

# *Reverse Moderate Relativism Applied: Third Generation International Human Rights from an Islamic Perspective*

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## I. Introduction – Reverse Moderate Relativism: The Missing Piece to the Universality Debate

The question of the universality of human rights norms has challenged scholars and commentators for decades.<sup>1</sup> It is a highly important question from a pragmatic standpoint, because human rights are sure to be ignored if they are not culturally relevant.<sup>2</sup> Because cultural legitimacy is so crucial to compliance, efforts to actively engage local and international law in the effort to seek universal values should be applauded. These efforts take three different forms. On one extreme, universalists

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<sup>1</sup> See, e.g., Kimberly Younce Schooley, Comment, *Cultural Sovereignty, Islam, and Human Rights, Toward a Communitarian Revision*, 25 CUMB. L. REV. 651, 678-79 (1994); HENRY J STEINER & PHILIP ALSTON (eds.), INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 366-403 (2000) (citing K. DALACOURA, ISLAM, LIBERALISM AND HUMAN RIGHTS (1998); E. COTRAN AND A. SHERIF, EDS., DEMOCRACY, THE RULE OF LAW AND ISLAM (1999); A. POLLIS & P. SCHWAB, EDS., HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES (1979); T. DUNNE & N. WHEELER, EDS., HUMAN RIGHTS IN GLOBAL POLITICS (1999); ELVIN HATCH, CULTURE AND MORALITY: THE RELATIVITY OF VALUES IN ANTHROPOLOGY (1983); *American Anthropological Association, Statement on Human Rights*, 49 AMER. ANTHROPOLOGIST N. 4 539 (1947); CULTURE AND RIGHTS: ANTHROPOLOGICAL PERSPECTIVES (JANE K. COWAN ET AL, EDS., 2001); ADAM KUPER, CULTURE: THE ANTHROPOLOGISTS' ACCOUNT (1999); Pannikar, *Is the Notion of Human Rights a Western Concept?* 10 DIOGENES 75 (1982); Rhoda Howard, *Dignity, Community, and Human Rights*, in ABDULLAHI AN-NA'IM, ED., HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVE 81 (1991); Abdullahi Ahmad An-Na'im, *Human Rights in Muslim World: Socio-Political Conditions and Scriptural Imperatives*, 3 HARVARD HUMAN RIGHTS JOURNAL 13 (1990); Oscar Schachter, *Human Dignity as a Normative Concept*, 77 Am. J. Int. L. 848 (1983); Jack Donnelly, *Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights*, 76 AMERICAN POLITICAL SCIENCE REVIEW 303 (1982); Yash Ghai, *Human Rights and Governance: The Asian Debate*, 15 AUSTRALIAN YEAR BOOK OF INTERNATIONAL LAW 1 (1994); Michael Perry, *Are Human Rights Universal? The Relativist Challenge and Related Matters*, 19 HUMAN RIGHTS QUARTERLY 468 (1997); A D RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM (1990); Rein Mullerson, *Universal Human Rights in the Multicultural World: Reasons and Excuses for, and Circumstances Conducive to their Gross and Systemic Violation*, in MEGHNAD DESAI & PAUL REDFERN (eds.), GLOBAL GOVERNANCE: ETHICS AND ECONOMICS OF THE WORLD ORDER 133(1995); Adamantia Pollis, *Cultural Relativism Revisited: Through a State Prism*, 18 HUMAN RIGHTS QUARTERLY 316 (1996); UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS 91-118 (2002); Fernando R Teson, *International Human Rights and Cultural Relativism*, in PHILIP ALSTON (ed.), HUMAN RIGHTS LAW 117 (1996); Michael Goodhart, *Origin and Universality in the Human Rights Debate: Cultural Essentialism and the Challenge of Globalisation* 25 HUMAN RIGHTS QUARTERLY 935 (2003); Matthew A. Ritter, *Human Rights: The Universalist Controversy. A Response to Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claim of the "Asian" Concept of Human Rights from the Perspectives of Hinduism*, by Dr. Surya P. Subedi, 30 CAL. W. INT'L L.J. 71 (1999); John Witte, Jr., *Law, Religion, and Human Rights*, 28 COLUM. HUMAN RIGHTS L. REV. 1 (1996); Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869 (1984-1985); Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, 16 HUM. RTS. Q. 740 (1994); Reza Afshari, *An Essay on Islamic Cultural Relativism in the Discourse of Human Rights* 16 HUM. RTS. Q. 235 (1994).

<sup>2</sup> Ahmad An-Na'im, *Human Rights in Muslim World: Socio-Political Conditions and Scriptural Imperatives*, supra note 1, at 15 (“[H]uman rights violations reflect the lack or weakness of cultural legitimacy of international standards in a society. Insofar as these standards are perceived to be alien to or at variance with the values and institutions of a people, they are unlikely to elicit commitment or compliance.”).

argue that all human rights are applicable in all cultures,<sup>3</sup> an untenable stance because it eliminates the tensions between various cultures simply by ignoring them. A much more realistic approach is offered by the moderate cultural relativists, who accept cultural differences but still strive to find a core group of universal norms.<sup>4</sup> In the area of Islamic law, moderate cultural relativism is best represented by the outstanding work of Professor Abdullahi Ahmad An-Na'im to interpret the Qur'an and Sunna consistent with international human rights norms.<sup>5</sup> Moderate cultural relativists such as An-Na'im have accepted equality as a core right shared across cultures, and their work analyzing equality of the sexes<sup>6</sup> and of

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<sup>3</sup> Schooley, *supra* note 1, at 691-98.

<sup>4</sup> The term "moderate" distinguishes moderate cultural relativism from strict cultural relativism, a theory holding that because cultural variation is so great, there are no universally shared norms of any kind. Schooley, *supra* note 3, at 679-82. Because this article is premised on the belief that some shared norms do transcend cultures, strict cultural relativism is not discussed further.

<sup>5</sup> See, e.g., A. AN-NA'IM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS AND INTERNATIONAL LAW (1990); An-Na'im, *The Rights of Women and International Law in the Muslim Context*, 9 WHITTIER L. REV. 491 (1987); An-na'im, *Islamic law, International Relations and Human Rights: Challenge and Response*, 20 CORNELL INT'L L. J. 17 (1987); An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives, A Preliminary Inquiry*, *supra* note 1, at 46-52.

<sup>6</sup> See, e.g., Donna E. Arzt, *The Application of International Human Rights Law in Islamic States*, 12 HUM. RTS. Q. 202, 208 (1990) (describing the issue of sexual equality as "[p]robably the most celebrated inequality under traditional Islamic law"); Abdullahi Ahmed An-Na'im, *Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives, A Preliminary Inquiry*, 3 HARV. HUM. RTS. J. 13, 36-46 (1990) (hereinafter "Scriptural Imperatives") (noting that "[t]he most important general principle of Shari'a influencing the status and rights of women is the notion of *qawama* (citing HOLY QUR'AN 4:34: "Men have *qawama* [guardianship and authority] over women because of the advantage they [men] have over them [women])); An-Na'im, *The Rights of Women and International Law in the Muslim Context*, *supra* note 5; Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643 (1990); Leila P. Sayeh and Adriaen M. Morse, Jr., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT'L L.J. 311 (1995); Bharathi Anandhi Venkatraman, *Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible?* 44 AM. U.L. REV. 1949 (1995); ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 97-130 (1999). Under Islamic law, women generally cannot hold a political or judicial office, An-Na'im, *Scriptural Imperatives*, *supra*, at 37, sometimes lack capacity to initiate a marriage contract or obtain a unilateral divorce, Arzt, *supra*, at 223, and may inherit half as much as an equally situated male. *Id.* at 208. Monetary compensation for violent crimes (*diyya*) is less for female victims than for male, An-Na'im, *Scriptural Imperatives*, *supra*, at 39, and a woman's testimony in court is valued at half that of a man's. HOLY QUR'AN 2:282 (N.J. DAWOOD, TRANS., 1999); Arzt, *supra*, at 208; An-Na'im, *Scriptural Imperatives*, *supra*, at 39. According to some interpretations of *Shari'a* (some of which state-sanctioned), her husband may chastise her, including "light beating," Arzt, *supra*, at 208, demand intercourse at any time, and restrict her freedom of movement. See, e.g. *Human Rights Committee: Third Periodic Report of Yemen*, ¶ 141, UN Doc.; CCPR/C/YEM/2001/3 (Oct. 18, 2001) ("A husband has a right to his wife's obedience in matters affecting the family's interests, particularly with regard to the following: She must ... permit him to live with her and enjoy access to her, ... permit him to have licit intercourse with her, ... obey his orders without obstinacy and perform her work in the conjugal home, ... not leave the conjugal home without his permission"). Many commentators also consider polygamy fundamentally incompatible with international human rights standards An-Na'im, *Scriptural Imperatives*, *supra*, at 38-39; Arzt, *supra*, at 222-23.

religious groups<sup>7</sup> in Islam has been extensive, certainly controversial,<sup>8</sup> but in my view highly valuable.<sup>9</sup>

Similarly, the practical effects of moderate cultural relativism are evident in the momentous legal and

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<sup>7</sup> See, e.g., Riffat Hassan, *Religious Human Rights and the Qu'ran*, 10 EMORY INT'L L. REV. 85 (1996); Abdullahi A. An-Na'im, *Islamic Foundations of Religious Human Rights*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 337 (J. WITTE, JR., & J.D. VAN DER VYVER, EDS., 1996); Arzt, *supra* note 6, at 208-09; MAYER, *supra* note 6, at 131-174. Compare HOLY QUR'AN, *supra* note 6, at 9:5 ("Slay them [those who do not believe in revealed scriptures] wherever you may find them"); *Id.* at 3:85 ("If anyone desires a religion other than Islam, never will it be accepted of him; and in the hereafter he will be among the losers"); to Universal Declaration of Human Rights, Art. 18, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) (hereinafter "UDHR") ("Everyone has the right to freedom of thought, conscience and religion"); UDHR, *supra* at Art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such ... religion"); International Covenant on Civil and Political Rights, Art. 18, Dec. 19 1966 (entered into force Mar. 23, 1976) 999 U.N.T.S. 171 (hereinafter "ICCPR") ("Everyone shall have the right to freedom of thought, conscience and religion"); ICCPR, *supra*, at Art. 2 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as ... religion"). See also Arzt, *supra* note 6, at 223 (reporting that "the principles of religious freedom and nondiscrimination against religious minorities are now constitutionally protected in the majority of Islamic states," but noting that "some such provisions are in conflict with other constitutional sections that establish Islam as the official state religion or *Shari'a* as a principle source of legislation"). Compare also An-Na'im, *Scriptural Imperatives*, *supra* note 6, at 23 ("According to *Shari'a*, a Muslim who repudiates his faith in Islam, whether directly or indirectly, is guilty of a capital offense punishable by death"), with UDHR, *supra*, at Art. 18 ("Everyone has the right to freedom of thought, conscience and religion; *this right includes freedom to change his religion or belief*") (emphasis added); ICCPR, *supra*, at Art. 18 ("Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and ... [n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice"). But see HOLY QUR'AN, *supra*, at 2:256 ("There should be no compulsion in religion").

<sup>8</sup> An-Na'im's approach is controversial particularly because he advocated expanding the scope of *ijtihad* (Islamic legal reasoning) "to enable modern Muslim jurists ... to substitute previously enacted texts with other, more general, texts of Qur'an and Sunna [the two principle textual sources of Islamic Law] despite the categorical nature of the prior texts." An-Na'im, *Scriptural Imperatives*, *supra* note 6, at 49. He defends this technique on the grounds that "the proposed new rule would also be based on the Qur'an or Sunna, albeit on a new interpretation of the text," *Id.*, but admits that this approach is sure to meet resistance. *Id.* at 51. See also FAZLUR RAHMAN, ISLAM & MODERNITY 142 (1982) ("It is ... something of an irony to pit the so-called Muslim fundamentalists against the Muslim modernists, since, so far as their acclaimed procedure goes, the Muslim modernists say exactly the same things as the so-called Muslim fundamentalists say: that Muslims must go back to the original and definitive sources of Islam and perform *ijtihad* on that basis.").

<sup>9</sup> Moderate cultural relativists also argue for a re-interpretation of Islamic law towards international standards in the areas of criminal defense rights, freedom from slavery, freedom of expression, and non-discrimination. On criminal defense rights, particularly the use of criminal penalties as retaliation (*qisas*), Compare Arzt, *supra* note 6, at 208 ("Islamic law provides for penalties not to promote rehabilitation of the criminal but as a retaliation (*qisas*), either by financial extraction or bodily mutilation") with UDHR, *supra* note 7, at Art. 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"); ICCPR, *supra* note 7, at Art. 7 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"). On slavery, Compare An-Na'im, *Scriptural Imperatives*, *supra* note 6, at 22 ("Although slavery was formally abolished in all Muslim countries through secular law, the institution itself remains lawful under *Shari'a* to the present day"), with UDHR, *supra*, at Art. 4 ("No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms"); ICCPR, *supra*, at Art. 8 ("No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. No one shall be held in servitude"). On freedom of expression, Compare An-Na'im, *supra*, at 23 ("The *Shari'a* law of apostasy can be used to restrict other human rights such as freedom of expression"), with UDHR, *supra*, at Art. 19 ("Everyone has the right to freedom of opinion and expression"); ICCPR, *supra*, at Art. 19(2) ("Everyone shall have the right to freedom of expression"). On non-discrimination, An-Na'im describes a

political efforts to reinterpret Muslim status law consistent with human rights instruments, first in Tunisia a half century ago, and currently in Morocco.<sup>10</sup>

Concurrent with these laudable efforts, however, another discourse is also warranted: As scholars continue to analyze, influence, and advocate for a legal shift towards an international standard in some areas, such as women's rights, there should be a concurrent dialogue examining the extent to which international human rights law can or should move towards a more Islamic standard in other domains, an opinion advanced by An-Na'im in his later work, noting that "the human rights movement cannot achieve its objectives without strong and sustained political support from different constituencies ... [and] is unlikely to achieve this degree and quality of political support ... so long as there is a perception of exclusive Western authorship of the concept of human rights and its normative implications."<sup>11</sup> In a previous work, I therefore proposed a new theory, reverse moderate relativism; like moderate cultural relativism, reverse moderate relativism also seeks to develop a core set of shared rights concepts across cultures, but it does so "in reverse," using other legal and cultural systems as the neutral benchmark to be achieved by international human rights law.<sup>12</sup> Without claiming any *past* causative link in the

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three-tiered rights entitlement based on religious adherence under Shari'a, including Muslims; *Ahl al-Kitab*, believers in a divinely revealed scripture such as Christians and Jews; and non-believers. Muslims are full citizens enjoying all Shari'a rights and freedoms. *Ahl al-Kitab* hold the status of *dhimma*, a compact with the Muslim state guaranteeing them inferior rights and freedoms to Muslims, including lack of equality with Muslims, a lower *diya* (financial compensation for murder or bodily harm) than Muslims, non-application of the Muslim *hadd* of *qadhif* ("criminal penalty for the unproven accusation of fornication"), inability of a *dhimmi* man to marry a Muslim woman, and subjection to a *jizya* poll tax. The rights of unbelievers are limited even further, with recognition as *dhimmi*s as a best-case scenario. An-Na'im, *supra*, at 24-25. To this, compare UDHR, *supra*, at Art. 2 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as ... religion"); ICCPR, *supra*, at Art. 2 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as ... religion"); *but see* HOLY QUR'AN, *supra* note 6, at \*\* ("You all are descendants of Adam and Adam is from the Earth. The Arab amongst you has no merit over the non-Arab save with piety.").

<sup>10</sup> See Tewfik Hakem, *Les Députés Marocains ont Adopté à l'unanimité l'égalité juridique entre hommes et femmes*, LE MONDE (Jan. 19, 2004), at 4.

<sup>11</sup> Abdullahi A. An-Na'im, *Human Rights and the Challenge of Relevance: The Case of Collective Rights*, in THE ROLE OF THE NATION-STATE IN THE 21<sup>ST</sup> CENTURY: HUMAN RIGHTS, INTERNATIONAL ORGANIZATIONS AND FOREIGN POLICY 7 (MONIQUE CASTERMANS-HOLLEMAN ET AL., EDS., 1998).

<sup>12</sup> Jason Morgan-Foster, *A New Perspective on the Universality Debate: Reverse Moderate Relativism in the Islamic Perspective*, ILSA J. INT'L & COMP. L. (forthcoming 2003). Upon reflection, reverse moderate relativism shares many common assumptions with Dianne Otto's "transformative" approach to international human rights, and she should be credited accordingly. See Dianne Otto, *Rethinking the "Universality" of Human Rights Law*, 29

development of international law,<sup>13</sup> reverse moderate relativism rather is concerned with *future* development of universal norms, arguing for a restructuring of the universality debate from Western neutrals to local neutrals.<sup>14</sup> It is only through the combined use of moderate cultural relativism in certain areas (such as equality), and reverse moderate relativism in others (such as, I will argue here, solidarity rights), that the most appropriate core set of universal human rights norms can be established, a set of rights which is neither neo-colonialist<sup>15</sup> nor apologetic.<sup>16</sup>

With this goal in mind, this article applies reverse moderate relativism in the Islamic context, recognizing and analyzing one potential area where the efforts to find universal human rights norms should begin with the teachings of Islamic law: the importance of individual duties, and their role in shaping the so-called “third generation” of human rights. Although several scholars have discussed the

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COLUM. HUMAN RIGHTS L. REV. 1 (1997); Dianne Otto, *Everything Is Dangerous: Some Poststructural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law*, AUSTL. J. HUM. RTS. (1998); Dianne Otto, *Rethinking Universals: Opening Transformative Possibilities in International Human Rights Law*, AUSTL. Y.B. INT'L L. (1997). Professor An-Na'im, in addition to his excellent work in moderate cultural relativism, has also advocated reverse moderate relativism, arguing, consistent with this article, that an emphasis on solidarity rights in the international human rights movement would add legitimacy to the quest for universal norms by emphasizing non-western traditions. See An-Na'im, *supra* note 11. But, whereas An-Na'im focuses on the group right component of solidarity rights, this article focuses on their individual duty component.

