punishment except by a legal provision. The research paper answers the following questions:

1. Can a state impose its authority on another state, and what is the role of public international law in this regard?
2. What is the legal basis for the sanctions imposed by the US?
3. What is the impact of those laws relating to penalties on the internal public order?
4. Do sanctions affect the concept of sovereignty, and what is the legal basis for this effect?
5. Do these sanctions create an international bloc composed of the sanctioned countries and others who issued and supported the sanctions?

The research questions will be discussed taking the analytical approach by addressing the impact of the US sanctions on the general principles of international law, and the impact of sanctions on international relations.

1. The Impact of the US Sanctions on the general principles of international law

The implicit concept of the term rule of law leads to democracy and the realization of human dignity. It requires a legislative authority subject to judicial oversight to ensure that the executive authority does not abuse its powers. On the international level, countries, as the most essential entities of international law, may not infringe on the rule of international law, which has been legislated over the years through international conventions and norms. The rule of law is that all persons, institutions, and entities, public and private, including the state itself, are equally accountable to the laws.

They are also subject to an independent judiciary and follow international rules and standards of justice and human rights. This principle also requires measures to be taken to ensure adherence to the principles of the rule of international law, equality, accountability, and fairness in applying the law to members of the international community and avoiding arbitrariness through transparency in the application of the law.

This paper argues that US sanctions are imposed internally outside the jurisdiction of the international community and the United Nations, which also has a direct impact on the sovereignty of the sanctioned state.

1.1 The Impact of the US Sanctions on the Internal Sovereignty of the Punished Country

The scope of application of sanctions issued by the United States applies to the US citizens and foreigners within the US, while abroad it includes all American natural and legal persons according to the principle of personality of law.

The subject area of application of sanctions mainly includes economic and military sanctions, including social sanctions. Society in any country needs good governance and a strict rule of law to enable its members to exercise their rights and freedoms in accordance with what is prescribed by law. When community members are unable to do so, they resort to defending their rights and freedoms through the justice system, represented by the judiciary, but they may face risks of weakness or inability to access it.[238]

Therefore, this study argues that the sanctions may indirectly support extremist groups to carry out actions that lead to social divisions, and at the same time exploit the political and security vacuum to achieve their ideological goals.

[238] About good governance, (2022). Retrieved December 20, 2022, from https://www.ohchr.org/en/good-governance/about-good-governance

Sanctions may direct the media to the corruption of the authority officials who did not cooperate with the state that imposes the sanctions. Consequently, they draw attention to their mistakes by practicing corruption and nepotism. Instead of promoting inclusive democracy for all, they may exploit existing tensions or provoke new ones between ethnic, religious, and societal groups by favouring and marginalising the other. Thus, the social fabric of society is likely to disintegrate, disillusionment with the government will increase, conflict will exacerbate, and there will be a breeding ground for terrorism.[239]

The definition of the rule of law has evolved, and the international community agreed at the United Nations on the practical definition of the rule of law as one of the principles of governance, and all legal and natural persons, public and private, including the state itself, are accountable to the laws, the principle of equality shall be applied on its basis, litigation shall be conducted independently, and it shall be consistent with the general principles of law. It is carried out according to measures consistent with the principles of justice, equality, and separation of powers.[240]

It is noticeable in this definition that it includes the basic element of the rule of law, which is the concept of the responsibility of all parties before the law, in addition to the elements that constitute the procedural aspect of the issuance, implementation, and application of the law. This is what achieves the aspect of transparency to reach justice.

The definition above has been criticised for including general concepts whose application is practically impossible. In addition, the censorship mechanisms represented by civil society organisations were not disclosed, popular censorship, and unofficial newspapers, are not recognised within the formal justice system. Undoubtedly, countries with the power to impose sanctions seek to put in place means of intervention through which to set it, such as protesting against the state to be punished for not achieving justice and equality or because of corruption. This is what brings the concept of sovereignty to the international sphere.

[239] Lianne McKay and Edited by Adewale Agade and Vivienne O'Connor. A Practical Guide Towards a Culture of the Rule of Law. United States Institute of Peace. Washington 1st. p.3 2015.

[240] Above, Lianne McKay. p. 12.

Next, the impact of US sanctions on the internationalization of sovereignty will be discussed .It is also not denied that US sanctions have implications for the internationalization of sovereignty. The relationship between international law and sovereignty is inseparable. Sovereignty is the starting point and source of international relations. Submission to international law does not contradict the concept of sovereignty, as it is in accordance with the will of the state itself. The state enjoys legal personality, works with international organizations, and concludes international and regional agreements. [241]

1.3 The Impact of the US Sanctions on the Internal System

As long as the sanctions issued by the American internal authority are applicable only to the citizens of the US and within its territory based on the principles of the personality of the law and the territoriality of law, it can make these sanctions have an effective international impact and expand their scope through bilateral and regional international agreements, the (NATO) Atlantic Alliance. They are sanctions of a military nature that could make US allies revolve around US policy in various global affairs. This can be seen in many of the positions of the European Union countries and in the usual coordination between them against the sanctioned countries in various fields.

Also, the strategic framework agreements concluded by the US with various countries aim to activate the effect of the sanctions issued by it towards countries that do not obey its orders. These agreements have an essential impact on domestic legal policy, in terms of the legal system on the one hand, and on the other hand, on trade relations, especially in those countries that are associated with the US with an alliance or a strategic framework agreement. Therefore, we deal with both matters in research and analysis through the following two issues.

1.3.1 The Effect of Sanctions on the Penal System

International law includes penalties like any other law, and these penalties are imposed on the punishing country and on anyone who does not abide by the penalties of international law. These penalties are as follows:

[241] Abdul Karim Alwan mediator in international law. The second book, House of Culture, 3rd edition, 2016. p. 24.

1. Sanctions Free of Coercion

These sanctions are represented by moral sanctions that are carried out through international conferences and organizations, as is the case with blaming Russia for its handling of the Ukraine crisis through the United Nations. Or, by severing diplomatic relations with the state to blame it for a specific position issued by it, so all political and economic relations will be suspended, as is the case with Syria and Iraq before 2003, and with Russia now, after launching the war on Ukraine. As for the financial sanctions, they are the result of the international responsibility and its obligation to compensate, as is the case in determining the compensation on Iraq as a result of its responsibility for the occupation of Kuwait and the resulting damages, in addition to the legal sanctions that led to the cancellation or suspension of international treaties. In addition to the disciplinary sanctions imposed by regional and international organizations, there are other sanctions such as the suspension of the state's membership in the organization or its expulsions from it, such as the suspension of Syria's membership of the League of Arab States, the suspension of aviation and the use of airports by the Civil Aviation Organisation on Russia as a result of its war on Ukraine.[242]

2. Sanctions Including Coercion

These sanctions include police actions and reprisals, which include military occupation, economic and military blockades, and coercive measures taken by the United Nations, especially by the Security Council, because of its mandatory status on the member states of that organization. The economic boycott is the most common and influential type of measure in contemporary history, which constitutes internal and external pressure on the boycotted state. The boycott may be imposed by individual countries or by international organizations. The most famous of them occurred in the 1990 Gulf crisis by the UN Security Council on Iraq and by regional organizations; these measures have consequences for Russia because of the Ukrainian crisis.[243]

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[242] Gutterman, S. (2011, November 14). *Russia opposes Syria's suspension from Arab League*. Reuters. Retrieved December 20, 2022, from https://www.reuters.com/article/uk-syria-russia-iran-idUKTRE7AD0J920111114

[243] Ninan Koshy, The United Nations and the Gulf Crisis. *Economic and Political Weekly*, *32*(47), 2007, 3011–3020. http://www.jstor.org/stable/4406094>.