<sup>13</sup> For such an attempt, albeit in the domain of international law generally and not international human rights law, see Marcel A Boisard, *On the Probable influence of Islam on Western Public and International Law*, 2 INTL. J. MIDDLE E. STUD. 429 (1980). Boisard's work provides forceful evidence of the Islamic influence on international legal concepts as varied as humanitarian law, *jus in bello*, diplomatic immunity, commercial law, maritime law, due process, equity, good faith, *pacta sunt servanda*, and the foundational work of Grotius. But, her analysis is more historical than legal, and she admits that it represents only a “modest attempt” to begin assessing the influence of Islam on international legal thought, and “[a] more complete study ... remains to be done.” *Id.* at 429-30.

<sup>14</sup> This is a particularly novel argument in the context of Islamic law, as the very idea that Islamic law may have something to teach international human rights law has been noticeably absent from Western scholarship. Professor Ann Mayer notes that “Islamic law and Islamic thought have been treated as irrelevant by people involved in the development of international human rights law. A study of serious treatises by recognized specialists on the development of international human rights law will not reveal claims on behalf of the possibility of Islamic inspiration for international human rights law or its historical antecedents.” ANN ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS: TRADITION AND POLITICS 46 (1991) [re-cited because different edition than that cited *supra* note 6].

<sup>15</sup> Dr. Abdulaziz Othman Altwajri, *Human rights in Islamic Teachings*, ISLAMIC EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION (ISESCO), at 22-23 (1421H/2001) (noting that although Islamic scholars “recognize the international legitimacy of the Universal Declaration on Human Rights, ... [m]any thinkers and philosophers have started to oppose the western tendency to impose a western interpretation and application of [it].”).

<sup>16</sup> In this author's view, women's rights and rights of non-Muslims are two such areas in which the international human rights movement should not look upon Islamic law apologetically, and in these areas moderate cultural relativism (interpretation of local norms towards international norms) is more appropriate than reverse moderate relativism (recognizing the movement of international norms towards local norms). See *supra* note 6.

importance of individual duties in local and regional legal traditions,<sup>17</sup> including several examinations of the role of duties in Islamic law,<sup>18</sup> no scholar has examined the potential of Islamic conceptions of duties to influence our understanding of third generation rights in the context of the debate on the universality of human rights.<sup>19</sup> By attempting this goal, this article will help make the case that, as the international human rights movement progressively recognizes the importance of human duties,<sup>20</sup> a core shared universal norm will develop with local tradition as its roots.

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<sup>17</sup> Makau wa Mutua has compellingly revealed the strong presence of duties in African traditions, as codified by the African Charter on Human and Peoples' Rights. Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J. INT'L L. 339 (1995). See also Michael C. Davis, *Constitutionalism And Political Culture: The Debate Over Human Rights And Asian Values* 11 HARV. HUM. RTS. J. 109 (1998). Mr. Miguel Alfonso Martínez, Special Rapporteur on the question of human rights and responsibilities, examined the use of duties in several regional legal traditions in his initial report. See Human Rights and Human Responsibilities, Report of Mr. Miguel Alfonso Martínez, Special Rapporteur appointed by the Sub-Commission on the Promotion and Protection of Human Rights to undertake the study requested by the Commission in its resolution 2000/63, UN Doc. E/CN.4/2002/107 (19 Mar. 2002) (hereinafter "Report of SR Martínez") at paras. 66-76 (duties in the inter-American human rights system), paras. 77-81 (duties in the African system), paras. 82-84 (duties according to the Cairo Declaration), and paras. 85-86 (duties according to the Helsinki Final Act). See also Damien Keown, *Are There "Human Rights" in Buddhism?* 2 J. OF BUDDHIST ETHICS (1995) available at: <http://www.urbandharma.org/udharma/humanrights.html>; Editorial, *Human Rights: Knots and Webs*, HINDUISM TODAY (1996) available at: <http://www.hinduism-today.com/1996/6/1996-6-07.html>; Joseph Chan "Human Rights and Confucian Virtues", 4 HARVARD ASIA Q. (2000) available at: <http://www.fas.harvard.edu/~asiactr/haq/200003/0003a006.htm>.

<sup>18</sup> See Ahmad Farrag, *Human Rights and Liberties in Islam*, in HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES 133, 134-46 (BERTING ET AL., EDS., 1990); Ebrahim Moosa, *The Dilemma Of Islamic Rights Schemes*, 15 J.L. & RELIGION 185 (2000); Muhammad Tal'at Al-Ghunaimi, *Justice and Human Rights in Islam*, in JUSTICE AND HUMAN RIGHTS IN ISLAMIC LAW 1, 6 (Gerald E. Lampe ed., 1997).

<sup>19</sup> In fact, the vast majority of comparative scholarship on Islamic law and international law never leaves the defensive paradigm at all, content to *defend* Islamic law against an international standard, rather than *promote* the adoption of Islamic legal precepts in international law. MAYER, *supra* note 14, at 46 ("Questions of Islamic law are only occasionally mentioned in scholarly writing on international human rights – for the sake of comparison with the international norms or to illustrate the problems of introducing international norms in areas of the developing world"). Unfortunately, this is even true with respect to the drafters of Islamic human rights schemes such as those cited *infra* notes 83-85. Professor Mayer astutely notes that these documents "[e]ven while promoting Islamic versions of human rights, ... seem to regard international human rights as the ultimate norm against which all rights schemes are inevitably measured and from which they fear to be caught deviating." MAYER, *supra*, at 53.

<sup>20</sup> See, e.g., Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992); Henry Steiner & Philip Alston, *Comment on Types of State Duties Imposed by Human Rights Treaties*, in STEINER & ALSTON, *supra* note 1, at 180-85; James Nickel, *How Human Rights Generate Duties to Protect and Provide*, 15 HUM. RTS. Q. 77 (1993); D. SELBOURNE, THE PRINCIPLE OF DUTY (1994); Ben Saul, *In the Shadow of Human Rights: Human Duties, Obligations, and Responsibilities*, 32 COLUM. HUM. RTS. L. REV. 565 (2001) (citing U.N. Comm'n on Global Governance, *Our Global Neighborhood: The Report of the Commission on Global Governance*, <http://www.cgg.ch> (1995) (a report on individual responsibilities; A Universal Declaration of Human Responsibilities, Inter-Action Council (Sept. 1, 1997), available at <http://www.asiawide.or.jp/iac/UDHR/EngDecl1.htm>; Universal Declaration of Human Responsibilities, UNESCO (1997), available at <http://astro.temple.edu/~diff/dialogue/Antho/unesco.htm>; Int'l Council of Human Duties, A Declaration of Human Duties: A Code of Ethics of Shared Responsibilities, <http://www.univ.trieste.it/~ichd> (1997); United People's Assembly, A Declaration of Human Responsibilities, <http://acgc.org/Ethics/adeclara.htm>

In Part II, I review the scholarship discussing the development of international human rights, paying close attention to the newest and most controversial set of human rights norms, the so-called “third generation” solidarity rights. These solidarity rights share several characteristics not common to previous international human rights; although most commentators focus exclusively on their “group right” component, I emphasize their equally important “individual duty” component. In Part III, I show that although social solidarity and individual duty to the group are among the new developments in the international human rights movement, they have long been fundamental in Islamic law, and elaborate the importance of individual duties in Islamic law by examining the complexity of the language of Islamic duties. In Part IV, I synthesize these previous parts, arguing that, from a reverse moderate relativist point of view, the move in the international human rights movement towards third generation solidarity rights marks a shift towards a more Islamic standard, which has traditionally placed high importance on individual duty to the *ummah* (group). To elucidate this point, I examine the three most common third generation solidarity rights – the right to development, the right to a healthy environment, and the right to peace – finding a strong basis for each in Islamic law. Because Islamic law emphasizes individual duty within group solidarity, examination of Islamic notions of these third-generation solidarity rights can help the human rights movement better understand the undervalued element of individual duty which is present in such rights alongside their “group right” element.

## **II. Social Solidarity: The Newest Generation of International Human Rights**

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(June 1998); The Hart Ctr. (UK), Universal Declaration of Human Responsibilities, <http://www.hartcentre.demon.co.uk/udhr.htm> (last modified Sept. 1998); UNESCO, SYMPOSIUM ON NEW HUMAN RIGHTS: THE RIGHTS OF SOLIDARITY, MEXICO CITY, 1980 at 3, UNESCO Doc. 55.81/CONF.806/4 (1981); International Council on Human Rights Policy, TAKING DUTIES SERIOUSLY: INDIVIDUAL DUTIES IN INTERNATIONAL HUMAN RIGHTS LAW 15–18 (1999); Human Rights and Human Responsibilities, U.N. Comm'n on Hum. Rts., 56th Sess., U.N. Doc. E/CN.4/RES/2000/63 (2000) ; UN Economic and Social Council, Decision 2001/285 (24 July 2001); Report of SR Martínez, *supra* note 17; *The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights*, report of the Special Rapporteur Erica-Irene Daes, UN Doc. E/CN.4/Sub.2/432/Rev.2 (1982) (hereinafter “Report of SR Daes”).

## **a. Explaining Third Generation Solidarity Rights**

Human rights law has historically placed a strong emphasis on the individual, leading Professors Henry Steiner and Philip Alston to conclude in their authoritative text on human rights that “[o]bservers from different regions and cultures can agree that the human rights movement ... stems principally from the liberal tradition of Western thought ... [and n]o characteristic of the liberal tradition is more striking than its emphasis on the individual.”<sup>21</sup> Amidst a historical tradition recognizing “first generation” civil and political *rights* of individuals,<sup>22</sup> and “second generation” economic, social, and cultural *rights* of individuals,<sup>23</sup> it is only recently that the human rights discourse has been enriched, developing a language of social solidarity containing individual duties alongside individual rights, an *international legal* language which combines rights and duties, as opposed to its predecessors in Western political theory and philosophy.<sup>24</sup>

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<sup>21</sup> STEINER & ALSTON, *supra* note 1, at 361-62.

<sup>22</sup> The “first generation” rights were/are the civil and political rights, such as “freedom from slavery, torture, the right to recognition and equality before the law, freedom from arbitrary arrest and the guarantee of fair criminal procedures, and respect for rights of worship and expression.” DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 95-96 (2001).

<sup>23</sup> The “second generation” rights were/are the economic, social, and cultural rights, including “the right to work, to rest and leisure, to education, and to participation in cultural life.” BEDERMAN, *supra* note 22, at 96.

<sup>24</sup> It would be erroneous and unfair to claim that the co-existence of individual duties and rights is absent from Western thought altogether. Quite the contrary, it forms a basis of Rousseau’s social contract and is also present in the writing of Kant, Mill, and Locke. *See, e.g.*, IMMANUAL KANT, *THE DOCTRINE OF VIRTUE*, in *THE METAPHYSICS OF MORALS* 116 (1797, M.J. GREGOR, TRANS., 1964); JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (South Bend, Ind.: Gateway Editions, 1962) (1961). I do not mean to argue that the synergy between individual duties and rights is absent from the Western *social* and *philosophical* discourse, but rather that it has not been codified in the international human rights *legal* discourse as it has been in Islamic law. Some would even dispute this claim. Professor Philippa Strum argues, for example, that “the idea of individual responsibility to the community is central to rights and contract theory as articulated in the Western tradition, and that *both responsibility and rights are implicit in the international version of the social-contract theory that currently illuminates international law*” (emphasis added). Philippa Strum, *Rights, Responsibilities, and the Social Contract*, in *INTERNATIONAL RIGHTS AND RESPONSIBILITIES FOR THE FUTURE* 29 (KENNETH W. HUNTER & TIMOTHY C. MACK, EDS., 1996) (hereinafter “RIGHTS AND RESPONSIBILITIES”). Strum adopts, however, a theory of social contract in which the individual’s duties to the community are limited to civic duties such as voting and participating in the political process, a far narrower conception than the inter-individual duties I am discussing here. Finally, Amitai Etzioni’s recent Communitarian movement, although arguing forcefully for individual responsibility to the group, does so outside the paradigm of international human rights law. *See* AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA* (1993).

The so-called “third-generation” human rights,<sup>25</sup> emphasize the combined rights and duties of both individuals and groups.<sup>26</sup> Originally developed by Professor Karel Vasak in the early 1980s,<sup>27</sup> and recently re-examined by Carl Wellman in his excellent article on the subject,<sup>28</sup> the definition of a third generation solidarity right has three distinct components. First, they impose *joint* obligations among states, as opposed to the mere *several* obligations of first- and second-generation human rights.<sup>29</sup> In other words, they can only be fulfilled when states and other groups work together. Second, solidarity rights involve a *group* right that is unique from and additional to the classic individual right paradigm.<sup>30</sup> Third, whereas the first- and second-generation rights impose obligations primarily upon states, third generation solidarity rights can “not be realized without the concerted efforts of all the actors on the social scene ... [including] *the individual*.”<sup>31</sup>

Thus, third generation human rights expand both the notion of right and that of obligation, from the smallest social unit (the individual) to the largest group. The notion of right is broadened to encompass group rights; the notion of obligation broadened to include individual obligations and joint obligations. Considering this complete cooperation between individuals and groups, Wellman’s term “solidarity rights” is indeed appropriate. Within this most-recent and least developed category of human rights, scholars typically include the right to development,<sup>32</sup> the right to a healthy environment,<sup>33</sup> and the right to peace,<sup>34</sup> but the boundaries of third generation rights have never been fully explored.<sup>35</sup> By examining Islamic notions of third generation solidarity rights, this article is one attempt in this direction.

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<sup>25</sup> See, e.g., Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U.L. REV. 1, 48-62 (1982).

<sup>26</sup> Nsongurua J. Udombana, *Articulating the Right to Democratic Governance in Africa*, 24 MICH. J. INT’L L. 1209, 1224-27 (2003)

<sup>27</sup> Karel Vasak, *Pour une Troisième Génération des Droits de l’Homme* in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES 837, 839 (CHRISTOPHE SWINARSKI ED., 1984).

<sup>28</sup> Carl Wellman, *Solidarity, the Individual, and Human Rights*, 22 HUM. RTS. Q. 639 (2000).

<sup>29</sup> *Id.* at 643.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 641-42.

<sup>32</sup> Sohn, *supra* note 25, at 52-56.

<sup>33</sup> Wellman, *supra* note 28, at 645-50.

<sup>34</sup> Sohn, *supra* note 25, at 56-59.

## ***b. Defending Third Generation Solidarity Rights***

The generational paradigm of human rights in general, and the third generation of human rights in particular, have been criticized by several commentators, most often from the Western World,<sup>36</sup> on multiple levels.<sup>37</sup> These critiques generally fall into one of the following four themes: that such generational terminology generally implies a preference for certain rights, that third-generation rights are unnecessary because they can already be protected by the existing generations, that third-generation rights are useless because they are non-justiciable, and that such aspirational rights threaten the legitimacy of existing human rights.<sup>38</sup> This section will treat, and reject, each in turn.

First, some criticize that the generational terminology generally implies a preference for some rights over others. Yet, while some of these critics argue that such terminology prefers the earlier generations, “plac[ing] Europe at the pinnacle of global development,”<sup>39</sup> others make the opposite claim that the word generation “connotes a succeeding generation replacing an older one.”<sup>40</sup> The fact that these critics have not even agreed which rights the generational terminology prefers is good evidence that the

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<sup>35</sup> For additional treatments of third-generation solidarity rights, see HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES (JAN BERTING ET AL. EDS., 1990); Stephen Marks, *Emerging Human Rights: A New Generation for the 1980's?*, 33 RUTGERS L. REV. 435 (1981) (suggesting other potential third generation rights such as the right to food, the right to benefit from or share in the common heritage of mankind, the right to communicate, the right to humanitarian assistance, the right to the satisfaction of basic needs, and the right to disarmament); Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 19 (1986); Jack Donnelly, *Third Generation Rights*, in PEOPLES AND MINORITIES IN INTERNATIONAL LAW (C. BROLMANN ET AL., EDS); Staughton Lynd, *Communal Rights*, 62 TEX. L. REV. 1417 (1984); Douglas Sanders, *Collective Rights*, 13 HUM. RTS. Q. 368 (1991); Roland Y. Rich, *The Right to Development as an Emerging Human Right*, 23 VA. J. INT'L L. 287 (1983); *Dueling Fates: Should The International Legal Regime Accept a Collective or Individual Paradigm to Protect Women's Rights?* 24 MICH. J. INT'L L. 347 (2002).

<sup>36</sup> Cees Flinterman, *Three Generations of Human Rights*, in HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES 75, 78 (1990).

<sup>37</sup> See, e.g., Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607 (1984); Otto, *supra* note 12 at 38 -39; Sohn, *supra* note 25, at 62; Wellman, *supra* note 28, at 649-56; Flinterman, *supra* note 36, at 79; Udombana, *supra* note 26, at 1226-1228; Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?* 29 NETH. INT'L L. REV. 307 (1982).

<sup>38</sup> An additional critique, raised by Cees Flinterman, “relates to the question of general acceptance and meaningfulness of international human rights in a world of diverse value systems. In this view third-generation rights are seen primarily as the reflection of the vagaries and pressures of current United Nations policies rather than of widespread and significant popular demands.” Flinterman, *supra* note 36, at 79. Because the rest of this article is based on the notion that third generation rights represent a move towards, not away from, non-Western value systems, this critique is not treated in this section.

<sup>39</sup> Otto, *supra* note 12, at 38.

<sup>40</sup> Sohn, *supra* note 25, at 62.

generational terminology does not, in fact, prefer particular rights at all. Rather than implying a preference for certain rights over others, the generational terminology represents variations in the balance between individual and collective rights and duties. These variations are valuable, and I have argued that a full recognition of them is fundamental to the question of the universality of human rights,<sup>41</sup> but this additional approach in no way effects the important role of previously established and important human rights.