The boycott aims to prevent economic dealings directly and indirectly with the boycotted state, with the intent of depriving its economy of dealing with the boycotted state, and the boycott is carried out through the international and regional offices of the boycott. Countries, institutions, and others who breach their commitment warn dealers of this breach to beware of dealing with them.[244]

The boycott's impact on the economy of countries prevents the flow of foreign capital into the country, which affects its balance of payments, on the one hand, and the competition of its exports in international markets on the other hand.[245] The impact of the economic boycott has catastrophic humanitarian effects on various health, educational and humanitarian fields, which prompts sanctioned countries to adopt legislation to mitigate the effects, including preventing some industries that affect the supply of some commodities necessary for daily life. For instance, the confectionery industry and manufacture of luxury and other items which withdraw the raw materials required for daily life result in neglecting the businesses that were related to customs and taxes evasion in an attempt to provide the necessary goods and materials, and this leads to a change in the public order, as the works that were prohibited become permissible and vice versa. This effect of the Penal Code extends from mitigating or canceling penalties for some acts and tightening them in another aspect on other actions, such as the killing of a thief who sneaks into homes at night is taken as permissible, the thief of food supplies is severely punished.[246]

1.2.2 The Impact of Sanctions on Commercial Relations

The application of sanctions may affect the commercial movement, but it is possible to overcome the difficulties that contractors may face from the stage of concluding the contract to the stage of implementation. Difficulties may be overcome due to the existence of methods known within the scope of international commercial law that facilitate commercial activity without considering it circumventing the law, by exploiting the characteristics of commercial

[244] A. M. Saltoun, Regulation of Foreign Boycotts. *The Business Lawyer*, *33*(2), 1978, 559–603. http://www.jstor.org/stable/40685850>.
[245] Essam Al-Attiyah, International Law, (Al-Sanhoury Library, Beirut: 2012), pp. 30-49.

[246] See Articles 440,441,442,443,444,445 of the Iraqi Penal Code No. 111 of 1969. Also, Article 117 of the Iraqi Military Penal Code No. 13 of 1940.

activity that are characterized by confidentiality, confidence, and speed. However, difficulties may arise for the parties to the contract, and they can be avoided through:[247]

1. False names (or pseudonyms) or an apparent person and a hidden person, as the law prevails over the obvious situation over the real situation, the same is the case with fictitiousness that authorizes others to either take the real or fictitious situation according to the creditor's interest in claiming the right. The third party also can refer to the money of the apparent person at the time of dealing with them. It cannot be referred to the hidden money that was not entrusted to the apparent person to be invested in the commercial activity. Some of the jurists[248] have taken the permissibility of recourse to the apparent and hidden situation, but this opinion has no basis in the law. Thus, it founds that the parties to the relationship, by using this method, protect themselves and their money from being exposed to any of the risks. However, this matter makes it difficult for third parties who are interested in being exposed to the contract to prove their claim.[249]
2. Also, most international trade deals are done under standard contracts, which often depend on a bill of lading issued to the orderer or bearer. Article 723 of the Iraqi Transport Law defines a bill of lading as "a document that establishes the contract of carriage and is considered evidence of the carrier's receipt of the object being transported, and gives its bearer the right to receive the object." Thus, in order to allow the movement of goods during the transportation process, where the goods are directed according to the instructions of the new owner of it, who is the bearer of the bond, this constitutes the difficulty of tracking the goods in terms of the consignee and its destination, as its destination may be determined in the port to change on the way.

   As for contracts that are not subject to goods, such as services, the commercial papers and the principles on which they are based are means of overcoming any difficulty that the parties face in paying the consideration. It also constitutes the

[247] Nidaa' Mawla, *The Impact of Caesar's Law on International Trade*, (The city of Science Journal, Baghdad: 2021), Volume 14, Issue 2, p.4.
[248] Walid Ali Maher, *Commercial license contract*, (Center for Arab Studies, Egypt: 2018), pg 17
[249] Abdullah bin Suleiman bin Abdulaziz. Virtual money. *Scientific Journal of Economics and Trade*. Ain Shams University No. 1, Yinler 2. 2. 2017 p. 3

difficulty of not paying the consideration because it is an abstract right that deserves proper consideration even if the reason is not mentioned.