Second, specific to third-generation rights, the critique is raised that “because the coordinated action of states is required, given contemporary global interdependence, to secure first and second-generation human rights, ... new joint obligations can be derived directly from the existing human rights of individual persons without the emergence of any additional rights of solidarity.”<sup>42</sup> But, this critique ignores the entire legitimacy concern upon which this article is based, that because efforts to universalize rights based consistently in Western conceptions of the individual will lack legitimacy in many cultures and therefore be ineffective, there should be a concurrent dialogue examining other rights paradigms, such as solidarity rights.<sup>43</sup> In the words of An-Na'im, “collective rights as a conceptual category are so important that the human rights movement is much more weakened by their wholesale exclusion than the inclusion of some of them.”<sup>44</sup>

Third, some are critical of the non-justiciable character third generation solidarity rights,<sup>45</sup> a critique also frequently mounted against second-generation rights. This argument is weak for three reasons. First, proponents of third-generation rights counter that “the existence or recognition of human

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<sup>41</sup> See *supra* notes 11-20 and accompanying text.

<sup>42</sup> Wellman, *supra* note 28, at 651. See also *Id.* at 652-53 (“If Vasak and other advocates of solidarity rights are correct in asserting that the human rights of individuals cannot be fully realized in a world of global interdependence without the efforts of all--or at least many--actors on the social scene, then the human rights of individuals provide legal sources adequate to justify the imposition of obligations upon a wider range of parties under existing human rights law.”).

<sup>43</sup> See *supra* notes 11-12 and accompanying text.

<sup>44</sup> *Id.* at 16.

<sup>45</sup> Flinterman, *supra* note 36, at 79.

rights should be considered a separate question from the means by which they are enforced.”<sup>46</sup> Second, to the extent that individual duties take precedence over individual rights in the latter generations – as I will show *is* the case in Islamic notions of solidarity rights and *should be* the case in international notions of these rights – justiciability is, in fact, realistic. Third, it should be considered by many a strength, rather than a weakness, that the human rights movement has realized that the “legal discourse offers, at best, limited and precarious tools for transformative challenge.”<sup>47</sup> In fact, in her study on the universality of human rights, Professor Dianne Otto cites “resisting legal imperialism” as one of the five essential requirements to her transformational, post-structural approach to universality, stating that “we must be careful that the discourse of rights does not silence other languages--of needs, obligations, community, empowerment, ethics, economic justice, and material equity. These extralegal, local languages may have been what Foucault meant when he suggested we turn to the possibility of a new form of ‘antidisciplinary’ right.”<sup>48</sup>

Fourth, and related, some argue that because third generation rights “cannot realistically be satisfied at present and are not readily susceptible to legal codification, ... [they move] the entire human rights idea to the level of utopian aspiration, to which governments need to feel little present obligation.”<sup>49</sup> From a positivist legal standpoint, there is little substance to the argument that new rights could harm the implementation of old rights, because obligations in human rights law are highly disaggregated, with each State’s obligations being a function of its ratifications and reservations to the existing human rights treaties. Any non-binding codification of third generation rights would have no consequence on State obligations under the existing binding human rights treaty mechanisms, the latter obligations being specific and rooted in the elaboration of rights developed by the relevant treaty body.

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<sup>46</sup> *Id.* at 78. See also An-Na’im, *supra* note 11, at 14 (“[T]here is a circular logic in saying that since collective rights cannot satisfy the exact justiciability requirements of individual rights, they cannot possibly qualify as human rights.”).

<sup>47</sup> Otto, *supra* note 12, at 42.

<sup>48</sup> *Id.* at 43 (citing MICHEL FOUCAULT, *POWER/KNOWLEDGE* 108 (Colin Gordon ed., 1980)).

<sup>49</sup> *Id.* at 79. See also Sohn, *supra* note 25, at 62 (“It has also been said that claims for new rights distort the meaning of human rights ‘by pretending that all objects of human desire are ‘rights’ which can be had, if not for the asking then at least for the demanding,’ especially if one talks of such ‘rights’ as rights ‘to a happy childhood, to self-fulfillment, to development.’”) (citing Kirkpatrick, *Double Standards in Human Rights* 2, 2 (Dep’t of State Bureau of Public Affairs, U.S. Current Policy No. 353, Nov. 24, 1981)).

The argument is also questionable from the perspective of legal history: Human rights law specifically,<sup>50</sup> and international law generally,<sup>51</sup> has always been marked by a progressive codification process, beginning with non-binding declarations and progressing towards binding obligations when and if support exists in the international community. Professor Sohn notes that “Like the economic, social, and cultural rights, the new rights, even if not immediately attainable, establish new goals that can be achieved progressively, by one laborious step after another.”<sup>52</sup>

Rather than mere utopian aspirations, third generation solidarity rights are in the words of Paul de Waart “the pivot on which both human rights and rights of state hinge.”<sup>53</sup> In this regard, Flinterman notes that the right to development “works as a corrective to the direction of development, ...concerned with the quality of development ... [and making] individual development its ultimate goal.”<sup>54</sup> Similarly, Vasak argues that general protection of the environment is useless, “if one does not start from the basic right [and, I might add, duty] of the individual to a clean and balanced environment.”<sup>55</sup> Third generation rights, according to Vasak, “infuse the human dimension into areas where it has all too often been missing having been left to the State or States.”<sup>56</sup> Furthermore, their acceptance may go a long way towards solving the universality question in the international human rights movement. The critiques outlined in this section can largely be distilled into an over-all fear that acceptance of solidarity rights will threaten

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<sup>50</sup> The modern international human rights movement was born with a non-binding declaration, the *Universal Declaration of Human Rights*, which was later codified as two binding Covenants, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social, and Cultural Rights*. See STEINER & ALSTON, *supra* note 1, at 138-41.

<sup>51</sup> Customary International Law is grounded in the assumption that non-binding declarations and other *opinio juris* become binding customary international law if they are consistently followed by States “out of a sense of legal obligation.” BEDERMAN, *supra* note 22, at 14-24; ANTONIO CASSESE, *INTERNATIONAL LAW* 119-126 (2001). See, e.g. Hurst Hannun, *The Status and Future of the Customary International Law of Human Rights: The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L. 287 (describing how the Declaration has been utilized by a number of U.S. courts as evidence of the content of customary international human rights law).

<sup>52</sup> Sohn, *supra* note 25, at 63-64. See also Abdullahi A. An-Na’im, *Human Rights and the Challenge of Relevance: The Case of Collective Rights*, *supra* note 11, at 4 (arguing that “the recognition of collective rights as human rights should neither be at the expense of the protection of individual human rights, nor confined to the conceptual and implementation framework of these rights.”).

<sup>53</sup> Flinterman, *supra* note 36, at 77.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 78.

<sup>56</sup> Lecture by Karel Vasak, Tenth Study Session of the International Institute of Human Rights (July 1979), as quoted in Marks, *supra* note 35, at 441.

existing individual rights. This fear should be taken for what it is – an effort to keep the human rights movement Western-centric – and disregarded.

### **c. The De-emphasized “Individual Duty” Variable in Third Generation Solidarity Rights**

As explained above, Wellman’s three-pronged definition of third-generation solidarity rights emphasizes their role both as group rights (the second prong) and as individual duties (the third prong).<sup>57</sup> Although this is the case, the prevailing western conception of these rights focuses almost exclusively on the “group right” component, rarely mentioning the “individual duty” component.<sup>58</sup> This reluctance to acknowledge the role of individual duties in third generation human rights is consistent with a long-standing reticence in international law to codify individual duties in international instruments.<sup>59</sup> As

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<sup>57</sup> *Supra* notes 29-31 and accompanying text.

<sup>58</sup> For a lengthy characterization of solidarity rights as “group rights,” see Koo VanderWal, *Collective Human Rights: A Western View*, in HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVITIES (hereinafter “INDIVIDUALS AND COLLECTIVITIES”) 83 (1990). See also Jack Donnelly, *Human rights, Individual Rights and collective Rights*, in INDIVIDUALS AND COLLECTIVITIES, *supra*, at 39, 43-54; Peter R. Baehr, *Human Rights and Peoples’ Rights*, in INDIVIDUALS AND COLLECTIVITIES, *supra*, at 99; Theo van Boven, *Human Rights and Rights of Peoples*, 6 EUR. J. INT’L L. 461, 470-72 (1995). In another work, my argument that affirmative action be classified as a third generation group right was, similarly, based on its “group right” component. See Jason Morgan-Foster, *From Hutchins Hall to Hyderabad and Beyond: A Comparative Look at Affirmative Action in Three Jurisdictions*, 9 Wash. & Lee R.E.A.L. J. 73 (2003) (arguing that “as a human right, affirmative action [is] ... a positive duty on a government and it protects group rights”). See also Louise Mulder, *How Positive can Equality Measures Be?* in NON-DISCRIMINATION LAW: COMPARATIVE PERSPECTIVES 65 (Titia Loenen & Peter R. Rodrigues eds., 1999) (arguing that, by its very nature, affirmative action represents some willingness to acknowledge group rights no matter what the jurisdiction). Even when An-Na’im follows a reverse moderate relativist approach and discusses the potential universality of collective rights, he treats these rights almost exclusively from the “group right” and not “individual duty” perspective. See Abdullahi A. An-Na’im, *Human Rights and the Challenge of Relevance: The Case of Collective Rights*, *supra* note 11.

<sup>59</sup> STEINER & ALSTON, *supra* note 1, at 323 (noting that a “fundamental characteristic of the UDHR and ICCPR [is] their foundation in the rhetoric and concept of rights”). See also UDHR, *supra* note 7 (completely framed as rights with the exception of article 29); ICCPR, *supra* note 7 (completely framed as rights except one pre-ambular reference to duties); International Covenant on Economic, Social, and Cultural Rights (hereinafter “ICESCR”) Dec. 16, 1966 (entered into force Jan. 3, 1976), 993 U.N.T.S. 3 (completely framed as rights except one pre-ambular reference to duties); Convention on the Elimination of All forms of Discrimination Against Women, Dec. 18, 1979 (entered into force Sept. 3, 1981) 1249 U.N.T.S. 13 (fifty references to rights and no references to duties); Convention on the Elimination of All forms of Racial Discrimination, Dec. 21, 1965 (entered into force Jan. 4, 1969), 1249 U.N.T.S. 13 (forty-five references to rights and no references to duties); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 113 (entered into force June 26, 1987) (fifteen references to rights and only one reference to duties (Art. 10)); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). (seventy-six references to rights and three references to duties (Arts. 3, 5, 14)). But see Ben Saul, *In the Shadow of Human Rights: Human Duties, Obligations, and Responsibilities*, 32 COLUM. HUM. RTS. L. REV. 565, 588-91 (arguing that “the

Special Rapporteur Erica-Irene Daes made clear in her exhaustive, 8-year study on the individual's duty to the community under Art. 29 of the UDHR (the soul duties provision of that instrument),<sup>60</sup> the debate over duties in the drafting of the UDHR was long and protracted: Although "it was emphasized that it was not possible to draw up a declaration of rights without proclaiming the duties implicit in the concept of freedom which made it possible to set up a peaceful and democratic society,"<sup>61</sup> the numerous attempts to enumerate such duties could never find agreement,<sup>62</sup> and the weak and undefined general duty of the individual under article 29 is all that emerged.<sup>63</sup> The reference to duties in the pre-ambular paragraphs of the ICCPR and the ICESCR is the similarly insignificant result of an equally protracted debate.<sup>64</sup>

Controversy surrounding the concept of international duties has been rekindled in response to the international duties movement of the late 1990s,<sup>65</sup> particularly the proposed draft Universal Declaration of Human Responsibilities written by the Inter-Action Council for possible adoption by the UN General Assembly on the fiftieth anniversary of the Universal Declaration of Human Rights in 1998.<sup>66</sup> Because of

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recognition of concepts of duty in Western legal theory carries over into an express recognition of duties in international human rights instruments"). Saul is incorrect, basing this broad assertion on article 29 of the UDHR and the mere pre-ambular references in the ICCPR and ICESCR. *Compare* Report of SR Martínez, *supra* note 17, at 6 ("There is quite clearly a sharp contrast between, on the one hand, the very extensive bibliographical materials published on the subject of human rights, the enormous conceptual advances made in this respect and the variety of practical actions which human rights and fundamental freedoms have already warranted, and, on the other, the lack of precise formal definitions concerning what duties arise for each individual under article 29, paragraph 1, of the Universal Declaration of Human Rights and the last paragraph of the common preamble to the International Covenants on Human Rights"). Nevertheless, Saul's overall thesis, arguing against a "superfluous and potentially damaging human responsibilities treaty," Saul, *supra* at 617, is consistent with my argument here that there has been a historical reticence to codify individual duties in international instruments.

<sup>60</sup> See Report of SR Daes, *supra* note 20.

<sup>61</sup> Report of SR Daes, *supra* note 20, at para. 29 (cited in Report of SR Martínez, *supra* note 17, at 12 para. 47).

<sup>62</sup> SR Daes cites several proposed formulations, none of which were approved. Report of SR Daes, *supra* note 20, at paras. 11, 13, 14, 15 and 17 (cited in Report of SR Martínez, *supra* note 17, at 26 fn. 22).

<sup>63</sup> Report of SR Martínez, *supra* note 17, at 12, para. 48 (There appears to have been no difficulty at the time in recognizing that individuals had duties/responsibilities to their social environment but, despite the various formulations proposed (some withdrawn, others rejected after a vote) to arrive at precise wordings in this respect, the Committee finally adopted - by 35 votes to none, with 6 abstentions - the generic text which now stands as article 29, paragraph 1, of the Universal Declaration of Human Rights."). Article 29 states: "Everyone has duties to the community in which alone the free and full development of his personality is possible." UDHR, *supra* note 7, at Art. 29(1).

<sup>64</sup> Report of SR Martínez, *supra* note 17, at 12, paras. 49-52 (citing Report of SR Daes, *supra* note 20, at paras. 48-63).

<sup>65</sup> Saul, *supra* note 20, at 566-78. The various declarations proposed by the Human Responsibilities Movement are cited *supra* note 20.

<sup>66</sup> Report of SR Martínez, *supra* note 17, at 22 ¶ 112.

the harsh criticism of the draft declaration by leading scholars, such as Theodore Van Boven,<sup>67</sup> and human rights NGOs, such as Amnesty International,<sup>68</sup> the International Commission of Jurists, and others,<sup>69</sup> plans to present the draft for adoption by the UN GA were tabled.<sup>70</sup> As explained by Ben Saul in his article critical of the international duties movement:

The human rights movement originated in struggles against traditional forms of duty towards the church, feudal lords, and the monarchy. As these struggles were slowly won, new forms of duty and obligation arose against which the human rights movement continued to struggle: the exclusions, hypocrisies, and omissions in the early human rights movement; the emergence of ethnic nationalism; the growth of industrial economic dependence; and colonial and patriarchal domination. While the human rights movement frequently betrayed its ideals or framed its original ideals in exclusionary terms, over time the movement has adapted its tactics and refocused its resistance against new forms of oppressive duty and obligation. In doing so, human rights advocates have vigilantly learned to treat the language of duty and obligation with deep and well-justified suspicion.<sup>71</sup>

Essentially, human rights advocates are concerned that duties will be overpowering rather than complementary to rights, that they will be used as an alternative force for evil, rather than as an additional force for good. Yet, even Saul recognizes the element of duty present in the third generation solidarity right to a healthy environment, noting the “individual ‘responsibility to protect and improve the environment’” in the Stockholm Declaration of the United Nations Conference on the Human Environment.<sup>72</sup> This is a step in the right direction, because it finds an acceptable place for duties not complementary or additional to rights, but *within* the definition of a specific class of rights. By narrowing

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<sup>67</sup> See generally Theodore Van Boven, *A Universal Declaration of Human Responsibilities?* in REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, A FIFTIETH ANNIVERSARY ANTHOLOGY 73 (1998). See also Saul, *supra* note 20.

<sup>68</sup> Amnesty Int'l, *Muddying the Waters: The Draft "Universal Declaration of Human Responsibilities" - No Complement to Human Rights* (1998), online at <http://www.amnesty.org/ai.nsf/index/IOR400021998> (discussed in Saul, *supra* note 20, at 604-07).

<sup>69</sup> Report of SR Martínez, *supra* note 17, at 30, fn. 52 (listing specifically Amnesty International, the Carter Centre, the International Commission of Jurists and the International Federation of Human Rights) (citing the annual reports to the Commission on Human Rights working group on the draft declaration on the right and responsibility of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms. UN Docs. E/CN.4/1993/64, E/CN.4/1994/81, E/CN.4/1995/93, E/CN.4/1995/93, E/CN.4/1996/97, E/CN.4/1997/92 and E/CN.4/1998/98).

<sup>70</sup> Saul, *supra* note 20, at 578.

<sup>71</sup> *Id.* at 616.

<sup>72</sup> *Id.* at 598-99 (citing the Stockholm Declaration of the United Nations Conference on the Human Environment, adopted 16 June 1972, U.N. Doc. A/CONF. 48/14/Rev.1 at 3, reprinted in 11 I.L.M. 1416 (1972)).

this place for duties so significantly, the fears of Amnesty international,<sup>73</sup> Saul,<sup>74</sup> and Van Boven,<sup>75</sup> will be kept at bay, and duties can become a useful component of, rather than a nebulous or even dangerous alternative to, international human rights.

Thus, rather than a wholesale replacement of human rights by human duties, or even a human responsibilities movement which emphasizes the need for individual duties separate and complementary to human rights, duties can best be incorporated into human rights law by recognizing their place in third generation solidarity rights. Consequently, the de-emphasis of the role of individual duties in third generation solidarity rights is harmful not only for distorting the true nature of these rights, but also because it denies an acceptable place for duties within human rights, a place where duties do not overpower *all* rights but rather are integral to the definition of *certain* rights. Reverse moderate relativism provides a tool to correct this de-emphasis: By looking to Islamic law, where individual duty to the group is emphasized, this article will attempt to expand the international understanding of individual duty as a component of third-generation solidarity rights.

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<sup>73</sup> Amnesty Int'l, *Muddying the Waters: The Draft "Universal Declaration of Human Responsibilities" - No Complement to Human Rights*, *supra* note 68.