3. The parallel market or the so-called black market, the presentation of commercial contracts and the agreements they contain on the provisions of the commercial and civil laws in the application, does not constitute a source of the legal base in the strict sense. However, it constitutes a source of commitment to the fact contained in the agreement because the contract that includes the obligation to be implemented is not characterized by generality and abstraction. Therefore, the rules that govern the commercial market are not subject to the agreements concluded between the parties but instead have their own rules.
4. Dealing with companies that provide the required goods may result in a violation of laws and regulations and evasion of them, which leads to forgery of the certificate of origin or the so-called geographical location, and the consequent violation of the agreements of the World Trade Organization (the bolt agreement), to achieve the largest profits.
5. One of the difficulties that emerge from the application of sanctions is the emergence of means of fulfillment that may activate money laundering operations. For example, it may occur through bartering, delivering materials prohibited under the sanctions in exchange for oil, or purchasing lands to carry out tourism projects from illegal funds and transferring them to projects following the law.
6. These operations may be carried out by international forces, as companies and people of that state deal with the state on which sanctions are applied in cooperation with those international forces and find the control that violates international rules and norms, creating instability at all levels of the commercial aspect.
7. One of the difficulties that sanctions may eventually cause as a by-product in the commercial field is the emergence of a new type of economic terrorism, as it constitutes a kind of siege on some sectors that have a direct impact on people, in terms of health and living, such as transportation, treatment, and heating, which causes tremendous pressure on various social strata, and consequently has a negative impact on human rights.

8. In sum, violating the general principles of law in general and commercial law in particular, especially about freedom of trade and the free will of contractors, and the principle of trust and credit, by exercising political pressures to obtain economic gains and control over energy sources may lead to the demolition of international trade law. We are facing the fate of the Roman state historically, or the end of the institutions that govern this sector, which may lead to the collapse of trust and credit and the institutions on which it is based and represent a source of protection and control for them.[250]

2. The Impact of the US Sanctions on International Relations

International law can impose its authority and control over international relations; the states are not absolute sovereignty as they are subject to its rules in their relations.[251] Countries have relied on the option of sanctions in order to impose their policies, and this matter became more effective when the collective security system was established. The sanctions took many forms, including siege or military embargo, or sanctions of an economic nature. The United Nations have relied on a legal framework that regulates international sanctions to influence countries, and it constitutes an effective alternative to engaging in wars. The researchers support the principle of sanctions of moral nature to support international law and its effect in the absence of a deterrent force that imposes respect for the law on a global scale. Things have developed and taken a direction contrary to those principles, especially after the US followed the approach of the international police and imposed economic sanctions without the authorization of the Security Council. From here, it is necessary to discuss the impact of these sanctions on the relations of the sanctioned countries with other countries, and whether those countries supported the sanctions or not.

International sanctions are defined as "an appropriate response adopted by states individually or collectively against the perpetrator of an illegal incident at the international level,

[250] Lord's call. *The Impact of Caesar's Law on International Trade* (The city of Science Journal, Baghdad: 2021) Volume 14, Issue 2, p.10
[251] Essam Al-Attiyah, *International Law*, (Al-Sanhoury Library, Beirut: 2012), 393.

to ensure respect and implementation of a binding law or duty" which justifies sanctions such as an economic blockade imposed on states.[252]

It should be noted that both penalties, siege, and prohibition, are not imposed in the internal law because they are penalties of a collective nature, including towards those who did not commit an act punishable by law. In addition, the nature of the penalties affect the rights of individuals due to its direct impact on the lifestyle of food, clothing, and means of maintaining health. It clashes with the lives of individuals and their rights to a decent life and constitutes a system of human rights, as it raises the basis on which the punishment was imposed and the jurisdiction of the party that imposed it. This punishment lacks a definition of the actions that could constitute a penalty for its perpetration, which leads to the overlap of political and economic interests between the states that impose the punishment and those who support it in their policies, and the states that reject those sanctions, especially since the party imposing the sanctions is a party to the conflict. Hence, it is the judge and the executioner at the same time.

The United Nations has imposed sanctions based on Chapter VII of the United Nations Charter, allowing the Security Council to take the measures stipulated in Article 41 of the Charter in the use of force and what Article 42 refers to in cases of threats to international peace or aggression when the peaceful endeavours fail. However, the supposed threat cannot be proven by an authorized and specialized body in this matter, as there is no supervisory body that applies the penalties above, as it is subject to political considerations and the balance of power in the world.[253] The general negative consequences are evident in the history of the application of these sanctions – of the ones imposed on Iraq, which resulted in the starvation as well of the people who were not engaged in any decision-making processes about the war; economic consequences in South Korea, Yemen, and worldwide present ones with the war in Ukraine.

2.1 The Impact of Sanctions on the Relations between Sanctioned and Supportive Countries.

[252] Al-Hussein Al-Zawi, Gulf Policy in International Relations, Article published on You.10/15/2021
[253] Ammar Koussa, Evidence before international courts, (House of Culture for Publishing and Distribution, Amman: 2020), pg. 121.

Sanctions are being imposed outside the United Nations to settle scores between the major powers, and this is what appears in the US policy with Russia, confronting China's economic power, the Iranian nuclear file, and sanctions against some South American countries. At the same time, the sanctions appear as a liberal policy that seeks to direct the perpetrator's behaviour to what is consistent with international values or push the perpetrator to adopt a specific domestic policy, or limit human rights violations. This is what we note in the relationship between the European Union and its support for American sanctions policy. Just to illustrate, in February 2021, 88 people from Belarus were punished for a year, including politicians and people in business by freezing the assets of seven organizations and banning citizens and companies of European Union countries. In addition to that, the sanctions on Russian personalities and entities were imposed by US President Joe Biden for the poisoning of the Russian opposition leader Alexei Navalny.[254] The same applies to the war between Russia and Ukraine. This leads to a reaction of the sanctioning party against the countries assisting those who expect the punishment, thus losing the relations that would have led to a great individual benefit to them. In addition to losing their international prestige, those sanctioned countries may describe it as interfering with their internal affairs, or reciprocating with them, preventing personalities from traveling. Despite the controversy over the effectiveness of sanctions, it has become the preferred means for countries to express their positions, especially the US, which possesses strength and economic characteristics, most of which are related to the power of the dollar and the American economy in the global system.[255]

When imposing penalties, there must be restrictions that specify the reasons, the entity, and the actions they are charged. Accordingly, the Committee on Economic, Social, and Cultural Rights has set the seventeenth session at the University of Minnesota with limitations in this regard, including:

1. When imposing sanctions, the provisions of the International Covenant on these rights or based on Chapter VII of the Charter of the United Nations must be taken into

[254] US sanctions against officials and entities in Russia for poisoning opposition leader Navalny - BBC News Arabic, 2021

[255] Abdul Majeed Abu Ela, Al-Ahram Center for Political and Strategic Studies, 2021. See also. Adel Abdullah Hassan Al-Masadi. Judicial settlement of international border disputes. Dar Al-Nahda Al-Arabiya. Cairo. 1st edition 1997. p. 92.

account, as they constitute the legal basis for imposing sanctions, legitimizing sanctions, their causes, and duration, and avoiding effects that may affect innocent people. The US failed to obtain the approval of the Security Council in the Russian-Ukrainian crisis because of Russia's veto; it has resorted to the General Assembly for recommendations and has already denounced.