<sup>74</sup> Saul, *supra* note 20, at 602 ("Clearly, there is a danger that codifying responsibilities may intrude arbitrarily and selectively into delicate codes of local human morality, disturbing organic balances that have developed over time."); *Id.* at 607-08 ("[T]hose in power [in West-ern and non-Western contexts] have used the language of duty and obligation to suppress human rights" (citing position of International Council on Human Rights Policy, stated at Jan Bauer, Report on United Nations Commission on Human Rights 55th Session, online at <http://www.hri.ca/uninfo/unchr99/report4.shtml#human> (July 23, 1999)); *Id.* at 608 ("Notions of individual duty may be transformed by political authorities into demands for blind and uncritical patriotism."); *Id.* ("The fear has been expressed, for example, that some Asian governments may 'readily embrace the concept of human responsibilities as a substitute for the advancement of human rights,' particularly since Malaysian Prime Minister Dr. Mahatir Mohammed has called for a review of the text of the UDHR" (citing Inter-Action Council, Summary Report of the Steering Committee Meeting on the Dissemination of the Universal Declaration of Human Responsibilities, <http://www.asia.wide.or.jp/iac/Meetings/Eng98frankfurt.htm> (Mar. 20-21, 1998); Joint Standing Comm. on Foreign Affairs, Defence & Trade, Austl. Parliament, Improving But ... ; Australia's Regional Dialogue on Human Rights, <http://www.aph.gov.au/house/committee/jfadt/dialog/reportinx.htm> (1998)); *Id.* at 610 ("European history is littered with the bodies of desperate, rebelling peasants who sought relief from, or the moderation of, oppressive duties."); *Id.* at 613 ("The harnessing of duty for the glory of the territorially expansionist State was a bloody feature of European imperialism and foreign colonization, most glaringly in the British conquest of Africa and India. It was also an effective method of rallying patriotism: duty to God, King/Emperor, and Country was the ubiquitous leitmotif of First and Second World War propaganda.") (citations omitted).

<sup>75</sup> Van Boven, *supra* note 67.

### III. Social Solidarity: A Muslim Duty

The first Report of the United Nations Special Rapporteur on Human rights and human Responsibilities, Mr. Miguel Alfosno Martínez, has already begun using the technique of reverse moderate relativism by looking to teachings of the world's religions to better understand the relationship between human rights and human responsibilities instead of limiting his research to international law.<sup>76</sup> Unfortunately, despite the paramount importance of duties in Islam, this initial investigation by the Special Rapporteur was limited to “the tenets of the Roman Catholic and Apostolic Church.”<sup>77</sup> This is a true disadvantage, because the importance of responsibility in Islam is fundamental. As explained by Marcel A. Boisard :

Islam offers a unifying and integrated vision of humankind, of society, and of the world. In this framework, *individual duties trump individual rights*. Social virtue is preeminently collective rather than inter-individual. The Western notion of individual self-interest as the antithesis of general welfare is thus theoretically absent in Islamic social thought.<sup>78</sup>

This Islamic emphasis on duties over rights is so pronounced that one scholar characterized Islamic law as “an endless discussion on the duties of a Muslim.”<sup>79</sup> Consistent with Wellman's definition of third-generation international human rights,<sup>80</sup> this Islamic notion of social improvement is a combined effort, whereby “[i]ndividuals, communities and indeed the state, act as the instruments by

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<sup>76</sup> Human Rights and Human Responsibilities, Report of Mr. Miguel Alfonso Martinez, Special Rapporteur appointed by the Sub-Commission on the Promotion and Protection of Human Rights to undertake the study requested by the Commission in its resolution 2000/63, UN Doc. E/CN.4/2002/107, at 19-21 (19 Mar. 2002).

<sup>77</sup> *Id.* The SR “hopes, however, that in the second phase of his research he will able [sic] to examine at first hand the teachings of other religions and include the results of his inquiries in his final report.” *Id.* at 19. *But see Id.* at 17-18 (describing the importance of duties in the Cairo Declaration of Human Rights in Islam).

<sup>78</sup> Marcel A. Boisard, *Existe-t-il une Conception Islamique Spécifique des Droits de l'Homme ? in ISLAM & DROITS DE L'HOMME* 131, 132-33 (Emmanuel Hirsch, ed., 1984) (« L'Islam offre une vision unificatrice et intégré de l'homme, de la société et du monde. ... Dans cette optique, *le devoir de l'individu prime son droit*. La qualité sociale par excellence est collective plutôt qu'inter-individuelle. L'antithèse traditionnelle de la philosophie occidentale opposant l'intérêt individuel au bien commun est donc théoriquement absente de la pensée sociale islamique. ») (translation by the author). *See also Id.* at 132 (« l'Islam ... propose ... un humanisme balancé qui représente un équilibre entre l'individualisme libéral plus mystique qu'égoïste et le collectivisme déshumanisant l'individu, au profit de l'Etat devenu une fin en soi. »).

<sup>79</sup> RAHMAN, *supra* note 8, at 32.

<sup>80</sup> Wellman, *supra* note 28, at 644.

which these ideals are translated into practice.”<sup>81</sup> But, although Wellman’s three-pronged definition of third-generation solidarity rights includes both duties and rights for the individual and the group, the prevailing western conception of these rights focuses on the “group right” component, rarely mentioning the “individual duty” component.<sup>82</sup>

In Islam, by contrast, social solidarity is rooted in the importance of individual duty to the group (*ummah*), as has been clarified in several declarations on Islam and human rights. First, the *Cairo Declaration on Human Rights in Islam*, emphasizes individual and collective responsibility in its preamble and cites human duties in Articles 1 (non-discrimination), 2 (right to life), 6 (equality of the sexes), 8 (legal capacity), and 9 (education).<sup>83</sup> The *Rome Declaration on Human Rights in Islam*, composed of five principles, dedicates one of them to the importance of individual duties.<sup>84</sup> The *Universal Islamic Declaration of Human Rights* states in its preamble that “duties and obligations have priority over ... rights”<sup>85</sup> and concludes with an explanatory note that “[e]ach one of the Human Rights enunciated in this declaration carries a corresponding duty.”<sup>86</sup> By expanding on the concept of individual duties in Islamic law in this Part, and then exploring Islamic conceptions of third generation solidarity rights in the next Part, this article aims to enrich the international understanding of individual duty as a component of third-generation solidarity rights using Islamic law as its guide.

### **a. Islamic Bases for Individual Duties**

In Islamic law, individual duties are particularly prominent and immutable because of their religious foundation. Dr. Abdulaziz Othman Altwaijri emphasizes that:

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<sup>81</sup> Nanji, *supra* note 182, at 346.

<sup>82</sup> *See supra* note II(C).

<sup>83</sup> *Cairo Declaration on Human Rights in Islam*, Arts. 1, 2, 6, 8, 9, Nineteenth Islamic Conference of Foreign Ministers, UN Doc: ST/HR/1/Rev.5 (Vol. II) (Aug. 5, 1990) (hereinafter “Cairo Declaration”).

<sup>84</sup> *Rome Declaration on Human Rights in Islam*, World Symposium on Human Rights in Islam (Feb. 27, 2000), reprinted in Altwaijri, *supra* note 15, at 39 (“Second Principle: Necessity to link rights with obligations through a concept based on a balance between man’s functions and his needs to construct a family and society and populate the earth in a way that would not run counter to *Allah’s* Will.”).

<sup>85</sup> *Universal Islamic Declaration on Human Rights*, Preamble (Paris, Sept. 19, 1981)

<sup>86</sup> *Id.* at Explanatory Notes. The importance of individual duties to the group in Islamic law has also been emphasized by numerous commentators. *See* MAYER, *supra* note 14, at 59-65.

[H]uman rights in Islam are Allah's rights and should be observed and exercised in the best manner possible, in order to achieve purity of worship, total subjugation and obedience to the Almighty, and full compliance with His Teachings. The Islamic concept of human rights thus ascends to the sublime status of an act of worship, these rights being in Islamic Sharia no less than religious duties. This degree of obligation to obey the law (taklif) lays a heavy responsibility on the human being vis-à-vis Allah, himself, the community and humanity as a whole.<sup>87</sup>

This religious weight, Dr. Alwajri argues, makes individual responsibility “the cornerstone that upholds Muslim society.”<sup>88</sup> In contrast to mere constitutional or political rights schemes, individual duties “are not the intellectual result of a phase in the development of the human mind, nor are they natural rights as stipulated in organic laws. They are, in fact, *duties of the faith*, entrusted to the individual and the society; each within their domain and depending on their degree of responsibility.”<sup>89</sup> Similarly, Professor Fazlur Rahman of the University of Chicago argues that “[j]ust as in Kantian terms no ideal knowledge is possible without the regulative ideas of reason ..., so in Qur’anic terms no real morality is possible without the regulative ideas of God and the Last Judgment. Further, their very moral function requires that they exist for religiomoral experience and cannot be mere intellectual postulates to be ‘believed in.’”<sup>90</sup> In fact, the sense of obligation created is so strong, that several Islamic scholars prefer the term “human necessities” to human rights.<sup>91</sup> Under Islamic law, the sovereign is *Allah*, “the absolute

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<sup>87</sup> Alwajri, *supra* note 15, at 15. *See also Id.* at 20 (“The Development that Western civilizations witnessed towards the middle of the 20<sup>th</sup> century in the field of human rights had long been acquired and put into practice not as ‘rights’ only, but as ‘divine duties’ and lawful obligations that no human being could sidestep even if he wished to. This is a new angle and a new height that constitutes a qualitative addition which enriches the Islamic perspective and enhances effectiveness and impact of these rights with social peace as a result.”).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (emphasis added).

<sup>90</sup> RAHMAN, *supra* note 8, at 14.

<sup>91</sup> In his book, aptly titled *Islam and Human Rights: Requisite Necessities rather than Mere Rights*, Dr. Muhammad Amara explains that “due to its belief in the ... sacred nature of ... rights,” Islam considers them “‘necessities,’ and made them part of the ‘obligations.’” MUHAMMAD AMARA, *ISLAM AND HUMAN RIGHTS: REQUISITE NECESSITIES RATHER THAN MERE RIGHTS* (MIMOUN MOKHTARI, TRANS., 1996). Drawing extensively on the Qur’an and Sunna, he enumerates the following human necessities: Freedom, *shura* (consultation), justice, knowledge, involvement in public issues, and opposition. *Id.* at 5. *See also* Alwajri, *supra* note 15, at 1920 (“If the Universal Declaration on [sic] Human Rights ... has covered the rights of contemporary men, the Islamic conception of these rights goes beyond the time difference, Islam having affirmed them fourteen centuries ago and elevates them from a status of ‘rights’ to that of ‘necessities’ and to the level of ‘duties and obligations.’”) (citing Muhammad Amara, *Human Rights, Social Security Fence, or Sources for its Violation?*, in *ISLAM AND SOCIAL SECURITY* 83 (1998)); Joelle Entelis, *International Human Rights: Islam’s Friend or Foe?* 20 *FORDHAM INT’L L.J.* 1251, 1290 (1997) (“In Islam, rights are the equivalent of duties owed to God and to others. Human rights, thus, exist only in regard to human duties, which shari’a prescribes. Individuals may obtain rights only by meeting such obligations.”); Said, *Human Rights in Islamic Perspective*, in *HUMAN RIGHTS: CULTURAL AND*

arbiter of values,”<sup>92</sup> and “[t]he sovereignty of the people, if the use of the word ‘sovereignty’ is at all appropriate, is a delegated, or executive sovereignty (*sultan tanfidhi*) only.”<sup>93</sup> A full examination of the bases for this sense of individual obligation under Islamic law, which literally permeates the entire Qur’an and Sunna, is beyond the scope of this article. Nevertheless, two specific manifestations deserve special mention: the doctrine of vicegerency and *amanah* (trust).

The doctrine of vicegerency,<sup>94</sup> -- variously translated as the human role as steward,<sup>95</sup> deputy,<sup>96</sup> or viceroy<sup>97</sup> of God – is rooted in The Holy Qur’an *Heifer* 30<sup>98</sup> and significantly enhances the importance of human duties. In this role as vicegerent of God, “the Muslim community is entrusted with the authority to implement the *Shari’ah*, to administer justice and to take all necessary measures in the interest of good government.”<sup>99</sup> Nanji notes that “[t]he concept of custodial trusteeship, expressed in the Qur’an through the notion of the individual’s role as *khalifah* – stewardship – and hence accountability for the way in

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IDEOLOGICAL PERSPECTIVES 92 (A. POLLIS & P. SCHWAB, EDS., 1980). (“[H]uman rights [in Islam] exist only in relation to human obligations. Individuals possess certain obligations toward God, fellow humans, and nature, all of which are defined in the *Shariah*. When individuals meet these obligations they acquire certain rights and freedoms which are again prescribed by the *Shariah*. Those who do not accept these obligations have no rights, and any claims of freedom that they make upon society lack justification.”) (cited in Arzt, *supra* note 6, at 205-06.

<sup>92</sup> MOHAMMAD HASHIM KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 7 (1991).

<sup>93</sup> *Id.* (citing ADB AL-KARIM ZAYDAN, AL FARD WA’L-DAWLAH FI’L-SHARI’AH AL-ISLAMIYYAH, 2<sup>ND</sup> ED. 29 (International Islamic Federation of Student Organizations, 1970). See also HOLY QUR’AN, *supra* note 6, at 57:2 (“It is He that has sovereignty over the heavens and the earth. He ordains life and death, and has power over all things.”).

<sup>94</sup> See, e.g., Amara, *supra* note 91, at 64.

<sup>95</sup> This is the term preferred by Dr. Nanji, *supra* note 182, at 346.

<sup>96</sup> The Dawood translation of the Holy Qur’an prefers this term. See HOLY QUR’AN, *supra* note 6, at 2:30.

<sup>97</sup> This is the word preferred by Professor Kamali, *supra* note 92, at 39.

<sup>98</sup> THE HOLY QUR’AN, *supra* note 6, at 2:30-31 (“Behold, the Lord said to the angels: ‘I will create A vicegerent on earth.’ They said: ‘Wilt Thou place therein one who will make Mischief therein and shed blood? - Whilst we do celebrate Thy praises And glorify Thy holy (name)?’ He said: ‘I know what ye know not.’”). See also *Id.* at 6:165 (“He has given you the earth for your heritage and exalted some of you in rank above others, so that He might prove you with His gifts.”); 35:39 (“It is He who has given you the earth to inherit. He that denies Him shall bear the burden of his unbelief.”). According to Jose Abraham, The word *khalifa* and its plurals occur nine times in the Qur’an. Abraham, An Ecological Reading of the Qur’anic Understanding of Creation, BANGALORE THEOLOGICAL FORUM, Vol. XXXIII, No. 1 (2001), online at [www.religion-online.org/cgi-bin/researchd.dll/showarticle?item\\_id=1632](http://www.religion-online.org/cgi-bin/researchd.dll/showarticle?item_id=1632) (citing HOLY QUR’AN, *supra* note 6, at 38:26:10:14; 2:30; 7:69:7:74; 6:165; 2:255; 7:169).

<sup>99</sup> KAMALI, *supra* note 92, at 7.

which such a role is undertaken for the betterment of society, and for future generations” exemplifies the importance the Qur’an places on individual duty to the group.”<sup>100</sup>

Although many contemporary Muslim thinkers, both reformist and Islamist,<sup>101</sup> subscribe to the doctrine of vicegerency, including Abd-al-Hamid, Muhammad Iqbal, Mustansir Mir, George Koovackal, Safia Anbir, Seyyed Hossien Nasr, Al-Birnni, and Soumaya Pernilla Ouis,<sup>102</sup> others argue that it is based on a misinterpretation of the term *khalifah* in the Qur’an 2:30.<sup>103</sup> For these latter scholars, the doctrine of vicegerency would imply that *Allah* is not present today, an untenable position for Muslims. In my view, the correct interpretation is that of the former scholars, that “[h]uman beings are vicegerents of God not in the sense that they succeed and replace God, [but rather] ... because God subjected (sakhkhara) everything to us and gifted us with free will, knowledge and a bias towards doing good.”<sup>104</sup> This general interpretation is preferable, because even those who discount the doctrine of vicegerency as the legal basis for individual duties in Islamic law cannot possibly deny the existence of such duties. It is to other potential bases for individual duties that I now turn.

In addition, or in the alternative, individual duties to *Allah* and to the *Ummah* are rooted in the *amanah* (trust) which *Allah* has placed in each individual as described in *Al-Ahzab* 72-73: “We offered

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<sup>100</sup> Nanji, *supra* note 182, at 346 (citing HOLY QUR’AN, *supra* note 6, at 2:30). See also Nanji, *supra*, at 353 (“The new boundary within which such an integrated vision would operate for Muslims was in a moral community in which the Islamic ethical dispensation would find form. The *ummah* and its leaders were the custodians of these values and the community was also the context in which these values could be implemented, enforced and institutionalized.”).

<sup>101</sup> After analyzing the views of reformists Muhammad ‘Adbuh (d. 1905) and Rashid Rida (d. 1935), and Islamists Sayyid Qutb (d. 1966), ‘Abu al-A’la al-Mawdudi (d. 1981), Rashid al-Ghannushi (b. 1941) and Shaykh Ahmad Yasin (b. 1936) David L. Johnston argues that there is “a growing overlap between reformism and Islamism in the creative and constructive harnessing of [vicegerency] in the ongoing Muslim dialogue with the 1948 Universal Declaration of Human Rights.” David L. Johnston, *The Human Khilafa: A Growing Overlap of Reformism and Islamism on Human Rights Discourse?* 28 ISLAMOCRISTIANA 35, 52 (2002).