2. The incident to be imposed on should be carefully examined and analyzed in a manner that confirms the proportionality of the punishment to it and it should be considered whether it is authoritative for its imposition.
3. Sensing the effects of sanctions in terms of health and education, which enhance the power of tyrannical groups, the emergence of the black market, and sudden profits for groups with suspicious activities.
4. A distinction must be made between the primary purpose of political and economic pressure on the authority to comply with international law and the population's suffering. Therefore, sanctions regimes include specific exceptions related to humanitarian situations; some have considered that the suffering of the population is part of the sanctions, which constitute additional pressure on the authority to submit to international law, without considering that it constitutes collective punishment for a party that is already suffering from various forces and reasons.
5. Although the committee that studies the objectives, reasons, arguments, and monitoring of imposing sanctions has no role in imposing sanctions, it is responsible for everyone's compliance with the application of sanctions. Therefore, it also monitors the conditions and methods of imposing sanctions.
6. A United Nations mechanism was established to monitor and follow up on the impact of sanctions following principles and procedures based on respect for human rights and to identify goods and needs that emerge from sanctions for the requirements of those rights.
7. The party that imposed the sanctions should be monitored and applied following the international covenant, and it should be held responsible for any harm that may affect innocent people.
8. The commitment made by states derives from the obligation contained in the United Nations Charter to promote respect for human rights and that all members of the

United Nations have signed the International Covenant except China and the US. The first paragraph of Article 2 of its states that states "on their own, through international assistance and cooperation, particularly at the economic and technical levels, and to the maximum of the available resources, shall take the necessary steps to ensure the progressive enjoyment of the rights recognized in this covenant, by all appropriate means."[256] When the affected state is a party to the international covenant, other states must respect the relevant obligations.

However, if the sanctions are imposed on a country that is not a member of the covenant, then the same principles are applied to it. However, we note that the US and China are not parties to the international covenant. The one which imposes the sanctions is the US, depending on its international allies, which made Russia and China all allies to avoid the consequences of sanctions; these are often the ones which were subjected to those sanctions from the US.

2.2 The Impact of Sanctions on Countries that Reject Sanctions

Economic measures imposed by a country or international or regional organizations on a country or companies to commit aggressive acts that threaten world peace are a type of coercion. Economic sanctions may include restrictions on international trade, prohibition of certain types of weapons, food, medicine, and raw materials, and limiting exports and imports, pressuring it to change its policy in a particular field, or forcing it to make concessions in a specific area. Sanctions have become a foreign policy tool for major powers instead of military options that may have dire consequences.[257]

Article 39 and Article 41 of the United Nations Charter represent the legal framework upon which the Security Council is imposing economic sanctions on the state to be punished. As a result, there are the humanitarian effects of the sanctions that affect the targeted but also the innocent ones and may violate the principles of international law and human rights. The United

[256] Essam Al-Attiyah, 398, see also Dr. Abdul Karim Alwan, 30.
[257] I. Bogdanova, "Chapter 2 The Legality of Unilateral Economic Sanctions under Public International Law", *In Unilateral Sanctions in International Law and the Enforcement of Human Rights. Leiden, The Netherlands*: Brill: 2022. | Nijhoff. doi: https://doi.org/10.1163/9789004507890_004>.

States has recently turned to more reasonable sanctions to get rid of some of the negative effects it has had on the international level. Sanctions now target the political and military leaders responsible for the incidents for which the sanctions were imposed. These sanctions include travel bans, seizure of balances in international banks, or an arrest warrant issued by the International Tribunal on various charges.[258]

Whatever those penalties may be, their effects extend to the relationship with other countries that are exporters or importers of particular goods which are directly or indirectly affected, and to avoid the challenges and changes it faces in the political and economic sphere. Therefore, strategic alternatives must be used to bridge the economic gap or remedy the financial, economic, or societal imbalance, exploiting the elements of strength or facing competitive situations, represented by strategic alliances, which are a solution that helps in the growth and development of areas that suffer from a specific crisis or weakness.[259] Countries affected by the sanctions have found ways to mitigate these effects through alliances that have led to positive effects for them in their various dealings, such as the preference in dealing and acquiring the goods they need.[260]