<sup>102</sup> Abraham, *supra* note 98. For additional contemporary supporters in the doctrine of vicegerency, see Johnston, *supra* note 101, at 48-49 n. 60 (citing MUHAMMAD AL-GHAZALI, HUQUQ AL-INSAN BAYNA TA’ALIM AL-ISLAM WA-I’LAN AL-UMAM AL-MUTTAHIDA 11 (1984); MUHAMMAD FATHI UTHMAN, HUQUQ AL-INSAN BAYNA L-SHARI’A L-ISLAMIYYA WA-L-FIKR AL-QANUNI AL-GHARBI 62-65 (1982); MUHAMMAD ‘AMMARA, AL-ISLAM WA-HUQUQ AL-INSAN: DARURAT, LA HUQUQ 140 (1989); MUHAMMAD AHMAD FATHI & SAMI SALAH AL-WAKIL, HUQUQ AL-INSAN FI L-FIKR AL-GHARBI WA-L-SHAR’ AL-ISLAMI: DIRASA MUQARANA (1992); ‘Abd al-Sabur Marzuq, *Darurat, La Huquq, in* ‘ADB AL-NABI HASAN ‘ABD AL-WAHHAB, HUQUQ AL-INSAN WA-WAJIBATU-HU FI L-ISLAM, AL-QADAYA AL-ISLAMIYYA 57 (2000); USAMA AL-ALFI, HUQUQ AL-INSAN WA-WAJIBATU-HU FI L-ISLAM 15 (2000); AMAR ‘ABD AL-‘AZIZ, HUQUQ AL-INSAN FI L-ISLAM 8-11 (1997)).

<sup>103</sup> See *The Baseless Doctrine of Vicegerency of Man*, online at <http://www.renaissance.com.pk/decq102y2.html>.

<sup>104</sup> Abraham, *supra* note 98.

Our trust to the heavens, to the earth, and to the mountains, but they refused the burden and were afraid to receive it. Man undertook to bear it, but he has proved a sinner and a fool.”<sup>105</sup> By accepting this trust, humans have accepted individual responsibility towards each other and toward the whole of society.<sup>106</sup> The second part of the *sura* represents two major obstacles (sin and foolishness) to the accomplishment of this mission.<sup>107</sup> This trust is also represented in *Al-A’Raf* 172. After discussing the individual duty to “strictly observe” Islamic law,<sup>108</sup> this *sura* states: “Your Lord brought forth descendants from the loins of Adam’s children, and made them testify against themselves. He said: ‘Am I not your Lord?’ They replied: ‘We bear witness that You are.’ This He did, lest you should say on the Day of Resurrection: ‘We had no knowledge of that,’ or: ‘Our forefathers were, indeed, idolaters; but will You destroy us, their descendants, on account of what the followers of falsehood did?’”<sup>109</sup> In this *Sura*, the potential to exonerate individual duty is completely eliminated: Not only are humans prevented, through this solemn vow, from claiming they were not informed of their duties by *Allah*, but they also cannot place the burden on their parents.

Still other scholars find a basis for individual duties in *Al-Isra* 70: “We have bestowed blessings on Adam’s children and guided them by land and sea. We have provided them with wholesome things and exalted them above many of our creatures.”<sup>110</sup> Professor Idriss Alaoui Al Abdallaoui explains that one of the preferred explanations for this preferred status over other creatures is the human ability to think and reason, finding in this a duty to use it for good.<sup>111</sup>

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<sup>105</sup> HOLY QUR’AN, *supra* note 6, at 33:72-73. See also Hadith narrated by Al Bukhari and Muslim: “Verily, each one of you is a guardian (shepherd), and each guardian (shepherd) is responsible for his subjects (flock)” (discussed in detail in Abbas Al Jirari, *Responsibility in Islam*, HASSANIAN LECTURES 141 (1996).

<sup>106</sup> Dr. Ridwan El Sayyed, *Human Rights in Contemporary Muslim Thought*, paper submitted to United Nations Seminar “Enriching the Universality of Human Rights: Islamic Perspectives on the Universal Declaration of Human Rights,” *supra* note 182, at 252, 260; Ridwan Al-Sayyid, *Contemporary Muslim Thought and Human Rights*, 21 ISLAMOCRISTIANA 27, 34 (1995) (considering *Amanah* as “the responsibility that must be shouldered by the Muslim vis-à-vis himself, his society and his world”) (cited in Johnston, *supra* note 101, at 44). See also Al Jirari, *supra* note 105, at 146 (arguing that “there is a relationship between ‘*amaana*’ (trust), responsibility and the exercise of authority”).

<sup>107</sup> Al Jirari, *supra* note 105, at 146.

<sup>108</sup> HOLY QUR’AN, *supra* note 6, at 7:169.

<sup>109</sup> *Id.* at 7:172.

<sup>110</sup> *Id.* at 17:70.

<sup>111</sup> Idriss Alaoui Al Abdallaoui, *Protection of Human Rights in Islam*, HASSANIAN LECTURE 46 (1991).

Thus, even in this brief presentation of some of the most basic themes, it is clear that the bases for an Islamic emphasis on individual duties in the Qur'an and Sunna is extremely rich. Rather than debating where, exactly, this emphasis on duties originates, it is far more useful to acknowledge the combined effect of the aggregate of such justifications. As such, it is incontestable that the notion of individual duties in Islamic law carries great importance. After further examining the complexity of Islamic duties in the next sub-sections, Part IV will examine how this Islamic emphasis on duties changes notions of third generation international human rights.

### ***b. Islamic Language of Duties***

Because duties are so central to Islamic belief and practice, a language and structure of duties has developed in Islamic law which is far more complex than the simple references to duties seen in the international human rights movement.<sup>112</sup> Islamic law is a “comprehensive social blueprint” for all actions of Muslims, most of which are framed as duties.<sup>113</sup> These *hukm Shari'a* (commands of the lawgiver concerning the duties of Muslims) fall into five “well known categories of *wajib* (obligatory), *mandub* (recommended), *haram* (forbidden), *makruh* (abominable) and *mubah* (permissible).”<sup>114</sup> The importance of duties in this system is unquestionable: Islamic law determines a person's duties in every potential situation using these *al-ahkam al-khamsa* (“five qualifications”).<sup>115</sup> These categorical divisions are highly complex, the subject of many multi-volume treatises on Islamic law, most of which have never been translated from Arabic,<sup>116</sup> and a full examination of this subject far exceeds the scope of this article. Rather than explain the complex categorization of duties in Islam, a task that should only be undertaken by a qualified Islamic legal scholar (*ulm* or *imam*), this section aims simply to emphasize the point that

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<sup>112</sup> Ibrahim Kafi Dounmez, *Muslim Scholars' attitude Towards the Meaning of Duty*, THE HASSANIAN LECTURES 279 (1990) (“The fact that Islamic Jurisprudence scholars have divided the deeds of the people responsible into five groups proves that they have deep philosophical insights on the subjects of good and bad deeds, and the degrees of imposition of order and warning.”).

<sup>113</sup> JOHN L. ESPOSITO, ISLAM THE STRAIGHT PATH 87, 88 (1998).

<sup>114</sup> KAMALI, *supra* note 92, at 321-23.

<sup>115</sup> THE ENCYCLOPAEDIA OF ISLAM, v. II, p. 790 (B. LEWIS, CH. PELLAT & J. SCHACHT, EDS., 1983).

<sup>116</sup> See, e.g., AL-GAZALI, AL-MUSTASFA MIN 'ILM AL-USUL (Beirut, 1995) (originally published 1322 of the Hijra). For an in-depth explanation of the five categories of Muslim duties, see *Id.* at v. 1, pp. 37-38, 80-89.

duties *are* important in Islamic law. At the risk that my over-simplified summary will make the opposite point, I provide below several common subdivisions of the Islamic conception of individual duty, in an effort to show its importance and complexity in Islamic jurisprudence.

### 1. *Wajib and Fard*

One place in which the complexity of the language of duties can be seen in Islamic law is the distinction between *wajib* and *fard*, both of which would translate into English merely as “duty.”<sup>117</sup> Although many Islamic scholars view *wajib* and *fard* as synonymous,<sup>118</sup> “[t]he Hanafis have, however, drawn a distinction between [them]. An act is thus obligatory in the first degree, that is, *fard*, when the command to do it is conveyed in a clear and definitive text of the Qur’an or *Sunnah*. But if the command to do something is established in a speculative (*zanni*) authority, such as an *Ahad* Hadith, the act would be obligatory in the second degree (*Wajib*).”<sup>119</sup> This distinction is important, according to Islamic jurists, because disobeying a *fard* makes one a disbeliever, whereas one is only a transgressor if one contests the authority of a *wajib*.<sup>120</sup> According to some, the distinction is also important because disregarding a *fard* nullifies an act, while disregarding a *wajib* merely weakens it. For example, a prayer without obligatory bowing or prostration is void, but without recitation of *al-Fatihah* it is merely deficient.<sup>121</sup>

### 2. *Ayn and Kifaya*

As a point of comparison to third generation solidarity rights in international human rights law, the division of Islamic duties into *Ayn* and *Kifaya* is highly significant. *Ayn* duties (*wajib ayni* or *fard ayni*) are individual duties incumbent upon all Muslims because of their religious and social significance, such as ritual prayer, fasting,<sup>122</sup> fulfillment of contracts, obedience to one’s parents,<sup>123</sup> and the duty to

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<sup>117</sup> ENCYCLOPAEDIA OF ISLAM, *supra* note 115, at 790.

<sup>118</sup> KAMALI, *supra* note 92, at 324; AL-GAZALI, *supra* note 116, at v. 1, p. 80.

<sup>119</sup> KAMALI, *supra* note 92, at 324 (citing *salah* (prayer) and *hajj* (pilgrimage) as *fard* and *salat al-‘isha* (three units of prayers to conclude the late evening prayer) and reciting the *sura al-Fatihah* as *wajib*).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> ENCYCLOPAEDIA OF ISLAM, *supra* note 115, at 790.

<sup>123</sup> KAMALI, *supra* note 92, at 325.

understand certain religious rules.<sup>124</sup> *Kifaya* duties, on the other hand, are collective duties, “the fulfillment of which by a sufficient number of individuals excuses the other individuals [of the *ummah*] from fulfilling” them.<sup>125</sup> Examples of *fard kifaya* include funeral prayer, *jihad* (holy struggle), *hisbah* (the promotion of good and prevention of evil), giving testimony and serving as a judge, building hospitals, extinguishing fires,<sup>126</sup> and acquiring *Ilm al-Deen* (full religious knowledge).<sup>127</sup> Because not everyone is capable of acquiring full knowledge of Islam, and not everyone has the means to meet the cost of a burial when someone dies or to build a hospital, these duties are *kifaya* (collective). But, for those who have the means, the collective obligation becomes their personal obligation – the *fard kifaya* becomes *fard ayn*.<sup>128</sup>

### 3. *Muwaqqat* and *Mutlaq*

Islam also divides duty into *muwaqqat* (contingent on a time limit) and *mutlaq* (absolute, that is, free of time limit).<sup>129</sup> Examples of the former include fasting and obligatory prayers, because there is a specific time in which they are to be performed. On the other hand, the *hajj* pilgrimage is an example of a *mutlaq* duty, since it can be performed at any time during one’s life. Payment of *kaffarah* (expiation) also fits into this latter category. Other *mutlaq* duties are absolute in the sense that, every time the relevant

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<sup>124</sup> Shahid Bin Waheed, *Was 9/11 prophesized in Islam?*, online at [http://www.geocities.com/J\\_1975X/9-11.htm](http://www.geocities.com/J_1975X/9-11.htm) (discussing the *fard ayn* duties to acquire knowledge of the rules of Islam in areas such as rules of *Tahaarah* (purity) and *Najaasah* (impurity); *Salah* (Prayers); *Sawm* (fasting); all duties which are *fard* or *Wajib*; all things declared *haraam* (prohibited) or *Makruh* (reprehensible or repugnant); the laws of *Zakaah* (almsgiving) on the part of one who owns property or wealth above the fixed *Nisaab* (threshold); the rulings and injunctions on *Hajj*; the rulings and injunctions of sale and lease (*Ba’i* and *Ijaarah*) on the part of one who has to buy and sell or run a business or industry or work on wages or salary; and the laws of *Nikah* (marriage) and *Talaaq* (divorce)).

<sup>125</sup> ENCLYOPEDIA OF ISLAM, *supra* note 115, at 790.

<sup>126</sup> KAMALI, *supra* note 92, at 325.

<sup>127</sup> Waheed, *supra* note 124 (citing the duty “[t]o understand the meanings and rulings of the entire Qur’aan, [t]o understand all Ahadeeth and to master the ability to sift and recognize the trustworthy from the untrustworthy, [and t]o acquire a complete knowledge of all injunctions and rulings deduced from the Glorious Qur’aan, and Sunnah with a full awareness of the views of the Shariah, the Tabi’in and Mujtahid Imaams, expressed by them orally or practically.”).

<sup>128</sup> See KAMALI, *supra* note 92, at 325 (“*jihad*, ... is as *wajib kafa’i*, although when the enemy attacks and besieges a locality it becomes the personal duty of every resident to defend it. Similarly, when there is only one *mujtahid* in a city, it becomes his personal duty to carry out *ijtihad*.”); Interview with Professor Ahmed Abbadi, Professor of Islamic Law (Feb. 5, 2004) (“If you are skilled to become a physician, it is *fard ayn* for you. If not, it is *fard ayn* to oblige those who are skilled to do it, by convincing them and helping them. In this way, every *fard* is *kifaya* with *ayn* inside of it based on the faculties of the person.”).

<sup>129</sup> KAMALI, *supra* note 92, at 325; AL-GAZALI, *supra* note 116, at v. 1, pp. 83-84; Dounmez, *supra* note 112, at 280.

occasion arises, the duty must be fulfilled, such as the duty to obey one's parents and to carry out *hisbah* (promoting good and preventing evil).<sup>130</sup>

#### 4. *Muhaddad* and *Ghayr Muhaddad*

Finally, there is also a division in Islamic law between *muhaddad* (quantified) duties and *ghayr muhaddad* (unquantified) duties.<sup>131</sup> The former include *zakah*, *salah*, payment by the purchaser in a sales transaction, payment of a specific rent in a tenancy agreement, and payment of *hudud* (penalties), all of which are quantified and specific.<sup>132</sup> Unquantified duties, on the other hand, include the duty to “give charity to the needy not in time of *zakah*, to feed the hungry not in time of feeding, when the person responsible has to do penance, to do justice, benovelence [sic] and economy in expending, abstinence, to help the sorrowful and the grieved, and all similar duties to which the legislator has not fixed a determined value because *they are meant to meet the needs of the people*.”<sup>133</sup> Because *ghayr muhaddad* duties are unquantified specifically because they are meant to meet social demand, they exemplify particularly well the social solidarity goal inherent in Islamic duties. Although in a more subtle way, even *muhaddad* duties have a strong social solidarity component, because they are embedded with *ghayr muhaddad* duties, as determined by the capacity of the individual. For example, “the school master, the university teacher, after they have finished their duties and works required from them in exchange for a salary, ... should provide scientific and intellectual assistance to whosoever [sic] is in need of it. ... within the limits of their possibilities.”<sup>134</sup> Similarly, a wealthy Muslim upon paying *zakah* (a determined duty), must then evaluate his or her means combined with the needs of those around to determine if

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<sup>130</sup> KAMALI, *supra* note 92, at 325-26.

<sup>131</sup> *Id.* at 326 ; Dounmez, *supra* note 112, at 280-81.

<sup>132</sup> *Id.*

<sup>133</sup> Dounmez, *supra* note 112, at 281 (emphasis added). See also KAMALI, *supra* note 92, at 326 (citing also “the duty to support one’s close relatives, ... paying a dower (*mahr*) to one’s wife, the length of standing (*qiwwam*), bowing and prostration in *salah*, wiping the head in ablution (*wudu*) and quantifying the *ta’zir* penalties for offences which are punishable but in regard to which the Lawgiver has not quantified the punishment.”).

<sup>134</sup> Dounmez, *supra* note 112, at 283-84.

additional material help is required (an undetermined duty).<sup>135</sup> In this way, the end result of both *muhaddad* and *ghayr muhaddad* duties is meeting social need to the highest extent possible.

### ***c. Additional Aspects of Duties in Islam***

In several other ways, the discourse surrounding duties in Islam is complex. First, Islam has recognized the distinction between positive and negative duties,<sup>136</sup> much as the human rights movement recognizes the distinction between positive and negative rights.<sup>137</sup> Second, just as human rights scholars analyze conflicts between two rights, noting that one individual's right only extends as far as the encroachment of the rights of another individual,<sup>138</sup> Islam carries out the same analysis in the context of duties. Using the example of a society in need of 10,000 doctors which has 30,000 doctors, Dounmez argues that a society where too many people are meeting a *fard kifaya* (collective duty) has done no better in meeting the collective duty than a society where too few are meeting the duty. Analyzing the issue "in light of the aim of the collective duty," Dounmez concludes that "the collective duty is not realized, [because] ... the limit expected is surpassed on account of another collective duty."<sup>139</sup> Thus, just as human rights scholars limit an individual right partly based on its potential to encroach other rights of other individuals, Islamic legal scholars limit duties based on their potential to encroach upon other individual duties to society. The notable difference is in the effect: whereas the focus in the human rights analysis resolves a conflict of one individual against another, the Islamic duties analysis attempts to maximize two simultaneous attempts at societal improvement.

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<sup>135</sup> *Id.*

<sup>136</sup> Dounmez, *supra* note 112, at 282 ("Duties in Islam are not confined to the performance of certain specific behaviours. There are duties which are a sort of giving up certain specific, behaviour, even if the basic principle of duty is obligation.").

<sup>137</sup> J STEINER & ALSTON, *supra* note 1, at 363.

<sup>138</sup> For example, a potential conflict exists between one person's freedom of speech and another person's right to individual dignity, if the content of the speech is harmful to the ideas, beliefs or identity of the second person.

<sup>139</sup> Dounmez, *supra* note 112, at 286.

#### **d. Conclusion**

Thus, Islamic law is characterized by a pronounced emphasis on duties over rights, which now forms part of a complex language, theology, philosophy, and law of duties. Beginning with a discussion of several religious bases for the emphasis on individual duty, this Part has outlined several of the ways Islamic thinkers have divided the concept of duty. Any effort at brief summary of this vast world of duties, which has intrigued Islamic scholars for over a millennium, would be *ipso facto* deficient, but a notion of the importance of duties in Islamic law is critical to the greater goal of this article, analysis of Islamic notions of third generation solidarity rights. By providing an overview of four ways that duty in Islamic law is commonly divided, this section has aimed not to fully examine these divisions, but rather to argue that the mere presence of such divisions speaks to the importance of duties in the Islamic tradition. This Part concluded by discussing other areas where duties language in Islam is highly developed, paralleling rights language in international human rights law. Having established the paramount importance of individual duties in Islamic law, the next Part will examine its effect on Islamic notions of third generation solidarity rights.

### **IV. Third Generation International Human Rights: An Islamic Perspective**

At least a decade before Vasak made his famous “discovery” of third-generation human rights, a group of eminent jurists from Saudi Arabia described the concept in almost identical terms in their efforts to explain Islamic conceptions of human rights at The Vatican Colloquium on Economic, Social, and Cultural Rights in Islam.<sup>140</sup> In their concluding observations, they stated:

“We note that cultural rights as codified in the international conventions are personal and subjective rights, not general and imperative duties. We further note that these rights are framed in ‘negative’ terms only. ... [In contrast,] cultural rights in Islam have an

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<sup>140</sup> COLLOQUES DE RIYAD, DE PARIS. DU VATICAN, DE GENEVE ET DE STRASBOURG SUR LE DOGME MUSULMAN ET LES DROITS DE L’HOMME EN ISLAM : ENTRE JURISTES DE L’ARABIE SAOUDITE ET EMMINENTS JURISTES ET ENTELLECTUELS EUROPEENS 109, 132-34 (Dar Al-Kitab Allubnani, Beyrouth, undated) (hereinafter « COLLOQUES »).

obligatory character that cannot be renounced, contrary to the international conception which considers them as a personal and discretionary right which can be renounced by the beneficiary. *They are both individual and collective obligations, the execution of which is incumbent on both the individual and the collectivity.*”<sup>141</sup>

Although made in the context of economic, social and cultural rights, what these comments really describe are third generation solidarity rights in Islam, with an emphasis on the sharing of individual and collective duty. Whereas third generation solidarity rights are weak and aspirational in the international legal discourse, these Saudi jurists cite them as a basic principle in the Islamic notion of human rights, discussing them prior to their “discovery” by the international human rights movement. Just as Wellman expounds three decades later, these scholars emphasized the importance of coexisting individual and collective obligations that is characteristic of third generation solidarity rights. Because of these parallels between the conceptions of Islam and the foundations of solidarity rights, it should come as no surprise that strong support exists for the three most-commonly proposed solidarity rights – the right to a healthy environment, the right to development, and the right to peace – in the Islamic tradition. This Part will examine each area in detail.

### ***a. Right to a Healthy Environment***

As discussed by Wellman,<sup>142</sup> a growing number of international conventions in the past twenty years have attempted to codify a right to a healthy environment, such as the Stockholm Declaration on the Human Environment in 1972,<sup>143</sup> the African Charter on Human and Peoples' Rights in 1981,<sup>144</sup> the United Nations World Charter for Nature in 1982,<sup>145</sup> and the Additional Protocol to the American Convention on

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<sup>141</sup> *Id* (emphasis added).

<sup>142</sup> Wellman, *supra* note 28, at 646-48.

<sup>143</sup> Stockholm Declaration of the United Nations Conference on the Human Environment, *adopted* 16 June 1972, at ¶1, U.N. Doc. A/CONF. 48/14/Rev.1 at 3, *reprinted in* 11 I.L.M. 1416 (1972) (“Man has the fundamental right to ... life, in an environment of a quality that permits a life of dignity and well-being.”).

<sup>144</sup> African Charter on Human and Peoples' Rights, art. 24, *adopted* 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5 (*entered into force* 21 Oct. 1986), *reprinted in* 21 I.L.M. 58 (1982) (“All peoples have the right to a general satisfactory environment favorable to their development.”).

<sup>145</sup> World Charter for Nature, *adopted* 28 Oct. 1982, G.A. Res. 37/7 (Annex) U.N. GAOR, 37th Sess., Supp. No. 51, at 17, U.N. Doc. A/37/51 (1982), *reprinted in* 22 I.L.M. 455 (1983).

Human Rights in the Area of Economic, Social and Cultural Rights of 1988.<sup>146</sup> Against these recent developments on the international level, a right and duty towards environmental protection have existed in Islam since the time of the Prophet Mohammed,<sup>147</sup> present in both the Qur'an and the Sunna. This section will analyze some of the bases for environmental protection in Islam.

The environment is discussed in numerous verses of the Qur'an,<sup>148</sup> a common characteristic of these being the view that "the concept of the environment is broad and is used in many different ways,"<sup>149</sup> including the natural environment,<sup>150</sup> the social environment,<sup>151</sup> and the economic environment.<sup>152</sup> The Qur'an states generally: "Seek not (occasions for) mischief in the land."<sup>153</sup> This general notion of environmental protection manifests itself in several specific areas. First, in the area of pollution, the Prophet Mohammed stated "[n]o one shall urinate on stagnant water, [and] avoid the abhorrent act of

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<sup>146</sup> *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)*, art. 11, opened for signature 17 Nov. 1988, O.A.S.T.S. No. 69, reprinted in 28 I.L.M. 161 (1989) ("[e]veryone shall have the right to live in a healthy environment.").

<sup>147</sup> In every reference regarding the Prophet Muhammad, I ask that God's peace and blessings be upon him.

<sup>148</sup> HOLY QUR'AN as cited in Dr. Amina Muhammad Nasir, *Islam and the Protection of the Environment*, 13 ISLAM TODAY 67 (1995), at *Heifer*: 29 ("It is He who hath created for you all things that are on earth."); *Qâf*: 6-7 ("Do they not look at the sky above them? How we have made it and adorned it, and there are no flaws in it? And the earth - We have spread it out, and set thereon mountains standing firm, and produced therein every kind of beautiful growth."); *The Family of 'Imran*: 191 ("And contemplate the (wonders of) creation in the heavens and the earth, (with the thought): 'Our Lord! Not for naught hast Thou created (all) this!'); *The poets*: 7 ("Do they not look at the earth, - how many noble things of all kinds We have produced therein?"); *The Overwhelming Event*: 17-20 ("Do they not look at the camels, how they are made? And at the sky, how it is raised high? And at the Mountains, how they are fixed firm? And at the earth, how it is spread out?"); *The Heights*: 54 ("...the sun, the moon, and the stars, (all) governed by laws under His Command"); *The ants*: 61 ("Or, who has made the earth firm to live in; made Rivers in its midst; set thereon mountains immovable; and made a separating bar between the two bodies of flowing water? (can there be another) god besides God? Nay, most of them know not."); *Pilgrimage*: 65 ("He withholds the sky from falling on the earth except by His leave; For God is most kind and most merciful to man."). All Qur'anic verses in this footnote are as cited in Dr. Amina Muhammad Nasir, *Islam and the Protection of the Environment*, 13 ISLAM TODAY 67 (1995).

<sup>149</sup> Nasir, *supra* note 148, at 68.

<sup>150</sup> *Id.* at 87-96.

<sup>151</sup> *See, e.g., Id.* at 84-85; Nanji, *supra* note 182, at 355 ("One's environment thus affords an opportunity ... to improve the quality of life, to foster community values and to use human creativity to sustain the beauty as well as the vitality of the natural and built environment.").

<sup>152</sup> *Id.* at 83 ("Rightly guiding production and investment in accordance with the needs and interests of society is one of the important questions which have concerned the jurists in their researches.") (citing SHEIKH ALI AL-KHALIF, OWNERSHIP IN ISLAMIC SHARIA AS COMPARED WITH POSITIVE LAWS 67-69).

<sup>153</sup> HOLY QUR'AN, *supra* note 6 (cited in Mohamed Haitham Al-Khayyat, *On the Preservation of the Environment: An Islamic Perspective*, THE HASSANIAN LECTURES 152, 162 (1998)). *See also* Mohammed Taha Sabounji, *Islam and the Environment*, THE HASSANIAN LECTURES 68, 73 (1991) ("Doing harm is forbidden in Islam. It is therefore forbidden to harm life as it is forbidden to harm its foundations. Hence, causing damage to the environment is detrimental to life in general and is considered ... an infringement on the beauty of the environment created by Allah.").

emptying your bowels near water sources, in the middle of the road, and in the shade.”<sup>154</sup> Al-Khayyat notes that “[w]hat is striking in these commands is the use of the word ‘la’n’ (curse) or one of its derivatives. ‘La’n’ entails exclusion, repudiation, and banishment from the community. The implications are evident: he who deliberately pollutes the environment to the detriment of the community becomes liable to banishment.”<sup>155</sup> The use of such strong language reinforces the importance of environmentalism in the Islamic tradition.<sup>156</sup> Second, Islam takes a definite stand in the area of water conservation. The Prophet Mohammed forbid excessive use of water, even for cleaning or ablutions, setting the example himself by bathing in a ‘sa’ (two liters) of water and performing ablutions with half a liter.<sup>157</sup> According to Imam Ab ‘Ubeid in his *Kitab at-Tuhur*, the Prophet also returned unused clean water to the river after ablutions, stating “Let (this water) reach a human, an animal, or any living creature so that they may, by the Grace of Allah, benefit from it.”<sup>158</sup> The Qur’an also states: “Waste not through excess, for God does not love the wasteful.”<sup>159</sup> Third, Islam takes a stand on preservation of other natural resources, such as plants and animals. Imam Muhammad bin Hazm stated in his *al-Muhallak*: “beneficence to animals is an act of righteousness and piety. Any failure to assure and assist in their well-being is tantamount to sin and offense.”<sup>160</sup> The Prophet reportedly stated “He that unduly cuts down a tree shall be directed to hell.”<sup>161</sup> Similarly, he established the first environmental sanctuary, an area extending to twelve miles around Madinah: he restricted fishing in some areas, restricted logging within twelve miles of Madinah,

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<sup>154</sup> Al-Khayyat, *supra* note 153, at 165.

<sup>155</sup> *Id.*

<sup>156</sup> It is also worth noting the importance of personal cleanliness in Islam, which cannot be understated. Muslim and Al Tirmidhi relate a hadith of the Prophet on the authority of Abu Malik al-Ash’ari stating “The Prophet, Peace and Blessing be upon Him, said ‘Cleanliness is half of faith.’” Nasir, *supra* note 148, at 100. Nasir emphasizes that “Islam links faith and belief (*iman*) to cleanliness. Some of the pillars of Islam, such as prayer (*salat*) and the pilgrimage (*Hajj*) can only be performed in a state of purity and washing in pure, clean water, free of any contamination. This article of faith and others teach us to protect sources of water from pollution and to keep them clean.” *Id.* at 99-100.

<sup>157</sup> *Id.* at 165-66.

<sup>158</sup> *Id.* at 166.

<sup>159</sup> HOLY QUR’AN, *supra* note 6, at 6:141 (cited in Nanji, *supra* note 182, at 356). *See also* Sabounji, *supra* note 153, at 73-74.

<sup>160</sup> Al-Khayyat, *supra* note 153, at 166.

<sup>161</sup> *Id.* *See also* Sabounji, *supra* note 153, at 73 (noting that the Prophet Mohammed “forbade the cutting of trees for no purpose or burning of enemy trees. Islam prohibits the disfigurement of nature. It calls for its cleanliness and vigour.”).

and restricted hunting within four miles.<sup>162</sup> Al-Khayyat notes “some Ulemas (scholars) see in such interdictions a keen desire to preserve the environment. Such an awareness soon became deeply engrained in the minds of Muslims.”<sup>163</sup> Fourth, Islam rewards efforts to rekindle the natural environment. In a hadith on the authority of Anas b. Malik, The Prophet Mohammed states “Every Muslim who plants a tree or plants a crop from which birds, people or animals eat shall have a reward for a beneficent act.”<sup>164</sup>

The importance of balance and equilibrium are also stressed.<sup>165</sup> Environmental care “stands on the basis of faith ... [and] any kind of corruption whatsoever – whether in the natural or social environment – is considered a violation of God’s law.”<sup>166</sup> Because the duty to protect the environment is rooted in Divine orders, it easily exceeds duties present in third-generation human rights, which are at best intangible, at worst unknown to laypeople. Environmentalism in Islam is firmly rooted in the human role as vicegerent,<sup>167</sup> and the responsibility God placed in humans in the form of *amanah* (trust).<sup>168</sup> In his paper submitted to the United Nations Conference on Islamic Perspectives on the Universal Declaration of Human Rights, Dr. Nanji notes that “[t]he role of stewardship entrusted to human beings also necessitates an ethical stance towards the development of natural resources and the public space inhabited by human beings.<sup>169</sup> This stewardship, thus defined, is both a right and a duty to perpetuate these gifts of

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<sup>162</sup> Al-Khayyat, *supra* note 153, at 166.

<sup>163</sup> *Id.*

<sup>164</sup> In the collections of Al-Bukhari, Muslim, and Al-Tirmidhi, as cited in Nasir, *supra* note 148, at 96.

<sup>165</sup> HOLY QUR’AN, *supra* note 6, at 54:49: “Indeed all things have we created in proportion and balance” (as cited in Nanji, *supra* note 182, at 355); *The Moon* 49: “Verily, all things have We created in proportion and measure” (as cited in Nasir, *supra* note 148, at 76).

<sup>166</sup> Nasir, *supra* note 148, at 73. *See also Id.* at 105 (“[P]rotection of the environment does not have its rationale in still-born conference resolutions or in the strident voices of scientists, which may or may not be heard. Rather, it is the Divine Law which demands that man protect the environment and God, to Whom be ascribed all perfection and Majesty, will punish all who neglect its provisions.”).

<sup>167</sup> Nasir, *supra* note 148, at 82 (noting that under Shari’a, the right of ownership is not absolute, but “is portrayed as a kind of vicegerency from the True Owner – God. Thus, man should respect, in the use of this right, the purpose and wisdom for which God made him a vicegerent of His Property. Jurists consider an individual’s possession of property as a form of vicegerency from the true Owner of everything which is on earth.”). For a general discussion of vicegerency, *see supra* notes 94-104 and accompanying text.

<sup>168</sup> *See supra* notes 105-111 and accompanying text.

<sup>169</sup> Nanji, *supra* note 182, at 355 (citing HOLY QUR’AN 10:14: “We have made you heirs in the land after them, to see how you will behave”).

Allah.<sup>170</sup> The role of humans as vicegerents profoundly affects the meaning of exploitation of natural resources, when it occurs. In the capitalist model based on self-interested individuals, “exploitation” carries the negative connotation of using the environment for individual self-benefit. In the Islamic model based on vicegerency, exploitation carries the positive connotation of a trusteeship with God meant to benefit the group. Thus, Dr. Nasir notes that “in the Shari’a, ownership is a social responsibility, a fact which confirms the relationship between community and land, and the extent of Islam’s interest in regulating it.”<sup>171</sup> Similarly, Jose Abraham notes that although some scholars translate the Arabic word “Sakhkhara” in Qur’anic *ayat* on the environment<sup>172</sup> to mean “subjection,” “subservience,” or “exploitation,” “the relationship between human and non-human is not of domination or exploitation but that of the trust (*amanah*) placed with human beings by God,” making any attempt at human domination a “mockery to Allah.”<sup>173</sup> Thus, through both the doctrine of vicegerency and the *amanah* (trust) placed in humans by God, exploitation becomes a divinely-motivated duty of group improvement, not a self-motivated form of destruction.

### ***b. The Right to Development***

The “right to development,” first articulated by Senegalese jurist Keba M’Baye in 1972,<sup>174</sup> was codified in 1986 in the non-binding *United Nations Declaration on the Right to Development*.<sup>175</sup> Since

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<sup>170</sup> See, e.g., Sabounji, *supra* note 153, at 73 (“[T]he care, preservation, improvement and beautification of the environment is part ... of man’s great responsibility as Allah’s viceroy on earth.”).

<sup>171</sup> Nasir, *supra* note 148, at 82.

<sup>172</sup> See, e.g., HOLY QUR’AN *supra* note 6, at 14:32-34; 16:5-8; 45:12-13.

<sup>173</sup> Abraham, *supra* note 98 (citing Abd-al-Hamid, *Exploring the Islamic Environmental Ethics, in ISLAM AND THE ENVIRONMENT* 47-48 (A. R. AGWAN, ED., Delhi: Institute of Objective Studies, 1997)).

<sup>174</sup> Ved P. Nanda, *The Right to Development: An Appraisal*, in *WORLD DEBT AND THE HUMAN CONDITION: STRUCTURAL ADJUSTMENT AND THE RIGHT TO DEVELOPMENT* 41, 43 (Ved P. Nanda et al., eds., 1993) (citing Keba M’Baye, *Le droit au Developpement Comme Un Droit de l’Homme*, 5 *REVUE DES DROITS DE L’HOMME* 505 (1972)). Nanda’s article provides a detailed account of the history of the right to development, challenges facing the right to development, and its evolution as an international legal norm. See also James C.N. Paul, *Symposium: The United Nations Family: Challenges of Law and Development: The United Nations and the Creation of an International Law of Development*, 36 *HARV. INT’L L.J.* 307, 312 (1995); Mohammed Bejaoui, *The Right to Development*, *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* (1991), at 1182; Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and politics of the Right to Development*, 15 *CALIF. WESTERN INT. L.J.* 473 (1985).

<sup>175</sup> *Declaration on the Right to Development*, G.A. Resolution 41/128 (Dec. 4, 1986).

the Declaration on the Right to Development, it has become increasingly common to embody development norms in international legal instruments,<sup>176</sup> and the Secretary General of the United Nations has created a list of 81 international instruments codifying a commitment to social development.<sup>177</sup> Like the right to peace and the right to a healthy environment, the right to development meets all three of Wellman's requirements for a "third generation" solidarity right in international law: It imposes joint obligations,<sup>178</sup> it imposes duties on both states and individuals,<sup>179</sup> and is a group right, in addition to being an individual one.<sup>180</sup>

Like the right to a healthy environment, there is solid evidence that the notion of the right to development has existed in Islamic law since the revealed texts. The emphasis on socioeconomic justice and human egalitarianism is, in fact, so strong in Islam that Professor Fazlur Rahman identifies it as "[t]he basic élan of the Qur'an."<sup>181</sup> Dr. Azim Nanji notes that "The Qur'an is explicit in stating that human conduct and aspirations have relevance as acts of faith within the wider human, social and cultural context."<sup>182</sup> For example, the Holy Qur'an states that "[t]he righteous are those who ... give from what

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<sup>176</sup> Paul, *supra* note 174, at 307. See also SIGRUN SKOGLY, HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND 141-43 (2001) (describing the work of three successive UN working groups on the right to development established since 1986).