2.2.1 International Alliances

International alliances are a tool to avoid the effects of sanctions imposed on a country, organizations, or bodies that affect the countries that deal with them, which led to the conclusion of those alliances with neighbouring countries or powerful countries, or those that achieve the interest in avoiding the effects incurred as a result of the imposed sanctions. The alliance constitutes protection and protection from these effects and even from the abuses or attacks that may occur.

International alliances are based on the common interests between the allied countries and the utilization of the resources of the allied countries to cover their needs. Moreover, the

[258] Abdul Majeed Abu Ela, Al-Ahram (Center for Political and Strategic Studies, 2021)

[259] Khawaldi Farid Bou Smina, The impact of strategic alliances on supporting technology capabilities, *Journal of the University of Abou El Bouaghi*, 2013, p. 2

[260] Noura Mawaddah Haddad, Strategic alliances in organizations as a mechanism to support their competitiveness, *Journal of Colle*, University Algeria, 2020.

alliance secures collective security from expected or occurring attacks. Therefore, the alliance engagement is based on the state's interest in this agreement.

2.2.2 The Conditions of Alliance

The controls for working in the interest must be based on clear legal bases so that the alliance produces its effects in protecting and achieving the interests of the allied state, and this appears through the fulfilment of certain conditions:

1. Contemporary international alliances must consider the general order of the allied state without prejudice to its political, economic, and social principles. and find legitimate methods, and if the interest of the state conflicts with the interest of the alliance, the greatest harm shall be considered according to the rule "If two evils conflict, the greatest harm shall be taken into consideration by committing the lesser of them" and the rule "If two harms combined, bring down the smaller, the greater." It is the responsibility of the state to preserve its pillars.[261] If the interest conflicts with the harm and the benefit cannot be obtained except by committing the harm, and it cannot be repelled except by forfeiting the use, then here, preventing harm is more important than bringing benefits.[262]
2. The availability of the conditions of the interest and its continuity as long as the alliance was established should be maintained; otherwise, the alliance end with the expiry of the interest, and the interest must be direct, status, and achieved. As for the potential interest, it is about to be confirmed so that it can be considered, and this is what transforms NATO's work through the media in the situation and notifying that Russia is on the verge of entering Ukrainian territory, which serves as its grounds of presence and arm the Ukrainian forces in preparation for their annexation to the alliance.
3. Availability of the agreement elements from the consent of the contracting parties, place of the oath, and reason within the legal controls of the existence and their validity, in

[261] Mohamed Shaher Attia Al-Zeq, *Contemporary international alliances, the impact of interest in them*, Master's thesis. Islamic University, Palestine, 2020, pp. 50-63.
[262] Adel Abdullah Hassan Al-Masadi. *Judicial Settlement of International Border Disputes*, (Dar Al-Nahda Al-Arabiya, Cairo: 1997), 1st Edition p. 180. See also Ammar Kousa. p. 86.

addition to the achievement of international principles of observance of reciprocity and the condition of the most favoured nation, and all general principles of law.

2.2.3 Effects of Alliances

The establishment of alliances creates broad and overlapping groups based on dominant standards, institutions, networks, and mechanisms in the military, political and economic fields, which creates a large group of institutions, such as the United Nations and the World Trade Organisation, which have established records, rules, and standards.

What emerges from these groups and networks of dialogues and disagreements about the value of the international system for the US policy, and the difference between liberal economic systems and others, may show a kind of confusion in seeing the group of overlapping sub-systems resulting from those ramifications that lead to differences on the same level of complexity created by this intertwining of these organisations.