<sup>177</sup> UNITED NATIONS, PREPARATORY COMMITTEE FOR THE WORLD SUMMIT FOR SOCIAL DEVELOPMENT, REVIEW OF EXISTING INTERNATIONAL COMMITMENTS RELEVANT TO POVERTY, EMPLOYMENT AND SOCIAL INTEGRATION; OUTCOME OF THE WORLD SUMMIT FOR SOCIAL DEVELOPMENT: DRAFT DECLARATION AND DRAFT PROGRAMME OF ACTION, REVIEW OF EXISTING INTERNATIONAL COMMITMENTS RELEVANT TO POVERTY, EMPLOYMENT AND SOCIAL INTEGRATION, U.N. Doc. A/Conf.166/PC/16 at ¶ 259 (1994) See also Paul, *supra* note 174, at 307 (noting that "This contribution is an illustrative, but hardly complete, effort to identify some of the sources and principles of the international law of development ... that has been generated by the U.N. system, particularly during the past two decades").

<sup>178</sup> Wellman, *supra* note 28, at 646 (arguing that the responsibility on states to create "national and international conditions favourable to the realization of the right to development" in the Declaration on the Right to Development Art. 3.1 "necessarily requires coordinated joint action").

<sup>179</sup> Declaration on the Right to Development, *supra* note 175, at Art. 2.2 ("All human beings have a responsibility for development, individually and collectively."); Wellman, *supra* note 28, at 646.

<sup>180</sup> Declaration on the Right to Development, *supra* note 175, at Art. 1.1 ("[E]very human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development.") (emphasis added); Wellman, *supra* note 28, at 646.

<sup>181</sup> RAHMAN, *supra* note 8, at 19.

<sup>182</sup> Dr. Azim Nanji, *The Right to Development: Social and Cultural Rights and Duties to the Community*, paper submitted to United Nations Seminar "Enriching the Universality of Human Rights: Islamic Perspectives on the Universal Declaration of Human Rights," UN Doc. HR/IP/SEM/1999/1 (PART II Sect. 2), at 345 (Mar. 15, 1999).

they have, to: relatives, orphans, those in need, the ones away from home, those who ask, and in order to free the enslaved.”<sup>183</sup>

Parallel to the international conception of third generation solidarity rights, Professor Belkhoja argues that the right to development under Islamic law is based in both individual and collective responsibility: “Individuals are definitely responsible for the achievement of development for the individual has been mandated to discharge the *amanah* [trust] entrusted to him by Almighty Allah. ... Likewise, society is equally responsible because it is required to establish cooperation and solidarity. ... The role of the State is far more extensive because it ... must shoulder the burdens which cannot be borne by the individuals in view of their limited resources.”<sup>184</sup> This wording parallels the international conception almost to the letter: “All human beings have a responsibility for development, individually and collectively, [but] States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development.”<sup>185</sup>

Yet, although one may conclude from this language that the balance of obligations in the right to development is similar in its international law and Islamic law formulations, the element of individual duty is in fact significantly stronger in Islamic law, because the tie between the individual and the group is stronger.<sup>186</sup> For example, the Declaration on the Right to Development is almost completely worded in terms of state duties, with only one clear reference to individual obligations.<sup>187</sup> Comparatively, the role of individual duty in the Islamic conception of the right to development is enormous, as evidenced in practices such as *Zakat* (almsgiving), one of the five pillars of Islam.<sup>188</sup> This increased individual duty

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<sup>183</sup> HOLY QUR’AN, *supra* note 6, at 2 :177 (cited in Nanji, *supra* note 182, at 345).

<sup>184</sup> Muhammad Al-Habib Belkhoja, *Man in Islam is the Alpha and Omega of Global Development*, THE HASSANIAN LECTURES 188, 199-200 (1995) (citing the following two Hadith: “If any one of you has food in excess, let him give the excess food to the one who has none;” and “If the Final Hour comes and finds one of you holding a palm shoot in his hand, if he can plant it before the onset of the Hour, let him plant it and he will earn a reward for that.”).

<sup>185</sup> Declaration on the Right to Development, *supra* note 175, at Art. 2.1, 3.1.

<sup>186</sup> As stated by Sheikh Muhammad Abduh: “Solidarity of the *Ummah* means that your wealth is the wealth of the *Ummah* you belong to.” Dr. Mohammad Ammara, *The Vicegerency of Man*, 13 ISLAM TODAY 59, 62 (1995).

<sup>187</sup> Declaration on the Right to Development, *supra* note 175, at Art. 2.1.

<sup>188</sup> Morgan-Foster, *supra* note 12, at Part IV(B)(1); KAMALI, *supra* note 92, at 217 (“The Qur’an often indicates the rationale of its laws either explicitly or by reference to its objectives. ... [T]he rationale of *zakah* is to prevent the concentration of wealth in a few hands, which is clearly stated in the Qur’an (al-Hashr, 59:7).”); Timur Kuran,

can be traced to two important characteristics of Islamic law. First, just as explained *supra* in the context of the right to a healthy environment,<sup>189</sup> Professor Muhammad Al-Habib Belkhoja attributes this individual duty to further the right to development in the human role as viceregent.<sup>190</sup> Professor Ammara agrees, arguing that the Qur'an explicitly supports the right to development based in the concept of vicegerency in *Ascent 24-25*.<sup>191</sup> He notes that, as a vicegerent of God, each Muslim individual assumes a duty to the development of others, as is clear in the Qur'anic verse *Iron 7* tying vicegerency ("heirs") with almsgiving: "Spend in Charity out of the substance whereof he has made you Heirs."<sup>192</sup>

Second, this increased importance of individual duty can also be attributed to the spiritual nature of Islamic law, which facilitates a level of solidarity beyond that present in international law.<sup>193</sup> For example, the Hadith "Whoever sleeps satiated whilst his neighbour is hungry does not belong to our community,"<sup>194</sup> elevates the individual duty to contribute to the group right to development so high, that failure results in banishment from the community itself. The brief reference to individual duty in the UN Declaration on the Right to Development pales by comparison. But, banishment from the community (*ummah*) would not be conceivable if the community were not strong or even coherent, often the case in the international community. In Islam, by contrast, the community is coherent, defined, and spiritually relevant: it is the community of believers in Islam itself. Thus, it is the spiritual basis of Islamic law that

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*The Provision of Public Goods under Islamic Law: Origins, Impact, and Limitations of the Waqf System*, 35 LAW & SOC'Y REV. 841 (2001) ("[A]t least a dozen Qur'anic passages have been interpreted as instructing believers to establish foundations serving religious or charitable purposes.").

<sup>189</sup> See *supra* note 169.

<sup>190</sup> Belkhoja, *supra* note 184, at 197. Belkhoja explains that the human role as *khalifa* carries several complex and interrelated duties, including "the exertion of efforts in order to spread peace, achieve people's prosperity and establish peaceful coexistence." *Id.* See also *Id.* at 192 ("Almighty Allah selected man, elevated his status and entrusted him with the *amanah* (trust) which could not be assumed neither by the skies nor by the earth or the mountains. They all declined to bear that heavy burden whereas man accepted it. Man is therefore apt to become Allah's viceregent on the earth and to shoulder the responsibilities assigned to him by Allah.").

<sup>191</sup> Ammara, *supra* note 186, at 62 (citing HOLY QUR'AN *Ascent 24-25*: "And those in whose wealth is a recognized right for the (needy) who asks and him who is prevented (for some reason from asking)").

<sup>192</sup> *Id.* at 62.

<sup>193</sup> Belkhoja, *supra* note 184, at 198 (citing Hadith: "Work for your life on earth as if you are living eternally, and work for your Hereafter as if you are going to die tomorrow.").

<sup>194</sup> *Id.*

both creates a solid *ummah* and helps to solidify individual duties towards that *ummah*.<sup>195</sup> With this strong *ummah*, the principle of vicegerency can have meaning in the context of the right to development.

### **c. Right to Peace**

Of the three most common third generation solidarity rights, the right to peace is the least defined and developed in international human rights law.<sup>196</sup> Although the preservation of peace is a primary purpose of the United Nations, and figures prominently in the UN Charter, the international community did not begin framing peace as a third generation solidarity right until several decades later.<sup>197</sup> First, the UN Human Rights Commission framed it as a right in a controversial 1976 resolution.<sup>198</sup> In 1978, it was codified as an individual and collective right by the UN General Assembly Declaration on the Preparation of Societies for Life in Peace.<sup>199</sup> The 1984 Declaration on the Right of Peoples to Peace further codified the right.<sup>200</sup> Although the right has been recognized in international law, its contours are still vague,<sup>201</sup> and the above efforts met with harsh protest from several Western powers who argued that general promotion of peace should be left to other branches of the UN, particularly the Security Council, not added to the list of more-established, classic human rights.<sup>202</sup>

In Islam, the omnipresence of the concept of peace cannot be understated. It is present in the salutation exchanged between Muslims at each meeting. A prayer for peace is repeated twice at the end

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<sup>195</sup> *Id.* at 195 (“Muslim scholars do not view poverty as mere destitution but rather as a major stumbling block in the way of worship of Allah, which obstructs the achievement of spiritual development.”).

<sup>196</sup> Wellman, *supra* note 28, at 648-49.

<sup>197</sup> *Id.* at 648 (citing Charter of the United Nations, 1332 U.N.T.S. 261, Preamble (*signed* 26 June 1945; *entered into force* 24 Oct. 1945) (hereinafter “UN Charter”) (“We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small. . . .”)).

<sup>198</sup> Sohn, *supra* note 25, at 57 (citing U.N. Commission on Human Rights Res. 5(XXXII), 60 U.N. ESCOR Supp. (No. 3) at 62, U.N. Doc. E/5768 [E/CN.4/1213] (1976) (“everyone has the right to live in conditions of international peace and security and fully to enjoy economic, social and cultural rights and civil and political rights.”)).

<sup>199</sup> Wellman, *supra* note 28, at 649 (citing Declaration on the Preparation of Societies for Life in Peace, *adopted* 15 Dec. 1978, G.A. Res. 33/73, U.N. GAOR, 33rd Sess., 85th plen. mtg., U.N. Doc. A/Res/33/73 (1978) (“Every nation and every human being . . . has the inherent right to life in peace.”)).

<sup>200</sup> Declaration on the Right of Peoples to Peace, *adopted* 12 Nov. 1984, G.A. Res. 39/11, U.N. GAOR, 39th Sess., 57th plen. mtg., U.N. Doc. A/Res/39/11 (1984), available on [gopher://gopher.un.org:70/00/ga/recs/39/11](http://gopher://gopher.un.org:70/00/ga/recs/39/11) (cited in Wellman, *supra* note 28, at 649).

<sup>201</sup> Wellman, *supra* note 28, at 649.

<sup>202</sup> Sohn, *supra* note 25, at 57-58.

of each of Muslims' five daily prayers.<sup>203</sup> The very word "Islam" shares its root with the word for "Peace" in Arabic.<sup>204</sup> Peace is one of the ninety-nine attributes of Allah.<sup>205</sup> There are over one hundred Qur'anic verses discussing the importance of peace.<sup>206</sup> Indeed, this ever-presence of Peace in Islam led Professor Mohammed Yessef to state "[t]he alpha and omega of Islam is peace."<sup>207</sup> Professor Yessef finds an individual responsibility to promote peace in the following Hadith, narrated by Imam Muslim in his *Sahih*: "You shall not enter Paradise until you believe (in Allah), and you shall not believe (in Allah) until you love one another; shall I tell you something which, if you were to do it, you would love one another? Disseminate (and disclose) peace among yourselves."<sup>208</sup> Thus, this Hadith elevates the dissemination of peace to a condition precedent to belief in Allah, one of the five Pillars of Islam. Because the five pillars of Islam represent "the core and common denominator, the five essential and obligatory practices all Muslims accept and follow,"<sup>209</sup> it would be literally impossible for Imam Muslim to create a stronger statement regarding the duty to disseminate and disclose peace than to make one of these five pillars dependent on it. Peace was also made a condition precedent to faith itself in the Hadith by Al-Bukhari, Muslim, and Ibn Hanbal: "The Prophet (Peace be upon Him), says 'You only have faith when you desire for your brother what you desire for yourself.'"<sup>210</sup>

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<sup>203</sup> ESPOSITO, *supra* note 113, at 89 ("At the end of [each of five daily] prayer[s], the *shahada* is again recited, and the "peace greeting" – "Peace be upon all of you and the mercy and blessings of God" – is repeated twice.").

<sup>204</sup> Idris Alaoui Abdallaoui, *The Bases of Neighbourliness in Islam*, THE HASSANIAN LECTURES 217, 224 (1990) ("The word 'Islam' comes from the same root as the words 'Silm, Salm and Salam' (they all mean peace) and 'Salamah' (security)."). In Arabic, the vast majority of words are derived from a three letter root. The three letters س – ل – م form the root for both "salaam" (peace) and "Islam." THE HAHNS WEHR DICTIONARY OF MODERN WRITTEN ARABIC, A COMPACT VERSION OF THE INTERNATIONALLY RECOGNIZED FOURTH EDITION 495-97 (J. MILTON COWAN, ED., 1994).

<sup>205</sup> Abdallaoui, *supra* note 204, at 224 (citing HOLY QUR'AN, *supra* note 6 ("He is Allah, than Whom there is no other God, the Sovereign Lord, the Holy One, Peace.")).

<sup>206</sup> *Id.*

<sup>207</sup> Mohammed Yessef, *Foundations of Peace and Security in Islam*, THE HASSANIAN LECTURES 224 (1996) (adding that "[p]eace must be promoted from the outset so that relations among people may be based on solid foundations, thereby making it possible for society to overcome all problems which may lead to social unrest and chaos, and so that people may accede peacefully to Dar as-Salam, in which you hear no offense or foolish talk, but only peace, peace.").

<sup>208</sup> Hadith of Abu Al Hassan Muslim Bin Abu Shiba, reproduced in Yessef, *supra* note 207, at 215.

<sup>209</sup> ESPOSITO, *supra* note 113, at 88.

<sup>210</sup> Dr. Abbas Al Jirari, *The Concept of Coexistence in Islam*, 14 ISLAM TODAY 28 (get date).

This peace manifests itself in different ways and on different levels, all the way from simple daily acts such as greetings, to kind offerings of food, to financial assistance and charity, to peace on a global scale.<sup>211</sup> In expounding his vision of Peace and Security in Islamic law, Professor Yessef follows a model very similar to Carl Wellman's conception of third generation human rights, in which "[e]ach segment of the population, each category of people, indeed each individual has his own way of spreading peace."<sup>212</sup> Just as Wellman argues that third generation solidarity rights require the "concerted efforts of *all* the actors on the social scene,"<sup>213</sup> Yessef recognizes that the burden to strive for social peace "must not be shouldered by the state alone. The private sector must help the public authorities."<sup>214</sup>

Several experts have discussed the Islamic conception of the elements of the right to Peace. For example, in his 1990 Hassanian lecture,<sup>215</sup> Professor Idris Alaoui Abdallaoui developed a right to international neighborliness with Islamic sources beginning with the following Hadith narrated by Imam Al Bukhari: "Gabriel has recommended that I should take care of my neighbour so often that I began to think that he (Gabriel) wanted to make a heir of him (the neighbor)."<sup>216</sup> Similarly, Dr. Abbas Al Jirari has discussed the right to Peace under the rubric of the concept of coexistence in Islam.<sup>217</sup> In combination, these analyses emphasize three distinguishing elements of the right to peace in Islamic law. First, both Abdallaoui and Al Jirari discuss mutual understanding, an area that cannot be underestimated. Abdallaoui states that "[t]he Almighty Creator justifies the fact of creating mankind [sic] by His desire

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<sup>211</sup> See Yessef, *supra* note 207, at 222-24. Professor Yessef, for example, notes the relation between peace and development: "In a society crushed by poverty, want and indigence, it is not enough to tell people 'assalamu alaikum.' Rather the greeting must be coupled with concrete measures to alleviate their poverty. Indigence is like a war waged by the needy. Helping them out of the grip of poverty is a form of spreading peace." *Id.* at 223. Although international law commentators speaking on the right to development similarly speak of the "North-South divide" among rich and poor nations, the right to development and the right to Peace are still considered doctrinally distinct by human rights scholars. Whereas so much dialogue among international law scholars regarding peace and security is stalled around the meaning of those terms in the UN Charter and their relation to self defense, the international human rights movement could greatly expand and improve its conception of the right to Peace by emphasizing Professor Yessef's view, which duly recognizes the importance of equitable development to Peace.

<sup>212</sup> *Id.*

<sup>213</sup> See *supra* note 80.

<sup>214</sup> Yessef, *supra* note 207, at 223.

<sup>215</sup> A series of lectures related to Islam and delivered before the King of Morocco each year during the Holy month of Ramadan.

<sup>216</sup> Abdallaoui, *supra* note 204, at 216.

<sup>217</sup> Dr. Abbas Al Jirari, *supra* note 210, at 14.

that they know one another, as knowing one another leads to cooperation and fraternity. There are different ways of getting to know one another and they all call for political, economical social and cultural cooperation in general,” citing the Holy Qur’an 49:13: “O mankind! Lo! We have created you male and female and have made you nations and tribes that ye may know one another!”<sup>218</sup> Al-Jirari cites this same verse to emphasize the importance of mutual understanding in Islam.<sup>219</sup> This element of the Islamic conception of the right to peace is exemplary of the strong component of duty in a third generation right, a duty which falls both on the individual and the group.<sup>220</sup>

Related to mutual understanding, the second component of the right to peace in Islam is tolerance. This is based in the belief by Muslims that the existence of cultural difference was the will of Allah, an idea which finds support in the Qur’an: “And if they Lord had willed, He verily would have made mankind one nation, yet they cease not differing,”<sup>221</sup> and “And of His signs is the creation of the heavens and the earth, and the differences of your languages and colours.”<sup>222</sup> Based on these verses, Al

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<sup>218</sup> Abdallaoui, *supra* note 204, at 224 (citing HOLY QUR’AN, *supra* note 6, at 49:13). See also Al Bukhari and Muslim, *The Farewell Sermon* (All of you are from Adam, and Adam was made from Clay. ... No Arab shall be better than a non-Arab, a white better than a black, or a black than a white save in piousness.) (cited in Altwajri, *supra* note 15, at 17 n. 12).