The current international system stemmed from the system of free trade and the regional organizations to which it was attached, and which has to do with freedom of navigation, the determination of regional and international waters following the United Nations Convention on the Sea Law, and the determination of the rights of states among them. Although the US did not sign this agreement, it abides by most of its provisions. [263]

The solid-state may create the establishment of alliances in its entirety for serving its interests and be subject to its influence and follow its orders, and this can be seen concerning NATO, as it is being under the navigation of the US and it successfully pushes the war away from American lands, exposing the countries of Europe and the surrounding areas to danger.

The interests of the major powers did not stop at the military alliances but instead took on a broader scope with economic, social, and ideological dimensions, under the explanation of combating terrorism at the international level. It became one of the most critical topics for alliances; crimes have appeared under the name of crimes of international terrorism, and terrorist acts of various types and quantity, which led to it becoming a problem of contemporary life.

[263] Michael J. Mazar, Miranda Pirate, Andrew Radin, and Astrid Stuth Cephalus, *Understanding the current international system*, (Rand Corporation, Santa Monica: 2016), pp. 21-22.

Indeed, it has gone beyond being a phenomenon to the extent that it can be said that it is a fundamental shift in the structure of the international community. So, it was necessary to wage war against terrorism, which affected everyone without exception, regardless of the party that used it. In order to clarify the ambiguity of the term terrorism and to avoid its misuse and exploitation, it is necessary to agree on its concept, to combat it, which requires the mobilization of international alliances to confront it. Especially after the September events regarding the World Trade Centre, the alliances resulted in many repercussions on the economic, financial, and intellectual levels, and resulted in the confronting terrorist acts. The war became legitimized based on the fight against terrorism.[264]

Conclusion

It is necessary to define the criminal acts that require punishment and to determine the appropriate penalties, the authority authorized to impose them, and the guarantees of their application so that justice is achieved in the international community. Furthermore, the application of the rule of personal punishment should not affect others, especially innocent civilians, and there is the need to consider the humanitarian aspect that was afflicted by the US sanctions when they were applied to the targeted countries and affected directly and indirectly the civilians who thus lost confidence in international law.

International relations are affected by many economic, social, political, and military factors and everything that can be included in the concept of public order. Each country seeks to increase its political power by consolidating its sovereignty and by supporting it with international alliances as an alternative to armaments that drain its economic resources. Also, by finding means of weaponry and by concluding alliances or seeking to join them. An example of this is what Western European countries have achieved in alliance with the US to protect it from any nuclear attack by Russia, and this alliance is called the nuclear umbrella.

Among the most prominent international instability are international alliances that may make the state feel in danger and insecure, as they increase international tension and transfer conflict in

[264] Hassan Khater Maya, *The war on terrorism in the light of international law,* (Naif University Publishing House, 2015), p. 4.

times of war to different regions of the world. Actions in Iraq, the Arab Spring, the war in Afghanistan, in Ukraine are just a few testimonies to mention.

The sanctions imposed on states have led to negative results, changing the structure of collective security by reviewing their obligations to ensure the sharing of the risks incurred by them due to the sanctions and trying to mitigate their effects.

There is an imbalance in the application of the Universal Declaration of Human Rights, as sometimes blockades and economic sanctions are used to put pressure on governments by starving people, and sometimes collecting donations and aid are used to save people from hunger and the pandemic that affect them as a result of the sanctions. This leads to the emergence of hatred and phobia in the relations between people themselves; this is evident in many incidents that are a result of Islamophobia. There are at times, attacks on journalists and civil society organizations considered as spies as a result of the policies of their countries that seem hostile which in return comes as a result of the sanctions imposed on them.

The importance of punishment in the legal system, in general, is not denied, so it is safe to punish bad manners. The punishment and the destination for its imposition and the guarantees of this matter must be determined so that justice can be achieved. The rule of personal punishment must also be applied to not affect the innocent and the humanitarian aspects that have devastated a lot and changed the world order and people thus lost confidence in international law.

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