<sup>219</sup> Al Jirari, *supra* note 210, at 22-23. See also Adbulaziz Othman Altwajri, *Identity and Globalization in the Perspective of the Right to Cultural Diversity*, 15 ISLAM TODAY 13 (1998) (arguing that a full comprehension of inter-cultural diversity is essential to global peace).

<sup>220</sup> The individual has an obligation, for example, to make an effort to understand other cultures, so that her individual influence on national foreign-policy decisions will be as fair and informed as possible. Similarly, the State (group) has a duty to provide its citizens with opportunities to fulfill their individual obligation towards mutual understanding. This article was written under the support of a Fulbright Fellowship, a program which since 1946 has had as its primary stated goal to “increase mutual understanding ... through the exchange of persons, knowledge, and skills.” *The Fulbright Mission*, online at [http://www.iie.org/FulbrightTemplate.cfm?Section=Fulbright\\_Program\\_Overview](http://www.iie.org/FulbrightTemplate.cfm?Section=Fulbright_Program_Overview) (last visited Mar. 11, 2004). By providing over 255,000 people a chance to experience, study, live in, and come to love another culture, *Id.*, the Fulbright Fellowship program is an important step in the right direction towards State efforts to aid in individual international understanding. But, the Fulbright program, available to only the smallest percentage of the population, can be only one of many efforts. For example, States should strive to make additional contributions to individual international understanding by providing unbiased media and increased coverage of international issues in school curricula. See Charles P. Henry, *On Building a Human Rights Culture*, in RIGHTS AND RESPONSIBILITIES, *supra* note 24, at xvii, xxiii (arguing that inter-cultural education “sufficiently acquaints people of different kinds with one another so that they are less tempted to think of those different from themselves as only quasi-human. ... While such a goal is less grand than the construction of international legal standards, it seems to me a more honest place to start constructing a human rights culture”) (citing Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in ON HUMAN RIGHTS 123 (STEPHEN SHUTE & SUSAN HURLEY, EDS., 1993) (“The goal of this manipulation of sentiment is to expand the reference of terms ‘our kind of people’ and ‘people like us.’”)).

<sup>221</sup> Al Jirari, *supra* note 210, at 24 (citing HOLY QUR’AN *Hûd*: 118-119)

<sup>222</sup> *Id.* (citing HOLY QUR’AN *Romans* 22).

Jirari concludes that “God’s rule on earth is based upon the differences between human beings, be they race, language or religious differences or any other difference in any one of the components of civilization and culture.”<sup>223</sup>

One issue commonly raised in the context of tolerance is *jihad* (holy war), a concept frequently misunderstood by non-Muslims and misapplied by a select group of Muslim fundamentalists completely outside the context of Islamic law.<sup>224</sup> According to Al Jirari, “Islam considers that the basic attitude of man is his inclination toward peace, and that recourse to war occurs only in absolutely necessary situations,” supporting this proposition with the Hadith reported by Al-Bukhari and Muslim, which states “He (Peace be Upon him) said “Do not wish to fight your enemy and ask for God’s forgiveness, if you do encounter him, call the name of God and be firm.”<sup>225</sup> Similarly, the Qur’an states “Oh You who believe, ... cooperate in good and in pity, and do not cooperate in bad and aggression.”<sup>226</sup> Interpreting *jihad* as recourse to war in the solitary case of self defense makes it the functional equivalent of Article 51 of the UN Charter,<sup>227</sup> a fundamental component of the international understanding of peace and security.

Finally, the third component in the Islamic conception of the right to peace as outlined by Abdallaoui is the importance of compliance regardless of weak enforcement mechanisms, a common concern for international law. Abdallaoui explains that “international neighbourliness in islam is based on forgiveness. ... because faith is based on good will and choice, not on compulsion, force, and constraint.”<sup>228</sup> Similarly, he states that “If the jurists see that the international laws lack an important element which is compulsion, because there is no authority which is above all the nation and which can

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<sup>223</sup> *Id.*

<sup>224</sup> *See Id.* at 43.

<sup>225</sup> *Id.* at 44 (citing Hadith of Al-Bukhari and Muslim on the authority of Abu Hurayrah).

<sup>226</sup> COLLOQUES, *supra* note 140, at 252 (“O vous qui croyez, ... coopérez dans le bien et la piété, et ne coopérez pas dans le mal et l’agression. »).

<sup>227</sup> Al Jirari, *supra* note 210 at 44 (citing UN Charter, *supra* note 197, at Art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.”)).

<sup>228</sup> Abdallaoui, *supra* note 204, at 224.

guarantee the respect of those international laws by force when it is necessary, Islam considers contracts and covenants of any kind as binding on the level of individuals as well as communities.”<sup>229</sup> Moreover, he notes that the right to Peace “in Islam is based on keeping one’s vow, which is one of the principles of Islam and one of the bases of faith.”<sup>230</sup>

Abdallaoui’s focus on compliance strikes at international law’s perpetual Achille’s heel: enforcement. Since the Peace of Westphalia, because the international legal system lacks an over-arching sovereign power, it has consistently struggled with convenient breaches of international law by self-interested States situated to exact more benefit through breach than through adherence. This trend has continued in the “new world order,” in which the the world’s only superpower violates Security Council resolutions or other international legal norms,<sup>231</sup> weakens the International Criminal Court,<sup>232</sup> disregards

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<sup>229</sup> *Id.* at 227-28.

<sup>230</sup> *Id.* at 226 (citing HOLY QUR’AN: “O ye who believe! Fulfill your undertakings.”).

<sup>231</sup> See, e.g., John Quigley, *International Law Violations by the United States in the Middle East as a Factor Behind Anti-American Terrorism*, 63 U. PITT. L. REV. 815 (2002); *United States of America: Hypocrisy or Human Rights? Time to Choose*, AMNESTY INT’L, AI Index: AMR 51/075/2002 (May 15, 2002) (“On 14 August 2000, the day that President Clinton told his party that the USA was the most progressive force for human rights, the UN Sub-Commission on the Promotion and Protection of Human Rights affirmed that the use of the death penalty against child offenders – defendants who were under 18 at the time of the crime – violated customary international law. It called on offending countries to stop the practice. The USA, failing to stand firm for the rule of international law, has ignored such calls.”).

<sup>232</sup> See *U.S. Proposals to Undermine the International Criminal Court Through a U.N. Security Council Resolution*, HUMAN RIGHTS WATCH, June 25, 2002, online at <http://www.hrw.org/campaigns/icc/usproposal.htm>; *The United States and the International Criminal Court*, HUMAN RIGHTS WATCH, accessed Nov. 8, 2003, online at <http://www.hrw.org/campaigns/icc/us.htm>; Diane Marie Amann & M.N.S. Sellers, *American Law in a Time of Global Interdependence: U.S. national Reports to the XIVth International Congress of Comparative Law: Section IV: The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. 381 (2002); Joel F. England, *NOTE: The Response of the United States to the International Criminal Court: Rejection, Ratification or Something Else?* 18 ARIZ. J. INT’L & COMP. L. 941 (2001); Christopher M. Van de Kieft, *NOTE: Uncertain Risk: The United States Military and the International Criminal Court*, 23 CARDOZO L. REV. 2325 (2002); Eric P. Schwartz, *The United States and the International Criminal Court: The Case for "Dexterous Multilateralism"*, 4 CHI. J. INT’L L. 223 (2003); Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court’s Jurisdiction Truly Complementary to National Criminal Jurisdictions?* 35 CORNELL INT’L L.J. 1 (2002); Jelena Pejic, *The United States and the International Criminal Court: One Loophole Too Many*, 78 U. DET. MERCY L. REV. 267 (2001); James L. Taulbee, *A Call to Arms Declined: The United States and the International Criminal Court*, 14 EMORY INT’L L. REV. 105 (2000); John Washburn, *Assessments of the United States Position; The International Criminal Court arrives – The U.S. Position: Status and Prospects*, 25 FORDHAM INT’L L.J. 873 (2002); Matthew A. Barrett, *NOTE: Ratify or Reject: Examining the United States’ Opposition to the International Criminal Court*, 28 GA. J. INT’L & COMP. L. 83 (1999); Michael P. Scharf, *The United States and the International Criminal Court: A Recommendation for the Bush Administration*, 7 ILSA J. INT’L & COMP. L. 385 (2001); William K. Lietzau, *The United States and the International Criminal Court: International Criminal Law After Rome: Concerns from a U.S. Military Perspective*, 64 LAW & CONTEMP. PROB. 119 (2001).

the pronouncements of the International Court of Justice,<sup>233</sup> denies access to UN Special Rapporteurs,<sup>234</sup> and fails to ratify<sup>235</sup> or severely limits the effect of<sup>236</sup> human rights treaties. In a religious paradigm, such as Islamic law, compliance pull for otherwise non-justiciable moral duties<sup>237</sup> is present and strong – it is *Allah*.<sup>238</sup> By contrast, the secular human rights movement lacks any remotely comparable unifying force,

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<sup>233</sup> On April 14, 1998, the governor of Virginia ignored a request of the International Court of Justice to stay the execution of Breard, a Parguyan citizen pending review of the case by the international body, finding “no reason to interfere with his sentence” and proclaiming that “the safety of those residing in the Commonwealth of Virginia is not the responsibility of the International Court of Justice.” Jonathan Charney and Michael Reisman, *Agora: Breard: The Facts*, 92 AM. J. INT. L. 666, 674-75 (1998).

<sup>234</sup> In 1998, UN Special Rapporteur on Violence Against Women Radhika Coomaraswamy was denied access to prisons in Virginia and Michigan. Radhika Coomaraswamy, *Report of the Mission of the United States of America on the Issue of Violence Against Women in State and Federal Prisons*, UN Doc. E/CN.4/1999/68/Add.2, ¶9.

<sup>235</sup> See, e.g., Paula Donnolo and Kim K. Azzarelli, *Essay: Ignoring the Rights of Children: A Perspective on America's Failure to Ratify the United Nations Convention on the Rights of the Child*, 5 J.L. & POL'Y 203 (1996); Alison Dundes Renteln, *States Ratification of Human Rights Treaties: Who's Afraid of the CRC: Objections to the Convention on the Rights of the Child*, 3 ILSA J. INT'L & COMP. L. 629 (1997); Julia Ernst, *U.S. Ratification of the Convention on the Elimination of All Forms of Discrimination Against Women*, 3 MICH. J. GENDER & L. 299 (1995); Paula Donnolo and Kim K. Azzarelli, *ESSAY: Ignoring the Human Rights of Children: A Perspective on America's Failure to Ratify the United States Convention on the Rights of the Child*, 5 J.L. & POL'Y 203 (1996); Frank C. Newman, *United Nations Human Rights Covenants and the United States Government: Diluted Promises, Foreseeable Futures*, 42 DE PAUL L. REV. 1242 (1993); Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 20 GEORGIA J. OF INT'L L. 311 (1990); Amy C. Harfeld, *Oh Righteous Delinquent One: The United States' International Human Rights Double Standard—Explanation, Example, and Avenue for Change*, 4 N.Y. CITY L. REV. 59 (2001); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341 (1995); Nigel Rodley, *On the Necessity of the United States Ratification of the International Human Rights Convention*, in *US RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATION?* 3, 4-13 (Richard B. Lillich ed., 1981); Harold Hongju Koh, *On American Exceptionalism*, 55 Stan. L. Rev. 1479 (2003).

<sup>236</sup> See Timothy K. Kuhner, Note, *Human Rights Treaties in U.S. Law: The Status Quo, Its Underlying Bases, and Pathways for Change*, 13 DUKE J. COMP. & INT'L L. 419 (2003); DAVID WEISSBRODT, JOAN FITZPATRICK & FRANK NEWMAN, *SELECTED INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND BIBLIOGRAPHY FOR RESEARCH ON INTERNATIONAL HUMAN RIGHTS LAW* 281-86 (2001); Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, 452-57 (1997) (examining RUDs attached to the ICCPR and CERD); Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 584-85 (1991) (discussing RUDs to the ICCPR).

<sup>237</sup> RAHMAN, *supra* note 8, at 29 (arguing that “strictly speaking, [Islamic law] cannot be described as law – for, since it is basically concerned with morality, much of it is not enforceable in any court except that of the human conscience.”).

<sup>238</sup> Interpreting the word “trust” in the HOLY QUR’AN, *supra* note 6, at 33:72, Professor Dounmez notes that of all the many analyses of the word “trust” in this verse, “most of them meet in one single point, which is that the word trust, in short, means man’s duty towards his Lord.” Dounmez, *supra* note 112, at 278. See also *Id.* at 287 (“[T]he fundamental reason behind [duties] is to thrive to do everything possible to achieve gratification of Allah, the Creator, the Great and Almighty.”); RAHMAN, *supra* note 8, at 14 (“God is the transcendent anchoring point of attributes such as life, creativity, power, mercy, and justice . . . , and of moral values to which a human society must be subject if it is to survive and prosper – a ceaseless struggle for the cause of the good. This constant struggle is the keynote of man’s normative existence and constitutes the service (*‘idabda*) to God with which the Qur’an squarely and inexorably changes him.”).

and the right to Peace, like other solidarity rights, is unfortunately likely to remain much more hortatory and aspirational.<sup>239</sup>

#### ***d. Conclusion***

As Wellman has argued, solidarity rights are complex: In addition to the elements of individual right and group duty present in first and second generation rights, third generation solidarity rights emphasize elements of group right and individual duty. The vast majority of scholars considering solidarity rights concentrate on their group right element. Although Islamic law does recognize group rights,<sup>240</sup> it places paramount importance on individual duties, and thus provides an ideal paradigm within which further study of third generation solidarity rights becomes possible. This emphasis on individual duty is clear in all three of the most common third generation human rights examined in this section. It is a defining aspect of these rights as viewed from an Islamic perspective, carrying far greater weight than their “group right” component.

While many scholars remain mired in a discussion of the problematic aspect of third generation solidarity rights’ “group right” component, a close examination of these rights shows that their “individual duty” aspect provides an even bigger barrier. This barrier is eliminated in the context of religious law, such as Islamic law, by the compliance pull of God and religiosity itself. For example, Professor Fazlur Rahman explains that the concept of *taqwa*, central to the morality of the Qur’an, “is

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<sup>239</sup> Nevertheless, the very concept of solidarity rights is useful because they represent an increasing international emphasis on individual duty and group solidarity, strong evidence that some international human rights are moving towards non-western ideals.

<sup>240</sup> The Right of a community to group resources, including shared mineral wealth or the spoils of war, is represented in the Islamic concept of *ghana'im*. KAMALI, *supra* note 92, at 349. In addition, the right to retribution for past wrongs in Islamic law is a right not only of individuals but of the entire community, with the degree of community involvement varying with the degree of individual harm. *Id.* at 350 (“The community is entitled to punish such violations, but the right of the heirs in retaliation and in *diyah* for erroneous killing, and the right of the victim in respect of *diyah* for injuries, is preponderant in view of the grievance and loss that they suffer as a result. The guardian (*wali*) of the deceased, in the case of *qisas*, is entitled to pardon the offender or to accept a compensation from him. But the state, which represents the community, is still entitled to punish the offender through a *ta'zir* punishment even if he is pardoned by the relatives of the deceased.”). See also HOLY QUR’AN *supra* note 6, at 5:32 (“[W]hoever killed a human being, except as punishment for murder or other villainy in the land, shall be regarded as having killed all mankind; and that whoever saved a human life shall be regarded as having saved all mankind”) (cited in RAHMAN, *supra* note 8, at 144 (arguing that this *sura* “obviously makes murder a crime against society rather than a private crime against a family.”)).

usually translated as ‘piety’ or ‘God-fearingness’ but which in the various Qur’anic contexts may be defined as ‘a mental state of responsibility from which an agent’s actions proceed but which recognizes that the criterion of judgment upon them lies outside him.’ ... The idea of a secular law, insofar as it makes this state indifferent to its obedience, which is consequently conceived in mechanical terms, is the very abnegation of *taqwa*.”<sup>241</sup> Because the secular human rights movement lacks such a motivating force to compel individual duties towards a communitarian whole, it is the “individual duty” component of third generation human rights that poses the greatest threat towards their existence.

## V. Conclusion

Efforts of moderate cultural relativists to develop a core group of universal human rights based primarily on western conceptions are incomplete and should not stand alone. If such a group of universally applicable human rights norms does exist, the search to discover it must begin in multiple legal traditions, for no culture can contain all the universal answers towards which all other cultures should aspire. This article makes one such attempt, analyzing the extent to which the newest generation of human rights, the third generation solidarity rights, represent developing universal values based in non-western traditions. Finding a strong basis for, and rich understanding of, third generation rights in Islamic law, this article concludes that whereas other scholars have noted the complexities posed by the status of third-generation solidarity rights as “group rights,” the real complexity lies in their component of individual duties. In Islam, where the individual is the vicegerent of God, a steward responsible for the interests of the community,<sup>242</sup> individual duties to fulfill third generation solidarity rights become significantly stronger than their aspirational equivalents in international human rights law. Because the secular human rights movement lacks any equivalent unifying force or compliance pull on individuals, the move towards solidarity rights is all the more remarkable, but also significantly more fragile. Rather than criticizing the development of third-generation solidarity rights, international human rights

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<sup>241</sup> RAHMAN, *supra* note 8, at 155.

<sup>242</sup> Or, alternatively, the individual Muslim draws individual responsibility from other Islamic bases. *See supra* notes 94-111 and accompanying text.

commentators should recognize them as developing universal values, with traditions such as Islamic law at their core.